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WHEN: Tuesday, September 11, 2012
9 a.m.–12:30 p.m.

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Conference Room, Suite 700
800 North Capitol Street, NW.
Washington, DC 20002

RESERVATIONS: (202) 741–6008

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DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 272 and 273

RIN 0584–AB51

Supplemental Nutrition Assistance Program: Disqualified Recipient Reporting and Computer Matching Requirements

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule codifies the provisions of a proposed rule published on December 8, 2006, regarding prisoner verification and death matching procedures mandated by legislation and previously implemented through agency directive. This rule also requires State agencies to use electronic disqualified recipient data to screen all program applicants prior to certification to assure they are not currently disqualified from program participation. Finally, this final rule implements procedures concerning State agencies', participation in a computer matching program using a system of records required by the Computer Matching and Privacy Protection Act of 1988, as amended.

DATES: October 12, 2012.

FOR FURTHER INFORMATION CONTACT: Jane Duffield, Chief, State Administration Branch, Program Accountability and Administration Division, Supplemental Nutrition Assistance Program, Room 857, Alexandria, Virginia 22302, 703–605–4385, *Jane.Duffield@fns.usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

On December 8, 2006, the Food and Nutrition Service (FNS) published a proposed rule in 71 FR 71075 to revise the SNAP regulations in 7 CFR parts 272 and 273 regarding computer matching requirements, the prisoner verification system (PVS), the deceased person matching system and electronic disqualified recipient system (eDRS) matching, as well as redefining data requirements and retention, and the process for application screening. Comments on these proposed revisions were solicited until February 6, 2007. A total of 26 sets of comments were received by the published deadline from 22 State SNAP agencies, 2 governmental associations, and 2 recipient interest groups. This final rule addresses the concerns expressed in these comments. Readers are referred to the proposed rule for a more complete description of the rule's requirements and stipulations. The following is a discussion of the provisions of the proposed rule, the comments received, and the changes made in the final rule.

General Comments

Of the 26 sets of comments received, most recommended that FNS withdraw the proposed regulation altogether. Of these, 15 comments offered alternative suggestions for FNS to consider. FNS categorized the comments in order to sum up their contents: Burdensome and Ineffective (20 comments); Impact on Application Timeliness (15 comments); Impact on Simplified Reporting (12 comments); Impact on State Computer Systems (9 comments); Inaccurate Cost-Benefit Analysis (3 comments); and Cases Where Matches Cannot Be Verified (3 comments). All comments are addressed under the specific regulation citation they reference. Some comments received were general and did not pertain to specific regulation citations. Those comments are addressed first and are related to simplified reporting and computer systems.

Simplified reporting was authorized by the Farm Security and Rural Investment Act of 2002 (the 2002 Farm Bill), subsequent to the implementation of prisoner and death matching requirements. Since 2002, 51 State agencies have opted to implement simplified reporting. Generally, under simplified reporting, households are required to report changes in income between certification and scheduled reporting periods only when the total countable income rises above 130 percent of the poverty level. Prior to simplified reporting, most households were required to report most changes within 10 days, or monthly. State agencies implementing simplified reporting can set reporting intervals or certification periods at 4, 5, or 6 months. Generally, for households subject to simplified reporting, the death or imprisonment of a household member does not have to be reported until the 6-month report, or at the next recertification period for prisoner verification. Those electing 12-month certification spans must require an update of household circumstances at the 6-month interval, unless the household is made up of elderly or disabled members.

In some circumstances, no overpayment can occur if the change was not required to be reported. Simplified reporting has provided multiple benefits for State administration and Program access. FNS concurs with the comments expressing that simplified reporting has been beneficial in making the Program more efficient and recipient-friendly and will make specific accommodations for simplified reporting options when warranted in the waiver process.

In regard to the need to change computer systems, nine State agencies commented that the overall provisions in the proposed rule will require them to make expensive changes. There were three comments concerned with the steps States may need to take if the matches required by these provisions cannot be verified. In this instance, no adverse action is to be taken against the households for any matches described in this rule that cannot be verified.

In general, the comments expressed recognition that these matches are required by law, and suggested alternatives that would allow State agencies the discretion to determine the frequency of the matches. While FNS carefully considered these comments, the matches are required by law and FNS considers the frequency of the matching requirements described herein to be an acceptable standard.

Prisoner Verification System (PVS)

Section 1003 of the Balanced Budget Act of 1997 (Pub. L. 105–33) amended Section 11(e) of the Food Stamp Act of

1977 [1] (7 U.S.C. 2020(e)) to require States to establish systems and take periodic action to ensure that an individual who is detained in a Federal, State, or local penal, correctional, or other detention facility for more than 30 days shall not be eligible to be counted as a household member participating in SNAP. The FNS final rule will codify this requirement and define taking periodic action as requiring States to conduct PVS checks at application and re-certification.

FNS received several comments specifically addressing this provision. Thirteen comments stated that PVS data received from the Social Security Administration (SSA) is not reliable, shows only that individuals have been incarcerated in the past, and does not provide the admission and tentative release dates. One comment stated that State agencies cannot require correctional facilities to provide the necessary verification for taking action. Further, six comments indicated that including children and one-person households in the PVS matches provide little value.

FNS carefully considered these comments in finalizing this provision and agrees that it is appropriate to exempt minor children, as that status is defined by each State, and one-person households where there is a face-to-face interview. Therefore, these exemptions are provided for in the revised § 272.13. However, with regard to the frequency of the match, taking into account both simplified reporting and the need to prevent those incarcerated for more than 30 days from participating, FNS determined that conducting the prisoner match at application and recertification provides the best opportunity for effective policy enforcement. Therefore, FNS retained in this final rule the requirement to perform a PVS match with household members at application and recertification. Going forward, FNS will make every effort to work with the SSA and other relevant agencies to improve the quality and timeliness of the data made available to State agencies for the purpose of conducting the prisoner match. FNS is also willing to consider any alternatives that State agencies may wish to propose for their own unique situation through its waiver process.

Deceased Matching System

This rule also implements the deceased matching requirements enacted by Public Law 105–379 on November 12, 1998. Public Law 105–379, which amended Section 11 of the Food Stamp Act of 1977 (7 U.S.C. 2020), required all State agencies to enter into a cooperative arrangement with the SSA to obtain information on individuals who are deceased, and use the information to verify and otherwise ensure that benefits are not issued to such individuals. The law went into effect on June 1, 2000. The mandated requirements were implemented by FNS directive to all SNAP State agencies on February 14, 2000. State agencies are responsible for entering into a matching agreement with SSA in order to access information on deceased individuals. FNS proposed adding a new § 272.14 to codify this requirement in regulation and included requirements for accessing the SSA death master file. These requirements included independently verifying the record prior to taking adverse action, and conducting matches for deceased individuals at application and re-certification.

Several comments specifically addressed this provision. Eleven comments stated that experience has shown that it is very unusual for households to initially apply for benefits for a deceased household member. They state that, since starting to conduct death matches in 1999, it is more common that the death of a household member during the certification period goes unreported by the remaining household members. With simplified periodic reporting, the change does not need to be reported until the interim report of the next recertification.

Four comments received noted that the preamble to the proposed rule states that the SSA death master file be matched at the time of application and at recertification, but the actual wording in the regulation language says ''* * *at the time of application and periodically thereafter.'' FNS concurs that this is inconsistent and confusing; ''periodically thereafter'' may not be the same as recertification. FNS has, therefore, amended this provision in the final rule as indicated below.

Two comments noted that fulfilling the volume of match requests at the frequency required by the proposed regulation would be burdensome for SSA. One commenter further noted that, in the past, FNS has instructed State agencies to reduce the frequency of matches because the previous frequency was burdensome for SSA. SSA did encounter certain burdens during the implementation phase of the prisoner and death matches, but has subsequently worked through those complications. Nevertheless, FNS does want to focus on implementing requirements that will improve Program integrity while not imposing unnecessary burdens on State agencies.

Accordingly, after considering the comments, FNS is amending the final rule with respect to death matches. The revised final provision at § 272.14(c)(1) provides the requirement that State agencies conduct the match of deceased individuals against household members at application and no less frequently than every 12 months. As a result, FNS believes this final rule maintains the intent of the statute for conducting this match while relieving States of requirements that do not effectively promote Program integrity. In addition, State agencies can design their matching systems to make them more consistent with their simplified reporting procedures.

Disqualified Recipient Reporting

Existing regulations at § 273.16(i)(4) require State agencies to use disqualified recipient data to ascertain the correct penalty, based on prior disqualifications, for an individual currently suspected of an intentional Program violation (IPV), and to determine the eligibility of Program applicants suspected of being in a disqualified status. The proposed rule further proposed:

- State agencies use disqualified recipient data to screen all Program recipients and applicants prior to certification. State agencies may also periodically match the entire database of disqualified individuals against its current caseload.
- State agencies not take an adverse action against a household based on information provided by a disqualified recipient match unless the match information has been independently verified.
- The State agency initiating the disqualified recipient search contact the State agency that originated the disqualification or the household for verification prior to taking adverse action against the household. The proposed rule proposed that the agency that originated the disqualification provide documentation to the requesting agency within 20 days of the postmarked date of request.
- The disqualified individual and, if applicable, the household, be informed of the effect of the existing disqualification on the eligibility and, if applicable, benefits of the remaining household members.
- Changes and updates to the format, methodology and fields State agencies use to report and access intentional

[1] The Food Conservation and Energy Act of 2008 (FCEA) renamed the Food Stamp Act of 1977 to the Food and Nutrition Act of 2008.

Program violation (IPV) disqualification information.

Several comments specific to disqualified recipient matching were received. Regarding implementation, 13 comments noted that the provisions of the rule would be very difficult to implement because the nationwide eDRS database provided by FNS to perform this function is problematic. The comments further state that very few of the disqualifications in eDRS are relevant to the day-to-day operation of the Program because eDRS maintains disqualifications indefinitely, including those for individuals who are deceased or incarcerated for long periods of time. As the records age, the disqualifications become less and less useful because they have no impact on current eligibility. One comment noted that a very small percentage of SNAP households had the potential to be affected by an actively disqualified household member. Also, twelve comments noted that in order to meet the requirements of the rule, all eligibility workers would need access to eDRS via the eAuthentication process required by the Department of Agriculture, expressing concern that putting all eligibility workers through this process would be cumbersome and impractical.

Regarding the need for the eDRS system, while one State agency commented that it queries eDRS for those who newly arrive to the State, five other State agencies noted that disqualified recipients who newly arrive in the State are already known to the incoming State agency. State and local eligibility workers regularly contact other State agencies when applicants newly arrive from other States to obtain information about the applicant's participation, disqualification and able-bodied adults without dependents (ABAWD) status. These State agencies asserted that there is no need to check current or former household members (when they apply) from within the State as those participants and their disqualification status are already known. Further, they believed there was no reason to re-screen applicants at recertification since the current State would have originated any disqualification action and would have already known about it.

Regarding secondary verification, 11 comments noted that the timeframe of 20 days, specified under the computer matching requirements, for another State agency to respond for a request for information, does not leave enough time to gather all of the information and process the application in a timely manner. The comments indicated that if the person should not have been certified, it will be discovered when the State processes a periodic match and an overpayment can be completed at that time. They also indicated that it is unclear what a requesting State should do in instances of expedited service cases or if the other State agency does not respond within 20 days. Finally, one comment supported the proposed rule's clarification that no adverse action be taken against a recipient or applicant based on a match unless the match information is independently verified.

Regarding the eAuthentication process, FNS recognizes that this process may be difficult for some States to obtain the proper eAuthentication levels for their eligibility workers. The eAuthentication process is vital to protecting personally identifiable information of SNAP recipients, confidentiality and the integrity of the Program. This process, while difficult, is necessary to maintain the security standards set forth to protect client information. FNS will continue to explore possible ways to make the eAuthentication process less burdensome for States in the future.

In addressing these comments, it is important to note that, as a Program with national eligibility standards, an individual disqualified in one State because of an IPV determination is also disqualified in every State. However, the Program is administered by State agencies that use and maintain their own systems and databases to perform the functions associated with certifying and supplying benefits to households. As such, there must be some mechanism in place so that a State agency can determine that an applicant has been disqualified by another State when they apply for SNAP benefits. Also, since the disqualification penalties are cumulative, the State agency must be aware of whether an individual has had any prior disqualifications by any other State in order to assign the appropriate disqualification penalty.

The issue of how States become aware of an existing or previous disqualification to ensure that ineligible individuals are not participating or the proper disqualification is assigned is the crux of this portion of this rule. In the performance of this function, an individual's rights must be protected to ensure that only those individuals that should be ineligible to receive benefits due to an existing or previous disqualification are indeed determined ineligible. Further, States are expected to provide this information in a timely manner to the requesting State so that they can determine the eligibility of the applicant. States that fail to provide the requested information within the time frame set forth under the computer matching requirements are considered to be out of compliance with these regulations. Those States will be subject to corrective action upon review. In any case where the requesting State has not received the information timely, the State should certify the household for benefits in accordance with our regulations until it receives the requested documentation. If the State subsequently receives verification that the client or household is ineligible, they should disqualify them and establish a claim to collect any benefits that were issued in error. While FNS carefully considered all comments in determining the final provisions in this rule, the Agency wanted to ensure that individuals' rights are protected and that proper disqualifications are assigned. FNS believes this final rule meets these goals while adequately addressing the concerns of the comments.

Many of the comments received regarding this provision focus on the operation and integrity of the data contained in eDRS. There were concerns that the data may be outdated, inaccurate or incomplete. While FNS is continuously trying to add appropriate edits and perform data integrity checks where possible, it is ultimately the responsibility of each State to enter timely, accurate and verifiable disqualification data into eDRS for use by other States. This is a nationwide partnership in which FNS and State agencies need to work together to ensure that ineligible individuals are not participating and that disqualified individuals receive the appropriate disqualification period. FNS is committed to continuing efforts to improve the system and the integrity of data to ensure accurate and timely disqualifications are imposed.

FNS does not agree with the comment that very few of the disqualifications in eDRS are relevant to the day-to-day operation of the Program. Records with disqualification periods that have expired are necessary for making penalty determinations and those that remain active are useful for determining eligibility. Further, in addition to the complete database file containing all the records in the system, FNS has for some time made available a file containing only active records, specifically designed for the purpose of conducting eligibility matches. FNS has also modified its online database access system to search only active records when the user selects ''Eligibility'' as the purpose for the inquiry.

Nevertheless, FNS agrees with the comment that a very small percentage of SNAP households would be affected by a disqualified member. Data reported by States indicated that, in fiscal year 2010, 36,859 individuals were disqualified out of a total of 40.3 million participants. In addition to these 37,000 disqualifications, there are also those still serving 2-year, 10-year or permanent disqualifications whose records remain active. While this number remains relatively low compared to the number of participants, it still represents a potential issuance risk in excess of nearly $2.0 million per month should these individuals not be prevented from participating, based on estimates for 2013. The potential also exists for any of these individuals to cross into another jurisdiction to avoid serving their penalty. FNS believes that some form of applicant screening is therefore necessary to prevent those inclined to try to participate during a period of disqualification and to deter those that might otherwise make the attempt.

In response to those comments suggesting that there was no need to check current or former recipients (when they apply) from within the State, or to re-screen applicants at recertification since the State would have originated the action and would have already known about it, FNS would point out that since applicant matching was not previously mandated one cannot be certain there are no disqualifications in an individual's past. For example, applicants that may have been in a disqualified status in one State may have moved to, and been determined eligible by, another State that did not conduct the match at the time of application. Therefore, it is possible that disqualified individuals are currently participating in a number of States. However, FNS does agree that there is probably no need to conduct matches at recertification once FNS is reasonably certain that currently disqualified individuals that may be receiving benefits are removed from the active rolls. Consequently, FNS will retain the requirement to match all applicants prior to initial certification but require matches at recertification only for the first year subsequent to implementation of this final rule. Within the first year of the implementation date of this rule, but no later than 180 days from publication, States will be required to match all applicants prior to initial certification, all newly added household members at the time they are added, and all participants in the household at recertification. In the second year, the requirement to match participants at recertification will be discontinued, and States will only be required to match applicants prior to initial certification and newly added household members as they are added. Further, since the purpose of a 1-year match at recertification is to remove currently participating disqualified individuals, States having the ability to conduct a one-time match of their entire active caseload against active cases from the disqualified recipient database may do so and be exempted from the requirement to conduct matches at recertification. The periodic match that would have been required by the proposed rule will not be required in this final rule, but may be conducted at the option of the State. Finally, States may exempt from the matching requirements those individuals that have not reached the age of majority as defined by State statute.

Computer Match Benefit Adjustments

FNS proposed to add language to the existing regulations for when mass changes are made in Federal benefits that affect SNAP allotments. Specifically, in cases when the change in allotment was the result of a computer match, FNS proposed that the information would need to be independently verified, and the SNAP household would need to be provided notice and an opportunity to contest any adverse action, if the adjustment would change the level of benefits or eligibility status of the household.

FNS received several comments specific to this provision. One comment stated that this alternative is not attractive as it constitutes much more effort than applying the existing procedure. In addition, two commenters were concerned about the additional burden placed upon State agencies if this information is not considered verified upon receipt.

FNS carefully considered the comments in this area. A computer match, covered by the Computer Matching Act [5 U.S.C. 552a(o)], uses information provided by a Federal source and compares it to a State record, using a computer to perform the comparison; this match affects eligibility or the amount of benefits for a Federal benefit program. As such, FNS has no discretion in this area and the information must be independently verified. Moreover, the SNAP household must be provided notice and given an opportunity to contest the adverse action if the adjustment would change the level of benefits or eligibility status of the household. However, State agencies should be aware that the independent verification/notice of adverse action provisions apply only if there is an adverse effect on benefits (i.e., a denial, termination or reduction in benefits). The vast majority of mass changes in benefits are increases due to cost-of-living adjustments. As such, FNS expects this new requirement to have a minimal impact on State agency workload. In addition, State agencies can use the option found at § 273.12(e)(3)(A) to implement mass changes using percentages. Therefore, this provision remains unchanged in the final rule (see § 273.12(e)(3)(B)).

Implementation

State agencies have been instructed through FNS directive to implement the provisions of the prisoner verification matches (Pub. L. 105–33) and death file matches (Pub. L. 105–379) as required by law in the applicable legislation, and these matches should already be in place without waiting for formal regulations. Unless specified below, the remaining provisions of this rule are effective and must be implemented the first day of the month following 60 days from date of publication of this final rule.

Since the inception of the disqualified recipient database in 1992, FNS has required that States query the database for the purpose of assigning the correct penalty to those being disqualified and whenever they believe an applicant may be in a disqualified status. To comply with these requirements, States should already have in place some capability for conducting matches against the disqualified recipient database. In recognition of this, the provisions of this rule dealing with the systematic matching of disqualification data in § 273.16(i) are effective and must be implemented no later than 180 days after the effective date of this final rule.

Procedural Matters

Executive Order 12866 and Executive Order 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

This final rule has been designated a ''significant regulatory action,'' although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

Regulatory Impact Analysis

As required for all rules that have been designated as significant by the Office of Management and Budget, the following Regulatory Impact Analysis (RIA) was developed for this final rule.

Regulatory Impact Analysis

1. *Title:* Supplemental Nutrition Assistance Program: Electronic Disqualified Recipient System Reporting and Computer Matching Requirements that Affect the Supplemental Nutrition Assistance Program

2. *Action:*

a. *Nature:* Final Rule

b. *Need for the Rule:* This final rule codifies prisoner verification and death master file matching procedures mandated by legislation and previously implemented through agency directive. This rule also revises SNAP regulations affecting the way State agencies access and use client disqualification information to enforce penalties for Intentional Program Violations (IPV).

c. *Background:* The Balanced Budget Act of 1997 (Pub. L. 105–33), enacted on August 5, 1997, requires States to establish systems and take periodic action to ensure that an individual who is detained in a Federal, State, or local penal, correctional, or other detention facility for more than 30 days shall not be eligible to participate in the Supplemental Nutrition Assistance Program. The law was effective August 5, 1998. This regulation will amend current rules to require States to conduct Prisoner Verification System (PVS) checks at application and re-certification. Public Law 105–379, enacted on November 12, 1998, requires all State agencies to enter into a cooperative arrangement with the Social Security Administration (SSA) to obtain information on deceased individuals and to use the information to verify and otherwise ensure that benefits are not issued to such individuals. The law was effective June 1, 2000. FNS is also requiring States to use the Electronic Disqualified Recipient System (eDRS) to screen all new applicants. States report all disqualified recipients to the eDRS database in order to prevent those individuals from participating in other States and to ensure that the proper penalties are assigned for intentional Program violations.

3. *Justification of Alternatives.* The Department has no discretion regarding the portions of the regulation that are based on legislative mandate to implement prisoner verification and deceased persons' data match programs. The Department does have discretion on the portion of the regulation affecting matches to identify disqualified recipients. The law requires that matches be performed, but is silent on when in the certification process the match must occur. The regulation mandates that these matches be performed up front, prior to certification. This alternative was chosen over requiring matches at a later point in the certification process because of the expected result that earlier mandatory verification will save the most taxpayer dollars.

4. *Effects:*

Effects on Low-Income Families. This action would identify deceased individuals, prisoners, and other ineligibles to ensure that they are not included as members of SNAP households. These matches will assist State agencies in identifying who, due to extended certification periods or failure to notify a change of household status, should no longer receive SNAP benefits. The number of people we estimate being removed from the SNAP caseloads as a result of the matches is described in detail below.

PVS Matches: FNS estimates that mandatory computer matches using the PVS will identify approximately 64,000 ineligible prisoners from the SNAP case rolls in 2013. Because this regulation is codifying legislation enacted some years ago, all States are currently performing data matches using the PVS for initial certifications and recertification, so the impacts on participation and costs for initial certifications are incorporated in current baseline budget estimates. There are no new savings.

The estimate on the impact of the computer match using the PVS is based on a General Accounting Office [2] (GAO) Study, *Substantial Overpayments Result from Prisoners Being Counted as Household Members,* issued in March 1997. GAO examined data from four States: California, Florida, New York, and Texas. GAO estimated that in 1995, $2.6 million in benefits were paid to 9,440 State prisoners, and $925,000 in benefits was paid to 2,698 county prisoners, with a total of 12,138 prisoners receiving $3.5 million for an average of 3.85 months. If we assume that prisoners would have continued to receive benefits for one month before the data match identified them and they were removed from the caseload rolls, we estimate that a mandatory computer match with State and County prisoner databases at the time of certification could have saved $2.6 million in overpayments in those four States. The one month that the prisoners would continue to receive benefits reduces the savings from the match from $3.5 million to $2.6 million. The 12,138 prisoners accounted for 0.13 percent of the 1995 SNAP caseload among those four States.

Between 1989 and 2009, the average number of initial certifications was nearly identical to the number of households participating in an average month, and the average number of recertifications was close. In any given year, the two numbers tracked closely together—when caseloads rose, so did the number of initial certifications and recertifications. Since we project caseloads and not initial certifications and recertifications, we use projected participation estimates as a proxy for the number of certifications and recertifications.

The effect on participation resulting from a mandatory computer match is taken by applying the 0.13 percent impact to the total projected FY 2013 caseload of 46.9 million. This yields an estimate of 61,000 ineligible prisoners who would be taken off the SNAP rolls at initial certification. However, prior to the enactment of the legislation mandating matches, a number of States were already performing these matches—Connecticut, Massachusetts, New York, Maryland, Pennsylvania, Florida, Mississippi, North Carolina, Tennessee, Illinois, Texas, Kansas, and Missouri—accounting for 45 percent of the FY 2011 caseload. We also adjusted to account for an increase in the number of prisons between 1995 and 2017 (actual numbers through 2010 and projected for 2017) and an expected false positive match rate of 10 percent. Making the match mandatory for the States who did not perform the match prior to the legislation will remove 44,000 prisoners in 2013.

Requiring biennial matches at the time of recertification would yield yet more ineligible prisoners. No States were performing matches at recertification when the law was enacted, but now all States are, so all of the savings are incorporated in the budget baseline and none are ''new.'' There would be no savings from those prisoners who were identified in previous matches. According to the most recent SNAP characteristics report, the average certification period for SNAP households is 12 months.

[2] The General Accounting Office is now known as the Government Accountability Office.

However, the number of new prisoners who entered the system in 2010 is about half the total prison population as of June 30, 2011. Therefore, matches at recertification would yield only half as many hits as matches performed at initial certification. Therefore, we halved the original impact of 61,000. We also adjusted for an increase in the number of prisoners from 1995 to 2013 and assumed a 10 percent false positive match rate. Finally, we halved the impact yet again to adjust for biennial matches. The estimate of prisoners identified at recertification matches in 2013 is 20,000.

To obtain the impact of performing the matches at initial certification and at recertification, we added the two totals together, getting 64,000 prisoners for 2013. The estimate assumes that these prisoners identified by the matches would then be removed from the SNAP caseloads.

To obtain the impact of performing the matches at initial certification and at recertification, we added the two totals together, getting 60,000 prisoners for 2012. The estimate assumes that these prisoners identified by the matches would then be removed from the SNAP caseloads.

Matches with Social Security Deceased Lists. Mandatory computer matches using Social Security Administration (SSA) lists of deceased individuals could identify an estimated 100,000 deceased individuals on SNAP case rolls in 2013 Because this regulation is codifying legislation enacted some years ago, all States are currently performing data matches using the SSA lists at initial certification and at recertification, so the impacts of matches at initial certification on participation and costs are incorporated in current baseline budget estimates. There are no new savings that are not incorporated in the current budget baseline estimates.

In 2013, we estimate that 39,000 deceased individuals will be identified from matches performed at initial certification, and 61,000 individuals will be identified through matches performed at recertification.

The estimate on the impact of the computer match using SSA lists of deceased individuals is based on a GAO Study, *Thousands of Deceased Individuals Are Being Counted as Household Members,* issued in February 1998. GAO examined data from four States: California, Florida, New York, and Texas, and estimated that in 1995 and 1996, $8.4 million in benefits were paid on behalf of 25,881 deceased individuals, with these individuals ''receiving'' benefits for an average of 4.17 months. If we assume that some deceased individuals would have continued to be issued benefits for one month before the data match identified them and they were removed from the caseload rolls, we estimate that a mandatory computer match with SSA databases could have saved $3.2 million per year in overpayments. This figure is derived from taking the $8.4 million they received in benefits over two years, assuming that they would still receive benefits for 1 month rather than an average of 4.17 months, and halving the figure to get an annual total. The 12,941 deceased individuals (half of the 25,881 individuals identified over a two-year period) accounted for 0.14 percent of the 1996 SNAP caseload in those four states.

Between 1989 and 2010, the average number of initial certifications was nearly identical to the number of households participating in an average month, and the average number of recertifications was close. In any given year, the two numbers tracked closely together—when caseloads rose, so did the number of initial certifications and recertifications. Since we project caseloads and not initial certifications and recertifications, we use projected participation estimates as a proxy for the number of certifications and recertifications.

The effect on participation resulting from a mandatory computer match on deceased individuals at the time of initial certification is taken by applying the 0.144 percent impact to the total projected FY 2013 caseload of 46.9 million. This yields an estimate of nearly 68,000 deceased individuals who would be taken off the SNAP rolls. Several adjustments were made after this point. First, prior to the enactment of the legislation mandating matches, a number of States were already performing these matches—California, New York, Florida, Illinois, and Ohio—accounting for 35 percent of the FY 2011 caseload. We assume that 10 percent of the matches are false positives. We estimate that mandatory matches at certification will identify an estimated 39,000 deceased individuals being removed from the rolls in 2013.

Requiring the matches at the time of recertification would identify more deceased persons. Since no States were performing matches at recertification at the time that the law was enacted, all States would be included. We also assume that 10 percent of the matches are false positives. Thus, we estimate that performing the match at recertification would identify 61,000 deceased individuals in 2013 for removal from SNAP caseloads.

To obtain the impact of performing the matches at initial certification and at recertification, we added the two totals together, for a total of 100,000 deceased persons identified through matches in 2013.

Matches Using the eDRS. Optional matches at initial certification using the eDRS as currently being performed will remove more than 6,000 ineligible persons from caseloads at initial certification in 2013. Making matches mandatory at initial certification and conducting a one-time match at recertification for current participants will remove an additional 9,000 ineligible persons from the caseloads in 2013; nearly 3,000 identified at initial certification and more than 6,000 identified at recertification.

The estimate on the impact of the computer match using the eDRS is based on a GAO Study, *Households Collect Benefits for Persons Disqualified for Intentional Program Violations,* issued in July 1999. GAO examined data from four States: California, Illinois, Louisiana, and Texas, and estimated that in 1997, $528,000 in benefits were paid to households on behalf of 3,166 disqualified individuals, with these individuals receiving benefits for an average of 2.33 months. If we assume that some disqualified individuals will continue to be issued benefits for one month, we estimate that a mandatory computer match at initial certification with the eDRS could have saved $301,000 in overpayments.

The four States accounted for 28 percent of the caseload in 1997 and 29 percent of benefits issued. Thus, taking the demonstration figures and applying them nationally, we estimate that over 11,000 individuals would have been disqualified.

We know from the eDRS that as of December 2010, 49,500 individuals were currently disqualified from SNAP. We do not have figures for past years, so we have no definitive data for whether the number of individuals disqualified at any one time has risen or fallen over the past decade. However, in the FNS National Data Bank, we have the number of disqualifications by year and by length of disqualification. Using this data to estimate the number of individuals becoming disqualified and the number of individuals whose disqualification expires, we estimate that over the past decade, the number of disqualified individuals has fluctuated between 50,000 and 70,000, and are not correlated with SNAP participation levels. So we did not make any adjustments to account for changes in overall participation levels.

Under current regulations, States are not required to perform the eDRS matches routinely; they are required only to do periodic matches on an ad hoc basis. FNS staff members estimate that 27 States, with 64 percent of the SNAP caseload, are currently doing routine matches at initial certification. No States are doing matches at recertification. Assuming that the regulations are published by September 2012, and adjusting for a 10 percent false positive rate for matches, we assume that in 2013, 9,000 ineligible persons will be identified by matches performed at initial certification. Of these, we estimate that 6,400 are currently identified and after publication of this regulation, an additional 2,800 will be identified. We are assuming that half the States not doing the match will have implemented the match by January 1, 2013, and the remaining States will have implemented the matches by July 1, 2013, for an overall phase-in rate of 75 percent for 2013 and 100 percent in later years.

The number of ineligible persons identified at recertification is adjusted downwards to account for the fact only new disqualifications would be identified. Also, we are assuming that we are only performing the recertification matches once, rather than annually or biannually. To estimate the impact of running one-time matches at certification, we computed the percentage of disqualifications which are for under a year (91 percent), and adjusted the estimate by that factor. We estimate that over 9,000 ineligible individuals will be identified through matches performed at recertification. We are assuming that in 2013, half the remaining States will have implemented the one-time matches at recertification by January 1, 2013, and the remaining half by July 1, 2013; so we are assuming a 75 percent impact for 2013 and a 25 percent impact for 2014. Thus, we are assuming the newly-matching States will identify nearly 7,000 ineligible individuals in 2013, and the remaining 2,000 individuals identified in FY 2014.

To obtain the impact of performing the matches at initial certification and at recertification, we added the totals for initial certification and recertification together for a total of 6,000 disqualified individuals identified by States currently performing matches and 10,000 disqualified individuals identified by States newly implementing matches in 2013.

Effects on Administering State Agencies: This rule affects State agencies by codifying computer matches mandated by legislation and requiring a previously optional computer match.

Effect on Retailers. This action is not anticipated to have any measurable impact on SNAP retailers.

Cost Impact. This action reduces benefit costs by identifying and removing ineligible and deceased individuals from the SNAP. It does not affect benefit levels for households without individuals identified in the computer matches.

PVS Matches: FNS estimates that mandatory computer matches using the PVS will save approximately $26 million in benefits that would have been paid to households on behalf of ineligible prisoners in Fiscal Year 2013. Of that, nearly $18 million will be saved through matches performed at initial certification, which were made mandatory by legislation and are incorporated in current budgetary baselines. Nearly $8 million will be saved through matches performed at recertification, which will be required under discretionary provisions of this regulation. The savings is estimated at $115 million for the five-year period 2013–2017.

The cost estimate was derived using the same methodology as that used for the participation impact estimate. Using data from the GAO report, we estimate that about $2,618,847 in overpayments could have been avoided using the computer match at initial certification. This accounted for 0.03 percent of benefits issued in Fiscal Year 1995.

Applying this to the Fiscal Year 2013 estimated benefits of $75.2 billion yields an unadjusted savings of $24 million in reduced overpayments to prisoners at initial certification. After taking out those States who used the PVS prior to the legislation making such matches mandatory, adjusting for increases in the number of prisoners since 1995, and assuming a 10 percent false positive rate for matches, we estimate that the savings will be $18 million.

Requiring the matches at the time of recertification would yield additional savings. Since all States are performing matches at recertification, any cost savings are included in the current budget baseline. There would be no savings from those prisoners who were identified in previous matches. According to the most recent SNAP characteristics report, the average certification period for SNAP households is 12 months. However, the number of new prisoners who entered the system in 2010 is about half the total prison population as of June 30, 2011. Therefore, matches at recertification would yield only half as many hits as matches performed at initial certification. Therefore, we halved the original savings of $24 million. We also adjusted for increases in the number of prisoners and assume a 10 percent false positive rate for matches. Finally, we halved the estimate because the recertification matches will be performed biennially, rather than annually. The savings from performing matches at recertification is an estimated $8 million in Fiscal Year 2013.

To obtain the impact of performing the matches at initial certification and at recertification, we added the two totals together, for savings of $26 million. The five-year savings are an estimated $115 million.

Matches Using Social Security Deceased Lists. The mandatory computer matches using SSA lists of deceased individuals may save over $45 million in benefits that would have been issued to households on behalf of deceased individuals in FY 2013. Of that, $18 million will be saved through matches performed at initial certification, which were made mandatory by legislation and are incorporated in current budgetary baselines. Nearly $27 million will be saved through matches performed at recertification, which will be required under discretionary provisions of this regulation. The total savings over the five-year period is estimated to be $203 million.

The cost estimate was derived using the same methodology as that used for the participation impact estimate. Using data from the GAO report, we estimate that about $3,185,000 in overpayments could have been avoided using the computer match. This accounted for 0.04 percent of benefits issued in Fiscal Year 1996.

Applying this to Fiscal Year 2013 estimated benefits of $75.2 billion yields an unadjusted savings of $30 million in reduced overpayments to deceased individuals. After taking out those States who ran computer matches with SSA death lists prior to the legislation making such matches mandatory, and assuming a 10 percent false positive rate for matches, the cost savings for performing matches at initial certification is $18 million.

Since all States currently perform matches with SSA death lists at recertification, these costs are all incorporated in the current budget baselines. The average certification period is 12 months; we take an annual estimate as for initial certification. The cost savings for performing matches at recertification is estimated at nearly $27 million in 2013 and $121 million for 2013–2017.

We then combined the savings for matches at initial certification and at

recertification for a total of $45 million. The five-year savings are an estimated $203 million.

Matches Using the eDRS. Matches at initial certification and recertification using the eDRS may save nearly $3 million in benefits that would have been paid out to individuals disqualified from participating in SNAP in Fiscal Year 2013 and $8 million for 2013–2017. Of that, more than $1 million of these savings is incorporated in the budgetary baseline for FY 2013; the five-year estimate is nearly $6 million. Under current law, States are only required to do periodic matches; however, 27 States currently perform matches at initial certification. No States perform matches at recertification. New savings are estimated to be nearly $2 million for Fiscal Year 2013. The five-year savings for 2013–2017 is estimated at $2.2 million.

The cost estimate was derived using the same methodology used for the participation impact estimate. Using data from the GAO report, we estimate that about $301,000 in overpayments could have been avoided using the computer match. Since the states featured in the GAO study accounted for 29 percent of all benefits, applying the study estimates nationally would have saved nearly $1.1 million in FY 1997.

No adjustments were made to account for caseload changes, since recent data, as discussed earlier, does not show a correlation between the number of disqualified individuals and SNAP participation levels. Since 1997, the average monthly benefit has risen; we anticipate that the average monthly benefit will be about 85 percent higher in 2013–2017. (The American Recovery and Reinvestment Act of 2009 increased the maximum allotment by 13.6 in April 2009 and froze it until FY 2014.) Inflating the 1997 cost to capture 2013 benefit costs yields nearly $2 million in savings.

We estimate that today, 64 percent of benefits were issued to States currently performing routine matches at initial certification. We then adjust for past and expected increases in the average monthly benefit, and assume a 10 percent false positive match rate. We estimate that the 2013 cost savings estimate will be $1.1 million for States currently performing the match, with a five year savings of nearly $6 million. We assume that the final regulation is published by October 1, 2012. We assume that 50 percent of the States currently not performing matches at recertification will start by January 1, 2013, and the remaining States will start by July 1, 2013, so the overall phase-in rate for 2013 is 75 percent. The 2013 cost savings by States newly performing the match will be nearly $500,000, and the five year savings will be $3 million.

Today, no States are performing matches at recertification, so all savings are ''new'' and not incorporated in the budget baseline. This proposal would require all States to perform a one-time match at recertification to capture cases not recently certified. The cost savings from disqualifying ineligible persons identified at recertification is adjusted downwards to account for the fact only new disqualifications would be identified. To estimate that, we computed the percentage of disqualifications that is for under a year (90 percent) and adjusted the estimate by that percentage. We also assumed that 10 percent of matches will be false positives. We estimate that the 2013 cost savings will be $1.1 million, with 75 percent of the matches run the first year; and the remainder matches run the second year. The five-year savings will be $1.6 million.

The combined savings for matches against the eDRS performed at initial certification and recertification is nearly $3 million in 2013 and $8 million over the 2013–2017 five-year time period. Of that, $1 million in 2013 savings comes from States currently performing the match and $1.7 million comes from new States. For the five-year period, nearly $6 million in savings comes from States currently performing the match and $2.2 million comes from new States.

The total savings from the computer matches is estimated at $73 million in 2013 and $326 million for the five-year period of 2013–2017. Of this, an estimated $324 million is incorporated in the current budget and $2 million represents new savings.

TABLE 1—COST IMPACT OF COMPUTER MATCH REQUIREMENTS (FEDERAL OUTLAYS)

[In millions of dollars]

	2013	2014	2015	2016	2017	5-Year	2013 Participant Impact (in thousands)
Mandatory prisoner verification match:							
Baseline Savings	−25	−23	−23	−22	−22	−115	−64
New Savings	−0	−0	−0	−0	−0	−0	−0
Total Savings	−25	−23	−23	−22	−21	−115	−64
Mandatory death master file match:							
Baseline Savings	−45	−41	−40	−39	−38	−203	−100
New Savings	−0	−0	−0	−0	−0	−0	−0
Total Savings	−45	−41	−40	−39	−38	−203	−100
Mandatory disqualified recipient subsystem match:							
Baseline Savings	−1	−1	−1	−1	−1	−6	−6
New Savings	−2	−1	−0	−0	−0	−2	−10
Total Savings	−3	−2	−1	−1	−1	−8	−16
Total:							
Baseline Savings	−71	−65	−64	−63	−61	−324	−170
New Savings	−2	−1	−0	−0	−0	−2	−10
Total Savings	−73	−65	−64	−63	−61	−326	−180

Note: Totals may not add up to the sum because of rounding.

Uncertainty: Because FNS lacks administrative or survey data that provides information about deceased persons, prisoners, and disqualified persons that are reported as part of households receiving SNAP, this estimate relied on small GAO studies run on a handful of States in the mid 1990s, and applying the impacts to the National Program, as operating today. To the extent that these small GAO studies are not nationally representative, the estimate will be skewed. FNS has no way to determine the size or direction of any bias based on the reliance of the GAO studies.

Our estimates also assume that the number of deceased persons identified by the match on SSA records is directly proportional to past and projected changes in SNAP caseloads. If the number of deceased persons identified by the match grows more quickly or slowly than the number of SNAP participants, the estimates will be biased.

Likewise, we assume that the number of households claiming prisoner members and thus losing benefits as a result of the match is directly proportional to past and projected changes in SNAP caseloads and the number of individuals incarcerated. If the number of prisoners identified by the match grows more quickly or more slowly than the number of SNAP participants or than the number of prisoners, the estimates will be biased.

Finally, we assume that the number of disqualified individuals has remained fairly constant over the past decade.

In all three cases, FNS has no way to determine the size or direction of the bias.

Because of these issues, there is a moderate degree of uncertainty with these estimates.

Societal Costs. While this regulatory impact analysis details the expected impacts on SNAP costs affected by the provisions described above, it does not provide an estimate of the overall social costs of the provisions, nor does it include a monetized estimate of the benefits they bring to society. FNS anticipates that the provisions will improve Program operations and strengthen Program integrity.

RULE TITLE—SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM: ELECTRONIC DISQUALIFIED RECIPIENT SYSTEM REPORTING AND COMPUTER MATCHING REQUIREMENTS THAT AFFECT THE SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM RIN 0584–AB51.

Category	*Primary estimate*	*Minimum estimate*	*Maximum estimate*	
BENEFITS				
Annualized, monetized Benefits ..	Not applicable.			
Annualized, quantified but unmonetized, benefits.	Not applicable.			
Qualitative (unquantified) benefits	Not applicable.			
COSTS				
Annualized monetized costs	Not applicable.			
Qualitative (unquantified) costs ...	Not applicable.			
TRANSFERS				
Annualized monetary transfers: ''on budget''.	$180 million	$180 million	$180 million	Regulatory Impact Analysis
From whom to whom	Funds that would have been received by ineligible participants are not issued, representing savings to the taxpayer.			
Annualized monetized transfers: ''off-budget''.	Not applicable.			
From whom to whom?	Not applicable.			

Regulatory Flexibility Act

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601–612). The Administrator of the Food and Nutrition Service has certified that this rule will not have a significant economic impact on a substantial number of small entities. State and local welfare agencies will be the most affected to the extent that they administer the Program. Applicants may be affected to the extent that matching client information with records in eDRS, PVS and Death Master Files may identify a client as disqualified, preventing them from Program participation.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandate Reform Act of 1995 (UMRA) established requirements for Federal agencies to assess the effects of their regulatory actions on State, local and tribal governments, and the private sector. Under Section 202 of UMRA, FNS generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, or tribal governments in the aggregate, or to the private sector, of $100 million or more in any one year. When such a statement is needed for a rule, section 205 of UMRA generally requires FNS to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule. This rule contains no Federal mandates (under the regulatory provisions of Title II of UMRA) for State, local and tribal governments, or the private sector, of $100 million or more in any one year. Therefore, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

Executive Order 12372

The Supplemental Nutrition Assistance Program is listed in the Catalog of Federal Domestic Assistance under No. 10.551. For the reasons set forth in the Final Rule codified in 7 CFR part 3015, Subpart V and related Notice

(48 FR 29115), this Program is excluded from the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

Federalism Summary Impact Statement

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement included in the preamble to the regulations describing the agency's consideration in terms of the three categories called for under section (6)(b)(2)(B) of Executive Order 13132. In adherence with verification laws, this final rule allows for little State agency flexibility on when and how States must match SNAP recipients with SSA Death Master Files, eDRS records, and PVS records. FNS understands that State flexibility is important and will work with each State agency through a waiver process if they can make a reasonable argument for a more efficient procedure that would still comply with the law.

Was there prior consultation with State officials?

Prior to drafting this final rule, FNS consulted with State and local agencies at various times. FNS regional offices have formal and informal discussions with State and local officials on an ongoing basis regarding program implementation and policy issues. This arrangement allows State and local agencies to provide comments that form the basis for many discretionary decisions in this and other SNAP rules. FNS has responded to numerous written requests for policy guidance on IPV disqualification data reporting. Also, guidance for the prisoner verification and deceased data matching programs were implemented by agency directive with the consultation and input from State and local SNAP agencies. Finally, FNS presented ideas and received feedback on Program policy at various National, State, and professional conferences regarding the matching requirements in this rule.

What is the nature of concern and the need to issue this rule?

FNS believes that it is important to standardize matching procedures to provide quality services to all SNAP participants and qualified applicants while ensuring that SNAP benefits are issued only to qualified individuals and households. In doing so, FNS and State agencies contribute to the success and integrity of the Program, garnering public support and user confidence in SNAP.

State and local SNAP agencies, however, want flexibility in Program administration. To the extent possible, FNS will consider alternate means of meeting the objectives of the law and has considered State comments in finalizing this rule.

What is the extent to which FNS meets those concerns?

This rule contains changes that are required by law and were implemented by agency directives in response to the implementation timeframes required in legislation. The changes to SNAP rules describing State agency responsibility for reporting IPV information will clarify how State agencies access disqualification information and follow-up on it, as well as provide for greater flexibility to State agencies for processing, retaining and sharing disqualification information. FNS is not aware of any case where the discretionary provision of this rule would preempt State law.

Executive Order 12988

FNS has considered the impact of the final rule on State and local agencies. This rule is intended to have a preemptive effect with respect to any State and local laws, regulations or policies, which conflict with its provisions or would otherwise impede its full implementation. Prior to any judicial challenge to the provisions of this rule, or the application of its provisions, all applicable administrative procedures must be exhausted.

This rule makes changes to the verification procedures for prisoner and deceased person data match programs, as well as reinforces requirements for disqualified recipient reporting and computer match benefits adjustments, as required by law. These procedures for matching prisoner and deceased persons were implemented by agency directives in May 1999 and February 2000, respectively, in response to implementation timeframes required in legislation. These changes to SNAP rules describing State agency responsibilities for reporting IPV information will clarify access and follow-up procedures for processing, retaining and sharing disqualification information.

Executive Order 13175

Executive Order 13175 requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. In late 2010 and early 2011, USDA engaged in a series of consultative sessions to obtain input by Tribal officials or their designees concerning the effect of this and other rules on Tribes or Indian Tribal governments, or whether this rule may preempt Tribal law.

Reports from the consultative sessions will be made part of the USDA annual reporting on Tribal Consultation and Collaboration. USDA will offer future opportunities, such as webinars and teleconferences, for collaborative conversations with Tribal leaders and their representatives concerning ways to improve rules with regard to their affect on Indian country.

We are unaware of any current Tribal laws that could be in conflict with the final rule.

Civil Rights Impact Analysis

FNS has reviewed this rule in accordance with Department Regulation 4300–4, ''Civil Rights Impact Analysis,'' to identify and address any major civil rights impacts the rule might have on minorities, women and persons with disabilities. After careful review of the rule's intent and provisions, and the characteristics of SNAP households and individual participants, FNS has determined that there is no way to determine their effect on any of the protected classes. The changes required to be implemented by law have already been implemented and are further clarified in this regulation. Regulations in § 272.6 specifically state that ''State agencies shall not discriminate against any applicant or participant in any aspect of program administration, including, but not limited to, the certification of households, the issuance of coupons, the conduct of fair hearings, or the conduct of any other program service for reasons of age, race, color, sex, handicap, religious creed, national origin, or political beliefs.''

Discrimination in any aspect of program administration is prohibited, stated in § 272.6 and title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d). Enforcement action may be brought under any applicable federal law, thus enabling FNS to implement verification standards mandating that SNAP State agencies systematize their application process. This would ensure that those who qualify are given a just amount of

SNAP support and that those that do not qualify are prohibited from receiving SNAP benefits. Title VI complaints shall be processed in accordance with 7 CFR part 15. Where State agencies have options, and they choose to implement a certain provision, they must implement it in such a way that it complies with the regulations in § 272.6.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; see 5 CFR part 1320), requires that the Office of Management and Budget (OMB) approve all collections of information by a Federal agency from the public before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current, valid OMB control number. This rule does not contain new information collection requirements subject to approval by OMB under the Paperwork Reduction Act of 1995. Information collection requirements and burden associated with this rule have been approved as part of OMB# 0584–0064, ''Application and Certification of Food Stamp Program Households'' (expiration March 2013) and OMB# 0584–0492, ''SNAP Repayment Demand and Program Disqualification'' (expiration September 2014).

E-Government Act Compliance

FNS is committed to complying with the E-Government Act of 2002, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to government information and services, and for other purposes. The information collection associated with this regulation is available for electronic submission through eDRS, which complies with the Paperwork Reduction Act.

List of Subjects

7 CFR Part 272

Civil rights, Supplemental Nutrition Assistance Program, Grant programs-social programs, Reporting and recordkeeping requirements.

7 CFR Part 273

Administrative practice and procedure, Claims, Supplemental Nutrition Assistance Program, Fraud, Grant programs-social programs, Penalties, Reporting and recordkeeping requirements, Social Security.

For the reasons set out in the preamble, 7 CFR parts 272 and 273 are amended as follows:

■ 1. The authority citation for parts 272 and 273 continues to read as follows:

Authority: 7 U.S.C. 2011–2036.

PART 272—REQUIREMENTS FOR PARTICIPATING STATE AGENCIES

■ 2. In § 272.1, paragraph (f) is revised to read as follows:

§ 272.1 General terms and conditions.

* * * * *

(f) *Retention of records.* Each State agency shall retain all Program records in an orderly fashion for audit and review purposes for no less than 3 years from the month of origin of each record. In addition:

(1) The State agency shall retain fiscal records and accountable documents for 3 years from the date of fiscal or administrative closure. Fiscal closure means that obligations for or against the Federal government have been liquidated. Administrative closure means that the State agency has determined and documented that no further action to liquidate the obligation is appropriate. Fiscal records and accountable documents include, but are not limited to, claims and documentation of lost benefits.

(2) Case records relating to intentional Program violation disqualifications and related notices to the household shall be retained indefinitely until the State agency obtains reliable information that the record subject has died or until FNS advises via the disqualified recipient database system edit report that all records associated with a particular individual, including the disqualified recipient database record, may be permanently removed from the database because of the individual's 80th birthday.

(3) Disqualification records submitted to the disqualified recipient database must be purged by the State agency that submitted them when the supporting documents are no longer accurate, relevant, or complete. The State agency shall follow a prescribed records management program to meet this requirement. Information about this program shall be available for FNS review.

* * * * *

■ 3. New §§ 272.12, 272.13, and 272.14 are added to read as follows:

§ 272.12 Computer matching requirements.

(a) *General purpose.* The Computer Matching and Privacy Protection Act (CMA) of 1988, as amended, addresses the use of information from computer matching programs that involve a Federal System of Records. Each State agency participating in a computer matching program shall adhere to the provisions of the CMA if it uses an FNS system of records for the following purposes:

(1) Establishing or verifying initial or continuing eligibility for Federal Benefit Programs;

(2) Verifying compliance with either statutory or regulatory requirements of the Federal Benefit Programs; or

(3) Recouping payments or delinquent debts under such Federal Benefit Programs.

(b) *Matching agreements.* State agencies must enter into written agreements with USDA/FNS, consistent with 5 U.S.C. 552a(o) of the CMA, in order to participate in a matching program involving a USDA/FNS Federal system of records.

(c) *Use of computer matching information.* (1) A State agency shall not take any adverse action to terminate, deny, suspend, or reduce benefits to an applicant or recipient based on information produced by a Federal computer matching program that is subject to the requirements of the CMA, unless:

(i) The information has been independently verified by the State agency (in accordance with the independent verification requirements set out in the State agency's written agreement as required by paragraph (b) of this section) and a Notice of Adverse Action or Notice of Denial has been sent to the household, in accordance with § 273.2(f); or

(ii) The Federal agency's Data Integrity Board has waived the two-step independent verification and notice requirement and notice of adverse action has been sent to the household, in accordance with § 273.2(f) of this chapter.

(2) A State agency which receives a request for verification from another State agency, or from FNS pursuant to the provisions of § 273.16(i) of this chapter shall, within 20 working days of receipt, respond to the request by providing necessary verification (including copies of appropriate documentation and any statement that an individual has asked to be included in their file).

§ 272.13 Prisoner verification system (PVS).

(a) *General.* Each State agency shall establish a system to monitor and prevent individuals who are being held in any Federal, State, and/or local detention or correctional institutions for more than 30 days from being included in a SNAP household.

(b) *Use of match data.* State prisoner verification systems shall provide for:

(1) The comparison of identifying information about each household

member, excluding minors, as that term is defined by each State, and one-person households in States where a face-to-face interview is conducted, against identifying information about inmates of institutions at Federal, State and local levels;

(2) The reporting of instances where there is a match;

(3) The independent verification of match hits to determine their accuracy;

(4) Notice to the household of match results;

(5) An opportunity for the household to respond to the match prior to an adverse action to deny, reduce, or terminate benefits; and

(6) The establishment and collections of claims as appropriate.

(c) *Match frequency.* State agencies shall make a comparison of match data for adult household members at the time of application and at recertification. States that opt to obtain and use prisoner information collected under Section 1611(e)(1)(I)(i)(I) of the Social Security Act (42 U.S.C. 1382(e)(1)(I)(i)(I)) shall be considered in compliance with this section. States shall enter into a computer matching agreement with the SSA under authority contained in 42 U.S.C. 405(r)(3).

§ 272.14 Deceased matching system.

(a) *General.* Each State agency shall establish a system to verify and ensure that benefits are not issued to individuals who are deceased.

(b) *Data source.* States shall use the SSA's Death Master File, obtained through the State Verification and Exchange System (SVES) and enter into a computer matching agreement with SSA pursuant to authority to share data contained in 42 U.S.C. 405(r)(3).

(c) *Use of match data.* States shall provide a system for:

(1) Comparing identifiable information about each household member against information from databases on deceased individuals. States shall make the comparison of matched data at the time of application and no less frequently than once a year.

(2) The reporting of instances where there is a match;

(3) The independent verification of match hits to determine their accuracy;

(4) Notice to the household of match results;

(5) An opportunity for the household to respond to the match prior to an adverse action to deny, reduce, or terminate benefits; and

(6) The establishment and collection of claims as appropriate.

PART 273—CERTIFICATION OF ELIGIBLE HOUSEHOLDS

■ 4. In § 273.2, a new paragraph (f)(11) is added to read as follows:

§ 273.2 Office operations and application processing.

* * * * *

(f) * * *

(11) *Use of disqualification data.* (i) Pursuant to § 273.16(i), information in the disqualified recipient database will be available for use by any State agency that executes a computer matching agreement with FNS. The State agency shall use the disqualified recipient database for the following purposes:

(A) Ascertain the appropriate penalty to impose based on past disqualifications in a case under consideration;

(B) Conduct matches as specified in § 273.16 on:

(*1*) Program application information prior to certification and for a newly added household member whenever that might occur; and

(*2*) The current recipient caseload at the time of recertification for a period of 1 year after the implementation date of this match. State agencies do not need to include minors, as that term is defined by each State.

(*3*) States having the ability to conduct a one-time match of their entire active caseload against active cases from the disqualified recipient database may do so and be exempted from the 1-year requirement to conduct matches at recertification.

(ii) State agencies shall not take any adverse action to terminate, deny, suspend, or reduce benefits to an applicant, or SNAP recipient, based on disqualified recipient match results unless the match information has been independently verified. The State agency shall provide to an applicant, or recipient, an opportunity to contest any adverse disqualified recipient match result pursuant to the provisions of § 273.13.

(iii) Independent verification shall take place separate from and prior to issuing a notice of adverse action—a two-step process. Independent verification for disqualification purposes means contacting the applicant or recipient household and/or the State agency that originated the disqualification record immediately to obtain corroborating information or documentation to support the reported disqualification information in the intentional Program violation database.

(A) Documentation may be in any form deemed appropriate and legally sufficient by the State agency considering the adverse action. Such documentation may include, but shall not be limited to, electronic or hard copies of court decisions, administrative disqualification hearing determinations, signed disqualification consent agreements or administrative disqualification hearing waivers.

(B) A State may accept a verbal or written statement from another State agency attesting to the existence of the documentation listed in paragraph (f)(11)(iii)(A) of this section.

(C) A State may accept a verbal or written statement from the household affirming the accuracy of the disqualification information if such a statement is properly documented and included in the case record.

(D) If a State agency is not able to provide independent verification because of a lack of supporting documentation, the State agency shall so advise the requesting State agency or FNS, as appropriate, and shall take immediate action to remove the unsupported record from the disqualified recipient database in accordance with § 273.16(i)(6).

(iv) Once independent verification has been received, the requesting State agency shall review and immediately enter the information into the case record and send the appropriate notice(s) to the record subject and any remaining members of the record subject's SNAP household.

(v) Information from the disqualified recipient database is subject to the disclosure provisions in § 272.1(c) of this chapter and the routine uses described in the most recent ''Notice of Revision of Privacy Act System of Records'' published in the **Federal Register**.

* * * * *

■ 5. In § 273.11, paragraph (c)(4)(i) is amended by adding a new sentence to the end of the paragraph to read as follows:

§ 273.11 Action on households with special circumstances.

* * * * *

(c) * * *

(4) * * *

(i) * * * However, a participating household is entitled to a notice of adverse action prior to any action to reduce, suspend or terminate its benefits, if a State agency determines that it contains an individual who was disqualified in another State and is still within the period of disqualification.

* * * * *

■ 6. In § 273.12:

■ a. The section heading is revised:

■ b. Paragraph (e)(3) introductory text is amended by removing the last six

sentences and adding four new sentences in their place.

■ c. New paragraphs (e)(3)(i) and (e)(3)(ii) are added; and

■ d. The introductory text of paragraph (e)(4) is revised.

The additions and revision read as follows:

§ 273.12 Requirements for change reporting households.

* * * * *

(e) * * *

(3) * * * A State agency may require households to report the change on the appropriate monthly report or may handle the change using the mass change procedures in this section. If the State agency requires the household to report the information on the monthly report, the State agency shall handle such information in accordance with its normal procedures. Households that are not required to report the change on the monthly report, and households not subject to monthly reporting, shall not be responsible for reporting these changes. The State agency shall be responsible for automatically adjusting these households' SNAP benefit levels in accordance with either paragraph (e)(3)(i) or (e)(3)(ii) of this section.

(i) The State agency may make mass changes by applying percentage increases communicated by the source agency to represent cost-of-living increases provided in other benefit programs. These changes shall be reflected no later than the second allotment issued after the month in which the change becomes effective.

(ii) The State agency may update household income information based on cost-of-living increases supplied by a data source covered under the Computer Matching and Privacy Protection Act of 1988 (CMA) in accordance with § 272.12 of this chapter. The State agency shall take action, including proper notices to households, to terminate, deny or reduce benefits based on this information if it is considered verified upon receipt under § 273.2(f)(9). If the information is not considered verified upon receipt, the State agency shall initiate appropriate action and notice in accordance with § 273.2(f)(9).

(4) *Notice for mass change.* When the State agency makes a mass change in SNAP eligibility or benefits by simultaneously converting the caseload, or that portion of the caseload that is affected, using the percentage increase calculation provided for in § 273.12(e)(3)(i), or by conducting individual desk reviews using information not covered under the Computer Matching and Privacy Protection Act (CMA) in place of a mass change, it shall notify all households whose benefits are reduced or terminated in accordance with the requirements of this paragraph, except for mass changes made under § 273.12(e)(1); and

* * * * *

■ 7. In § 273.13:

■ a. Paragraph (a)(2) is amended by adding two new sentences to the end of the paragraph;

■ b. Paragraph (b)(1) is revised; and

■ c. Paragraph (b)(7) is amended by removing the first sentence of the paragraph and adding three new sentences in its place.

The additions and revision read as follows:

§ 273.13 Notice of adverse action.

(a) * * *

(2) * * * A notice of adverse action that combines the request for verification of information received through an IEVS computer match shall meet the requirements in § 273.2(f)(9). A notice of adverse action that combines the request for verification of information received through a SAVE computer match shall meet the requirements in § 273.2(f)(10).

* * * * *

(b) * * *

(1) The State initiates a mass change through means other than computer matches as described in § 273.12(e)(1), (e)(2), or (e)(3)(i).

* * * * *

(7) A household member is disqualified for an intentional Program violation in accordance with § 273.16, or the benefits of the remaining household members are reduced or terminated to reflect the disqualification of that household member, except as provided in § 273.11(c)(3)(i). A notice of adverse action must be sent to a currently participating household prior to the reduction or termination of benefits if a household member is found through a disqualified recipient match to be within the period of disqualification for an intentional Program violation penalty determined in another State. In the case of applicant households, State agencies shall follow the procedures in § 273.2(f)(11) for issuing notices to the disqualified individual and the remaining household members. * * *

* * * * *

■ 8. In § 273.16, paragraph (i) is revised to read as follows:

§ 273.16 Disqualification for intentional program violation.

* * * * *

(i) *Reporting requirements.* (1) Each State agency shall report to FNS information concerning individuals disqualified for an intentional Program violation, including those individuals disqualified based on the determination of an administrative disqualification hearing official or a court of appropriate jurisdiction, and those individuals disqualified as a result of signing either a waiver of right to a disqualification hearing or a disqualification consent agreement in cases referred for prosecution. This information shall be submitted to FNS so that it is received no more than 30 days after the date the disqualification took effect.

(2) State agencies shall report information concerning each individual disqualified for an intentional Program violation to FNS. FNS will maintain this information and establish the format for its use.

(i) State agencies shall report information to the disqualified recipient database in accordance with procedures specified by FNS.

(ii) State agencies shall access disqualified recipient information from the database that allows users to check for current and prior disqualifications.

(3) The elements to be reported to FNS are name, social security number, date of birth, gender, disqualification number, disqualification decision date, disqualification start date, length of disqualification period (in months), locality code, and the title, location and telephone number of the locality contact. These elements shall be reported in accordance with procedures prescribed by FNS.

(i) The disqualification decision date is the date that a disqualification decision was made at either an administrative or judicial hearing, or the date an individual signed a waiver to forego an administrative or judicial hearing and accept a disqualification penalty.

(ii) The disqualification start date is the date the disqualification penalty was imposed by any of the means identified in § 273.16(i)(3)(i).

(iii) The locality contact is a person, position or entity designated by a State agency as the point of contact for other State agencies to verify disqualification records supplied to the disqualified recipient database by the locality contact's State.

(4) All data submitted by State agencies will be available for use by any State agency that is currently under a valid signed Matching Agreement with FNS.

(i) State agencies shall, at a minimum, use the data to determine the eligibility of individual Program applicants prior to certification, and for 1 year following implementation, to determine the

eligibility at recertification of its currently participating caseload. In lieu of the 1-year match at recertification requirement and for the same purpose, State agencies may conduct a one-time match of their participating caseload against active disqualifications in the disqualified recipient database. State agencies have the option of exempting minors from this match.

(ii) State agencies shall also use the disqualified recipient database for the purpose of determining the eligibility of newly added household members.

(5) The disqualification of an individual for an intentional Program violation in one political jurisdiction shall be valid in another. However, one or more disqualifications for an intentional Program violation, which occurred prior to April 1, 1983, shall be considered as only one previous disqualification when determining the appropriate penalty to impose in a case under consideration, regardless of where the disqualification(s) took place. State agencies are encouraged to identify and report to FNS any individuals disqualified for an intentional Program violation prior to April 1, 1983. A State agency submitting such historical information should take steps to ensure the availability of appropriate documentation to support the disqualifications in the event it is contacted for independent verification.

(6) If a State determines that supporting documentation for a disqualification record that it has entered is inadequate or nonexistent, the State agency shall act to remove the record from the database.

(7) If a court of appropriate jurisdiction reverses a disqualification for an intentional Program violation, the State agency shall take action to delete the record in the database that contains information related to the disqualification that was reversed in accordance with instructions provided by FNS.

(8) If an individual disputes the accuracy of the disqualification record pertaining to him/herself the State agency submitting such record(s) shall be responsible for providing FNS with prompt verification of the accuracy of the record.

(i) If a State agency is unable to demonstrate to the satisfaction of FNS that the information in question is correct, the State agency shall immediately, upon direction from FNS, take action to delete the information from the disqualified recipient database.

(ii) In those instances where the State agency is able to demonstrate to the satisfaction of FNS that the information in question is correct, the individual shall have an opportunity to submit a brief statement representing his or her position for the record. The State agency shall make the individual's statement a permanent part of the case record documentation on the disqualification record in question, and shall make the statement available to each State agency requesting an independent verification of that disqualification.

* * * * *

Dated: July 10, 2012.

Kevin Concannon,

Under Secretary, Food, Nutrition, and Consumer Services.

[FR Doc. 2012–19768 Filed 8–10–12; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 27

[Docket No. FAA–2012–0820; Special Conditions No. 27–028–SC]

Special Conditions: Eurocopter France, EC130T2; Use of 30-Minute Power Rating

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued for the Eurocopter France Model EC130T2 helicopter. This model helicopter will have the novel or unusual design feature of a 30-minute power rating, generally intended to be used for hovering at increased power for search and rescue missions. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: The effective date of these special conditions is July 30, 2012. We must receive your comments by September 27, 2012.

ADDRESSES: Send comments identified by docket number FAA–2012–0820 using any of the following methods:

Federal eRegulations Portal: Go to *http://www.regulations.gov* and follow the online instructions for sending your comments electronically.

Mail: Send comments to Docket Operations, M–30, U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., Room W12–140, West Building Ground Floor, Washington, DC, 20590–0001.

Hand Delivery of Courier: Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 8 a.m., and 5 p.m., Monday through Friday, except Federal holidays.

Fax: Fax comments to Docket Operations at 202–493–2251.

Privacy: The FAA will post all comments it receives, without change, to *http://regulations.gov,* including any personal information the commenter provides. Using the search function of the docket web site, anyone can find and read the electronic form of all comments received into any FAA docket, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). DOT's complete Privacy Act Statement can be found in the **Federal Register** published on April 11, 2000 (65 FR 19477–19478), as well as at *http://DocketsInfo.dot.gov.*

Docket: Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room @12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m., and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Eric Haight, Rotorcraft Standards Staff, ASW–111, Rotorcraft Directorate, Aircraft Certification Service, 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone (817) 222–5204; facsimile (817) 222–5961.

SUPPLEMENTARY INFORMATION:

Reason for No Prior Notice and Comment Before Adoption

The FAA has determined that notice and opportunity for public comment are impractical because we do not expect substantive comments, and because this special condition only affects this one manufacturer. We also considered that these procedures would significantly delay the issuance of the design approval, and thus, the delivery of the affected aircraft. As certification for the Eurocopter France model EC130T2 is imminent, the FAA finds that good cause exists for making these special conditions effective upon issuance.

Comments Invited

While we did not precede this with a notice of proposed special conditions, we invite interested people to take part in this rulemaking by sending written

comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data.

We will consider all comments we receive by the closing date for comments. We will consider comments filed late if it is possible to do so without incurring expense or delay. We may change these special conditions based on the comments we receive.

Background and Discussion

On October 7, 2008, Eurocopter France applied to amend Type Certificate No. H9EU to include the new EC130T2 model. The EC130T2 model is a derivative of the EC130B4, which is currently approved under Type Certificate No. H9EU. The EC130T2 is a 14 CFR part 27 normal category, single-engine rotorcraft, which will be certificated for single-pilot operation and a maximum of seven passengers. This model includes increased performance from the Turbomeca Arriel 2D engine, an upgraded main transmission, new vehicle engine management display (VEMD) avionics, and an active vibration control system.

Eurocopter France proposes that the EC130T2 model use a novel and unusual design feature, which is a 30-minute power rating, identified in the Arriel 2D engine type certification data sheet (TCDS) [FAA Turbomeca TCDS No. E00054EN]. 14 CFR 1.1 defines ''rated takeoff power'' as limited in use to no more than 5 minutes for takeoff operation. Thus, the use of takeoff power for 30 minutes will require special airworthiness standards, known as special conditions, to address the use of this 30-minute power rating and its effects on the rotorcraft. These special conditions will add requirements to the existing airworthiness standards in 14 CFR 27.923 (Rotor drive system and control mechanism tests), § 27.1305 (Powerplant instruments), and § 27.1521 (Powerplant limitations).

For the EC130T2, the European Aviation Safety Agency (EASA) has issued CRI E–02, which documents the special conditions.

The following is a summary of the final special conditions:

In addition to the requirements of Section 27.923, Rotor Drive System and Control Mechanism Tests, the aircraft drive-system effects due to use of the 30-minute power rating versus the Takeoff (5-minute) rating must be accounted for in the rotor drive-system testing.

In addition to the requirements of Section 27.1305, Powerplant Instruments, since this new 30-minute power rating has a time limit associated with its use, the pilot must have the means to identify:

- When the rated engine power level is achieved,
- When the event begins, and
- When the time interval expires.

In addition to the requirements of Section 27.1521, Powerplant Limitations, a new 30-minute rating must be defined for the use of takeoff power for greater than 5 minutes and must be limited to no more than 30 minutes per use.

Furthermore, the Model EC130T2 rotorcraft flight manual must include limitations on use of the 30-minute power rating to state:

- Continuous use above MCP is limited to 30 minutes, and
- Cumulative use above MCP is limited to 1 hour per flight.

Type Certification Basis

Under 14 CFR 21.101, Eurocopter France must show that the EC130T2 model helicopter meets the applicable provisions of the regulations incorporated by reference in Type Certificate No. H9EU, or the applicable regulations in effect on the date of application for the amendment to the type certificate. The regulations incorporated by reference in the type certificate are commonly referred to as the ''original type certification basis.'' The regulations incorporated by reference in H9EU are as follows:

(a) 14 CFR 21.29, and part 27 Amendments 27–1 through 27–32, except 14 CFR 27.952 is not adopted.

(b) 14 CFR Part 36 Appendix H through Amendment 20

(c) Special Condition 27–009–SC for HIRF

(d) Equivalent Level of Safety Findings issued against:

(1) 14 CFR 27.1549(b) Powerplant Instrument Markings.

(2) 14 CFR 27.1027(b)(2) Main Gearbox Oil Filter Bypass

The Administrator has determined that the applicable airworthiness regulations (that is, 14 CFR part 27) do not contain adequate or appropriate safety standards for the EC130T2 model helicopter because of a novel or unusual design feature. Therefore, special conditions are prescribed under the provisions of 14 CFR 21.16.

The FAA issues special conditions, as defined by 14 CFR 11.19, in accordance with 14 CFR 11.38, and they become part of the type certification basis under § 21.101.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same novel or unusual design feature, or should any other model already included on the same type certificate be modified to incorporate the same novel or unusual design feature, the special conditions would also apply to the other model.

Novel or Unusual Design Features

The EC130T2 model helicopter will incorporate a novel or unusual design feature, which is:

- A 30-minute power rating.

Applicability

These special conditions are applicable to the Eurocopter France Model EC130T2 helicopter. These special conditions would apply if Eurocopter France seeks to amend Type Certificate No. H9EU to add another model that has the same unusual design feature.

Conclusion

This action affects only certain novel or unusual design features on the Eurocopter France Model EC130T2 helicopter. It is not a rule of general applicability, and it affects only the applicant who applied to the FAA for approval of this feature.

List of Subjects in 14 CFR Part 27

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

■ The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701–44702, 44704.

The Special Conditions

■ Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for Eurocopter France model EC130T2 helicopter. Unless stated otherwise, all requirements in §§ 27.923, 27.1305 and 27.1521 remain unchanged.

(a) Section 27.923 Rotor drive system and control mechanism tests, at Amendment 27–29. In addition to the requirements of this section, the test prescribed in § 27.923(e) must be conducted in intervals of not less than 30 minutes.

(b) Section 27.1305 Powerplant instruments, at Amendment 27–37. In addition to the requirements of this section, a means must be provided to indicate to the pilot when the engine is at the 30-minute power level, when the event begins, and when the time interval expires.

(c) Section 27.1521 Powerplant limitations, at Amendment 27–29. In

addition to the requirements of this section, use of the 30-minute power must be limited to no more than 30 minutes per use, and no more than one hour per flight. The use of the 30-minute power must also be limited by:

(1) The maximum rotational speed, which may not be greater than—

(i) The maximum value determined by the rotor design; or

(ii) The maximum value demonstrated during the type tests;

(2) The maximum allowable gas temperature; and

(3) The maximum allowable torque.

Kimberly K. Smith,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2012–19444 Filed 8–10–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2012–0289; Airspace Docket No. 12–ANM–5]

Establishment of Class E Airspace; Fort Morgan, CO

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes Class E airspace at Fort Morgan, CO, to accommodate aircraft using a new Area Navigation (RNAV) Global Positioning System (GPS) standard instrument approach procedures at Fort Morgan Municipal Airport. This improves the safety and management of Instrument Flight Rules (IFR) operations at the airport.

DATES: Effective date, 0901 UTC, November 15, 2012. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Richard Roberts, Federal Aviation Administration, Operations Support Group, Western Service Center, 1601 Lind Avenue SW., Renton, WA 98057; telephone (425) 203–4517.

SUPPLEMENTARY INFORMATION:

History

On June 7, 2012, the FAA published in the **Federal Register** a notice of proposed rulemaking (NPRM) to establish controlled airspace at Fort Morgan, CO (77 FR 33687). Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

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 designations listed in this document will be published subsequently in that Order.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) Part 71 by establishing Class E airspace extending upward from 700 feet above the surface, at Fort Morgan Municipal Airport, to accommodate IFR aircraft executing new RNAV (GPS) standard instrument approach procedures at the airport. This action is necessary for the safety and management of IFR operations.

The FAA has determined 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 DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified this 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 U.S. Code. Subtitle 1, Section 106 discusses 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 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 establishes controlled airspace at Fort Morgan Municipal Airport, Fort Morgan, CO.

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 311a. This airspace action 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 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

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

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

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

§ 71.1 [Amended]

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

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

* * * * *

ANM CO E5 Fort Morgan, CO [New]

Fort Morgan Municipal Airport, CO
(Lat. 40°20′02″ N., Long.103°48′15″ W.)

That airspace extending upward from 700 feet above the surface within 7.5-mile radius of the Fort Morgan Municipal Airport.

Issued in Seattle, Washington, on August 3, 2012.

Robert Henry,

Acting Manager, Operations Support Group, Western Service Center.

[FR Doc. 2012–19701 Filed 8–10–12; 8:45 am]

BILLING CODE 4910–13–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 43

RIN 3038–AD08

Real-Time Public Reporting of Swap Transaction Data; Correction

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule; correction.

SUMMARY: The Commodity Futures Trading Commission (''CFTC'' or ''Commission'') published the Real-Time Public Reporting of Swap Transaction Data (''Real-Time Public Reporting'') rule and an accompanying preamble in the **Federal Register** on Monday, January 9, 2012 (77 FR 1182). This document makes an editorial correction to language of the preamble that conflicted with the rule text of the final rule.

DATES: *Effective Date:* These corrections are effective August 13, 2012.

FOR FURTHER INFORMATION CONTACT: Nancy Markowitz, Deputy Director, 202–418–5453, nmarkowitz@cftc.gov, Laurie Gussow, Attorney-Advisor, 202–418–7623, *lgussow@cftc.gov,* Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Center, 1155 21st Street NW., Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Background

The Commission published the final rule entitled *Real-Time Public Reporting of Swap Transaction Data* (''Final Rule'') in the **Federal Register** on January 9, 2012, (77 FR 1182), adopting rules to implement a framework for the real-time public reporting of swap transactions and pricing data for all swap transactions. The final rule, which became effective on March 9, 2012, contains a sentence in a footnote that created an inconsistency as to the type of swap transactions that may be considered ''publicly reportable swap transactions'' under the Final Rule. The sentence is corrected in this release to eliminate the inconsistent language in the footnote and, thus, make clear that certain, and not all, covered transactions as described in Sections 23A and 23B of the Federal Reserve Act may be considered ''publicly-reportable swap transactions.''

II. Summary of the Correction to the Real-Time Public Reporting Rule

The Commission received inquiries whether it considered all ''covered transactions'' between affiliates, as defined in Sections 23A and 23B of the Federal Reserve Act [1] to be ''publicly reportable swap transactions.'' As published, the last sentence of footnote 44 of the Final Rule reads: ''The Commission considers any covered transaction between affiliates as described in Sections 23A and 23B of the Federal Reserve Act to be publicly reportable swap transactions.'' This sentence unintentionally conflicts with the text of § 43.2 defining ''publicly reportable swap transaction,'' and with the preamble of the Final Rule.

Section 43.2 defines the term ''publicly reportable swap transaction,'' and also provides an example of certain swap transactions that do not fall within the definition. Under § 43.2, in paragraph (2)(i) of the definition of ''publicly reportable swap transaction,'' certain inter-affiliate trades may not be reportable as the rule excludes from the definition of reportable swap transactions: ''Internal swaps between one hundred percent owned subsidiaries of the same parent entity.'' Paragraph (3) of the definition states that the examples of transactions set forth paragraph (2) of the definition that do not fall within the publicly reportable swap transaction definition ''represent swaps that are not at arm's length and thus are not publicly reportable swap transactions, notwithstanding that they do result in a corresponding change in the market risk position between two parties.'' Indeed, there may be covered transactions as defined in Sections 23A and 23B of the Federal Reserve Act that are not at ''arm's length'' transactions under Part 43, but which nevertheless result in a corresponding change in market risk between the two parties. Under § 43.2, those types of covered transactions would not be ''publicly reportable swap transactions.''

Further, correction of the footnote 44 sentence will remove any conflict with the preamble language. The preamble language immediately preceding the footnote states: ''As adopted, the definition of a publicly reportable swap transaction also provides, by way of example, that internal transactions to move risk between wholly-owned subsidiaries of the same parent, without having credit exposure to the other party would not presently require public dissemination because such swaps are not arm's-length transactions.'' Again, there may be covered transactions as defined in Sections 23A and 23B of the Federal Reserve Act that may be internal transactions to move risk between wholly-owned subsidiaries of the same parent, without having credit exposure to the other party. Those transactions thus do not require public dissemination because they are not arm's-length transactions.

Accordingly, this document revises the language of the last sentence of footnote 44 on page 1187 of the **Federal Register** to read as follows: ''Certain covered transactions between affiliates as described in Sections 23A and 23B of the Federal Reserve Act may be considered to be publicly reportable swap transactions.''

For compliance purposes, this correction of the footnote sentence will result in a more accurate reflection of the regulatory language that the determination of whether a covered transaction under Section 23A or 23B of the Federal Reserve Act is a publicly reportable swap transaction should be made by the parties to the swap, rather than the Commission. In turn, the Commission's review of such determination will be based upon the standards as set forth in § 43.2.

III. Correction

In FR Doc. 2011–33173 appearing on page 1182 in the **Federal Register** on Monday, January 9, 2012, the following correction is made:

On page 1187, revise the last sentence of footnote 44 to read, ''Certain covered transactions between affiliates as described in Sections 23A and 23B of the Federal Reserve Act may be considered to be publicly reportable swap transactions.''

Dated: August 7, 2012.

Sauntia S. Warfield,

Assistant Secretary of the Commission.

[FR Doc. 2012–19664 Filed 8–10–12; 8:45 am]

BILLING CODE 6351–01–P

[1] Section 608 of the Dodd-Frank Act adds to paragraph 7 of the definition of ''covered transaction'' in Section 23A of the Federal Reserve Act (12 U.S.C. 371(c)): ''A derivative transaction, as defined in paragraph (3) of section 5200(b) of the Revised Statutes of the United States (12 U.S.C. 84(b)), with an affiliate, to the extent that the transaction causes a member bank or a subsidiary to have credit exposure to the affiliate.'' Hence, all derivatives transactions will be subjected to Section 23A of the Federal Reserve Act to the extent that they cause the bank to have credit exposure to the affiliate. Section 23B of the Federal Reserve Act contains an arm's-length requirement stating that a member bank and its subsidiaries may engage in any covered transaction with an affiliate only ''on terms and under circumstances, including credit standards, that are substantially the same, or at least as favorable to such bank or its subsidiary, as those prevailing at the time for comparable transactions with or involving other nonaffiliated companies, or in the absence of comparable transactions, on terms and under circumstances, including credit standards, that in good faith would be offered to, or would apply to, nonaffiliated companies.''

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2012–0002; FRL–9710–7]

Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; Regional Haze State Implementation Plan; Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; correction.

SUMMARY: This document corrects errors in the amendatory instructions and paragraph heading regarding EPA's limited approval of Pennsylvania's Regional Haze State Implementation Plan (SIP).

DATES: *Effective Date:* August 13, 2012.

FOR FURTHER INFORMATION CONTACT: Melissa Linden, (215) 814–2096 or by email at *linden.melissa@.epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document wherever ''we,'' ''us,'' or ''our'' are used we mean EPA. On July 13, 2012 (77 FR 41279), we published a final rulemaking action announcing our limited approval of Pennsylvania's Regional Haze SIP. In this document, we inadvertently provided an incorrect amendatory instruction on page 41284 regarding the addition of an entry to § 52.2020(e)(1), and also omitted a paragraph heading. This action corrects both the erroneous amendatory instruction and the omitted paragraph heading in part 52 for this paragraph.

In rule document 2012–16428, published in the **Federal Register** on July 13, 2012 (77 FR 41279), the following corrections are made:

§ 52.2020 [Corrected]

■ 1. On page 41284 in the third column, amendatory instruction number 2 is revised to read as follows:

''2. In § 52.2020, the table in paragraph (e)(1) is amended by adding an entry for Regional Haze Plan at the end of the table to read as follows:''

■ 2. On page 41284 in the third column, the paragraph designation is revised from ''(e)'' to ''(e)(1).''

Section 553 of the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(B), provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. We have determined that there is good cause for making today's rule final without prior proposal and opportunity for comment because we are merely correcting an incorrect citation in a previous action. Thus, notice and public procedure are unnecessary. We find that this constitutes good cause under 5 U.S.C. 553(b)(3)(B).

Statutory and Executive Order Reviews

Under Executive Order (E.O.) 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and is therefore not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355 (May 22, 2001)). Because the agency has made a ''good cause'' finding that this action is not subject to notice-and-comment requirements under the Administrative Procedures Act or any other statute as indicated in the Supplementary Information section above, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), or to sections 202 and 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4). In addition, this action does not significantly or uniquely affect small governments or impose a significant intergovernmental mandate, as described in sections 203 and 204 of UMRA. This rule also 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, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it 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 governments, as specified by Executive Order 13132 (64 FR 43255, August 10, 1999). This rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant.

This technical correction action does not involve technical standards; thus the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. The rule also does not involve special consideration of environmental justice related issues as required by Executive Order 12898 (59 FR 7629, February 16, 1994). In issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct, as required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996). EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1998) by examining the takings implications of the rule in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings'' issued under the executive order. This rule does not impose an information collection burden under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

The Congressional Review Act (5 U.S.C. 801 et seq.), as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 808 allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and public procedure is impracticable, unnecessary or contrary to the public interest. This determination must be supported by a brief statement. 5 U.S.C. 808(2). As stated previously, EPA had made such a good cause finding, including the reasons therefore, and established an effective date of August 13, 2012. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This correction for 40 CFR part 52, subpart NN (Pennsylvania) is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Dated: July 23, 2012.

W.C. Early,

Acting Regional Administrator, EPA Region III.

[FR Doc. 2012–19044 Filed 8–10–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R05–OAR–2009–0666; FRL–9712–8]

Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; Illinois; Ozone

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving a request from the State of Illinois to redesignate the Illinois portion of the Chicago-Gary-Lake County, Illinois-Indiana (IL–IN) area (the Greater Chicago area) to attainment of the 1997 8-hour ozone National Ambient Air Quality Standard (NAAQS or standard). The Illinois portion of the Greater Chicago area includes Cook, DuPage, Kane, Lake,

McHenry, and Will Counties and portions of Grundy (Aux Sable and Goose Lake Townships) and Kendall (Oswego Township) Counties. The Illinois Environmental Protection Agency (IEPA) submitted this request on July 23, 2009, and supplemented its request on September 16, 2011. In addition to approval of Illinois' ozone redesignation request, EPA is: (1) Approving the State's plan for maintaining the 1997 8-hour ozone standard through 2025 and the State's 2002 Volatile Organic Compound (VOC) and Nitrogen Oxides (NOx) emission inventories, as revisions to the Illinois State Implementation Plan (SIP) for the Illinois portion of the Greater Chicago area; and (2) approving and finding adequate the State's 2008 and 2025 VOC and NOx Motor Vehicle Emission Budgets (MVEBs).

DATES: This final rule is effective August 13, 2012.

ADDRESSES: EPA has established a docket for this action: Docket ID No. EPA–R05–OAR–2009–0666. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket material is available either electronically in *www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Edward Doty, Environmental Scientist, at (312) 886–6057 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Edward Doty, Environmental Scientist, Attainment Planning and Maintenance Section, Air Programs Branch, U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6057, *doty.edward@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. This supplementary information section is arranged as follows:

Table of Contents

I. What is the background for this rule?
II. What comments did we receive on the proposed rule?
III. What actions is EPA taking?
IV. Statutory and Executive Order Reviews

I. What is the background for this rule?

On July 18, 1997 (62 FR 38856), EPA promulgated an 8-hour ozone standard of 0.08 parts per million (ppm) (85 parts per billion (ppb) or higher exceeds the standard). EPA published a final rule designating and classifying areas under the 1997 8-hour ozone NAAQS on April 30, 2004 (69 FR 23857). In that rulemaking, the Greater Chicago area was designated as nonattainment for the ozone standard. This area was classified as a moderate nonattainment area under subpart 2 of the Clean Air Act (CAA).

On July 23, 2009, IEPA requested redesignation of the Illinois portion of the Greater Chicago area to attainment of the 1997 8-hour ozone standard based on ozone data for the period of 2006–2008. On September 16, 2011, IEPA supplemented the original ozone redesignation request, submitting ozone data for the period of 2008–2010, revising the mobile source emission estimates using EPA's on-road mobile source emissions model, MOVES, and extending the demonstration of maintenance of the ozone standard through 2025, with new MVEBs, but without emission reductions resulting from implementation of EPA's Clean Air Interstate Rule (CAIR).

On March 12, 2010, EPA issued a final rulemaking determining that the entire Chicago-Gary-Lake County, IL-IN area had attained the 1997 8-hour ozone NAAQS based on three years of complete, quality-assured ozone data for the period of 2006–2008, and continuing through 2009 [1] (75 FR 12088). On May 11, 2010, EPA issued a final rulemaking redesignating the Indiana portion (Lake and Porter Counties) of the Chicago-Gary-Lake County, IL-IN area to attainment of the 1997 8-hour ozone NAAQS (75 FR 26118).

On February 9, 2012 (77 FR 6743), EPA issued a notice of rulemaking proposing to approve Illinois' request to redesignate the Illinois portion of the Greater Chicago area to attainment of the 1997 8-hour ozone standard, as well as proposing to approve Illinois' ten-year ozone maintenance plan for the area, VOC and NOx MVEBs, and 2002 VOC and NOx emission inventories as revisions of the Illinois SIP. This proposed rulemaking sets forth the basis for determining that Illinois' redesignation request meets the CAA requirements for redesignation for the 1997 8-hour ozone NAAQS. Complete, quality-assured air quality monitoring data in the Greater Chicago area for 2008–2010 and for 2009–2011 show that this area is currently attaining the 1997 8-hour ozone NAAQS. Preliminary data available to date for 2012 are consistent with continued attainment of the 1997 8-hour ozone NAAQS. The quality-assured ozone data in the Greater Chicago area were discussed in the February 9, 2012, proposed rule for this rulemaking (77 FR 6747). Table 1 summarizes the 2009–2011 annual fourth high ozone concentrations and 2009–2011 ozone design values (three-year averages of the annual fourth high daily maximum 8-hour ozone concentrations) for each of the monitoring sites in the Greater Chicago area. These and other ozone data for the Greater Chicago area are also documented at EPA's Web site *http://www.epa.gov/airdata/ad_rep_mon.html.*

TABLE 1—ANNUAL FOURTH HIGH OZONE CONCENTRATIONS AND THREE-YEAR AVERAGES FOR 2009–2011 (CONCENTRATIONS IN PARTS PER MILLION (PPM))

Site Name (site code)	County	2009	2010	2011	Three-year average
4500 W. 123rd Street, Alsip (170310001)	Cook	0.069	0.073	0.071	0.071
3300 E. Cheltenham, Chicago (170310032)	Cook	0.065	0.074	0.079	0.073
Wacker At Adams, Chicago (170310042)	Cook	0.076	0.077	No Data	
5720 S. Ellis Avenue, Chicago (170310064)	Cook	0.060	0.071	0.074	0.068
1000 E. Ohio, Chicago (170310072)	Cook	0.062	0.075	0.074	0.070
7801 Lawndale, Chicago (1703100760	Cook	0.067	0.068	0.073	0.069

[1] The area continued to attain the 1997 8-hour ozone standard based on quality assured ozone data for 2010. See February 9, 2012, proposed rule (77 FR 6743).

TABLE 1—ANNUAL FOURTH HIGH OZONE CONCENTRATIONS AND THREE-YEAR AVERAGES FOR 2009–2011 (CONCENTRATIONS IN PARTS PER MILLION (PPM))—Continued

Site Name (site code)	County	2009	2010	2011	Three-year average
6545 W. Hurlbut, Chicago (170311003)	Cook	0.064	0.070	0067	0.067
729 Houston, Lemont (170311601)	Cook	0.067	0.073	0.069	0.070
1820 S. 51st Avenue, Cicero (170314002)	Cook	0.067	0.068	0.072	0.069
9511 W. Harrison Street, Chicago (170314007)	Cook	0.057	0.064	0.065	0.062
750 Dundee Road, Northbrook (170314201)	Cook	0.069	0.072	0.076	0.072
531 E. Lincoln, Evanston (170317002)	Cook	0.064	0.067	0.078	0.070
Route 53 (170436001)	DuPage	0.059	0.064	0.068	0.064
665 Dundee Road, Elgin (170890005)	Kane	0.068	0.069	0.070	0.069
Golf and Jackson Streets, Waukegan (170971002)	Lake	0.057	0.074	No Data	
Illinois Beach State Park, Zion (170971007)	Lake	0.075	0.078	0.076	0.076
First Street and Three Oaks Road, Cary (171110001)	McHenry	0.066	0.065	0.071	0.67
36400 S. Essex Road (171971011)	Will	0.063	0.065	0.061	0.063
201 Mississippi Street, Gary (180890022)	Lake	0.058	0.064	0.066	0.063
1751 Oliver Street, Whiting (180890030)	Lake	0.062	0.069	0.069	0.067
1300 141 Street, Hammond (180892008)	Lake	0.065	0.069	0.072	0.069
84 Diana Road, Ogden Dunes (181270024)	Porter	0.067	0.067	0.068	0.067
1000 Wesley/Valparaiso Water Department (181270026)	Porter	0.064	0.061	0.063	0.063
Chiwaukee Prairie, Pleasant Prairie (550590019)	Kenosha	0.071	0.081	0.081	0.078

The primary background for today's action is contained in EPA's February 9, 2012, proposal to approve Illinois' redesignation request, and in EPA's March 12, 2010, final rulemaking determining that the area has attained the 1997 8-hour ozone NAAQS. In these rulemakings, we noted that, under EPA regulations at 40 CFR 50.10 and 40 CFR part 50, appendix I, the 1997 8-hour ozone standard is attained when the three-year average of the annual fourth-highest daily maximum 8-hour average ozone concentrations is less than or equal to 0.08 ppm at all ozone monitoring sites in an area. See 69 FR 23857 (April 30, 2004) for further information. To support the redesignation of the area to attainment of the NAAQS, the area must show attainment based on complete, quality-assured data for the most recent three-year period. The data completeness requirement, for any given monitoring site, is met when the three-year average of days with valid ambient monitoring data is greater than 90 percent, and no single year has less than 75 percent data completeness, as determined in accordance with appendix I of 40 CFR part 50. Under the CAA, EPA may redesignate a nonattainment area to attainment if sufficient, complete, quality-assured data are available demonstrating that the area has attained the standard and if the State meets all applicable redesignation requirements specified in section 107(d)(E) and section 175A of the CAA.

The February 9, 2012, proposed rule provides a detailed discussion of how Illinois' ozone redesignation request meets the CAA requirements. Complete, quality-assured and certified air quality monitoring data in the Greater Chicago area for 2009–2011 and preliminary data available for 2012 show that this area is currently attaining the 1997 8-hour ozone NAAQS. With the final approval of its VOC and NOx emission inventories, Illinois has met all CAA requirements for redesignation of the Illinois portion of the Greater Chicago area to attainment for the 1997 8-hour ozone NAAQS. Illinois has demonstrated that attainment of the 1997 8-hour ozone NAAQS will be maintained in the Greater Chicago area through 2025 with or without the implementation of EPA's CAIR. Finally, Illinois has adopted 2008 and 2025 MVEBs that are supported by Illinois' ozone maintenance demonstration and adopted ozone maintenance plan.

II. What comments did we receive on the proposed rule?

EPA provided a 30-day review and comment period for the February 9, 2012, proposed rule. During the comment period, we received one comment set from an individual representing the Sierra Club. These comments are summarized and addressed below.

Comment 1: The commenter argues that it is inappropriate to redesignate the Illinois portion of the Greater Chicago area to attainment under the 1997 8-hour ozone standard when EPA intends to designate this area as nonattainment under the 2008 8-hour ozone standard, and asserts that EPA is delaying the implementation of the 2008 8-hour ozone standard.

Response 1: We disagree with the commenter. The area's status with respect to the 2008 8-hour ozone standard is not relevant to the area's attainment status under the 1997 8-hour ozone standard. It would be inappropriate to defer or reject the redesignation of the area under the 1997 8-hour ozone standard based on EPA's designation of the area under the 2008 8-hour ozone standard.

On June 11, 2012, EPA published its designation for the Chicago-Naperville, IL-IN-WI area for the 2008 ozone standards. 77 FR 34221. EPA designated the Chicago-Naperville, IL-IN-WI area as nonattainment with a classification of marginal for the 2008 ozone standards. The area's status with respect to the 2008 ozone standards, however, does not affect or prevent redesignation of the area to attainment for the 1997 ozone standard. The 1997 ozone standard currently remains in effect, and, thus, EPA continues to evaluate the area's designation status with respect to that standard. Until the 1997 8-hour ozone standard is revoked, it remains in effect and independent of the 2008 8-hour ozone standards, and EPA continues to evaluate and act upon states' redesignation requests with respect to the 1997 ozone standard.

EPA has in the past continued to redesignate areas under existing standards even after the adoption of new standards for the same pollutant. After adopting the 1997 8-hour ozone standard, EPA continued to redesignate areas for the 1-hour ozone standard

until the 1-hour ozone standard was revoked. See, for example the Cincinnati ozone redesignation for the 1-hour ozone standard, 70 FR 35946 (June 21, 2005) and the Atlanta ozone redesignation for the 1-hour ozone standard, 70 FR 34660 (June 15, 2005).

Subsequent to the adoption of the 2008 8-hour ozone standard and designation of areas for this standard, EPA has continued to redesignate areas to attainment for the 1997 8-hour ozone standard. See, for example, the Detroit, Michigan redesignation, 74 FR 30950 (June 29, 2009); Clearfield and Indiana Counties, Pennsylvania redesignation, 74 FR 11674 (March 19, 2009); Kewaunee County, Wisconsin redesignation, 73 FR 29436 (May 21, 2008); and, Door and Manitowoc Counties, Wisconsin redesignation, 75 FR 39635 (July 12, 2010). Also see the redesignation of the Illinois portion of the St. Louis area for the 1997 8-hour ozone standard, 77 FR 34819 (June 12, 2012).

Comment 2: The commenter argues that EPA has failed to consider ambient monitoring data from 2011 even though Illinois has already submitted and certified these data. The commenter asserts that the EPA must include these data in its consideration of Illinois' ozone redesignation request and provide the public with the opportunity to review and comment on these data before making any final decision on Illinois' ozone redesignation request.

Response 2: At the time EPA prepared the proposed rule for rulemaking on Illinois' ozone redesignation request, EPA had not yet received Illinois' certification of the 2011 ozone data. At the time of EPA's proposed redesignation of the area, the 2008–2010 ozone data were the most recent three years of State-certified data available to EPA. Illinois has subsequently certified its 2011 ozone data for the Illinois portion of the Greater Chicago area.

Indiana has certified its 2011 ozone data for the Indiana portion of the Greater Chicago area. In addition, Wisconsin has certified the 2011 ozone data for the Chiwaukee Prairie monitoring site in Kenosha County, generally considered to be the peak ozone design value site attributable to emissions in the Greater Chicago area.

The complete, certified 2011 ozone data, along with ozone data for 2009 and 2010, show that the Greater Chicago area continues to attain the 1997 8-hour ozone standard. The highest 8-hour ozone design value for the 2009–2011 period was recorded at the Chiwaukee Prairie monitoring site, with a value of 0.077 parts per million. All of these data show that the area continued to attain the 1997 8-hour ozone standard during the 2009–2011 period. Preliminary ozone data for 2012 for the Greater Chicago area and for Chiwaukee Prairie are consistent with the Greater Chicago area's continued attainment of the 1997 8-hour ozone standard. EPA has, thus, considered these data, which reflect continued attainment of the 1997 8-hour ozone standard. Although the 2011 data were not certified at the time of proposal, these data were available to the public through EPA's Air Quality System and commenters could have reviewed the data and addressed them in comments.

Comment 3: The commenter asserts that the consideration of the 2011 data is particularly important because 2008 (the attainment year used by the IEPA to document the emissions reduction-basis for the attainment of the ozone standard in the Chicago-Gary-Lake County, IL–IN area and the base year for the 10-year ozone standard maintenance demonstration) was the first year of a major recession. The commenter contends that emission reductions leading to the observed air quality improvement were the result of temporary economic conditions rather than the result of permanent emission reductions.

Response 3: First, as set forth in EPA's response to comment 2 above, EPA has considered the complete, quality assured and certified monitoring data for the bi-state nonattainment area for 2011. These data show that the area has continued to attain the 1997 8-hour ozone standard, and preliminary data for 2012 are consistent with continued attainment. A determination of attainment is based solely on air quality considerations, and, therefore, underlying economic conditions are not relevant to the limited inquiry that results in a determination. In another portion of this rulemaking, and with respect to a separate and independent criterion for redesignation under section 107(d)(3)(E)(iii), EPA examines whether attainment is due to permanent and enforceable emission reductions. See discussion in the proposed rulemaking (77 FR 6743, February 9, 2012) and elsewhere in these responses to comments.

The commenter provides no data to demonstrate that the economic recession of recent years had any impact on emissions in 2008. The commenter merely speculates that there was such an impact. Lacking any data to the contrary, we see no reason to assume that the lower emissions of 2008 (relative to those of the base nonattainment year of 2002) were exclusively or predominantly an artifact of temporary emission reductions resulting from the economic recession.

In addition, the Chicago-Gary-Lake County, IL–IN area has continued to attain the 1997 ozone standard over an extended period (over a number of sequential three-year periods, 2006–2008, 2007–2009, 2008–2010, and now 2009–2011), with general downward trends in ozone design values at most monitoring sites in the area (see Table 1 in the proposed rule for this rulemaking action, 77 FR 6747). Given the downward trend in ozone design values and the ozone design values below the 0.085 ppm ozone standard violation level, we see no reason to believe that a reversal in the economic situation in this area will cause a return to violation of the 1997 8-hour ozone standard in this area in the foreseeable future.

Comment 4 General: The commenter argues that Illinois and EPA have failed to comply with the ozone redesignation requirement of section 107(d)(3)(E)(iii) of the CAA, which requires that the observed improvement in air quality be due to permanent and enforceable emission reductions resulting from the State's implementation of its SIP and implementation of applicable Federal air pollution control requirements and other permanent and enforceable emission reductions. The commenter argues, in particular, that EPA relied on several emission control programs that are not permanent and enforceable. These questioned emission controls are specified in the following:

Comment 4a: The commenter asserts that the NO_X SIP call is not permanent and enforceable. The commenter notes that EPA found that the NO_X emission reductions leading to attainment in the Greater Chicago area were due, in part, to the implementation of the NO_X SIP call. The commenter argues that the NO_X SIP call cannot be assumed to be permanent and enforceable because it has been replaced, and, therefore, no longer exists. In addition, the NO_X SIP call is implemented through a cap-and-trade program, which means that no actual NO_X emission reduction may have been required for any specified source upwind of the high ozone areas in the Greater Chicago area. The commenter cites a 2009 decision by the D.C. Circuit Court of Appeals, which the commenter believes held that EPA cannot use cap-and-trade programs to satisfy an area-specific statutory mandate. See *NRDC* v. *EPA,* 571 F.3d 1245, 1257 (D.C. Cir. 2009).

Response 4a: EPA disagrees with the commenter's position that emission reductions associated with the NO_X SIP call cannot be considered to be

permanent and enforceable. The commenter's first argument—that the NO_X emission reductions are not permanent and enforceable because the NO_X SIP call has been replaced—is based on a misunderstanding of the relationship between the CAIR and the NO_X SIP call. While the CAIR ozone-season trading program replaced the ozone-season NO_X trading program developed in the NO_X SIP call (70 FR 25290), nothing in the CAIR relieved states of their NO_X SIP call obligations. In fact, in the preamble to CAIR, EPA emphasized that the states and certain units covered by the NO_X SIP call but not by CAIR must still satisfy the requirements of the NO_X SIP call. EPA provided guidance regarding how such states could meet these obligations.[2] In no way did EPA suggest that states could disregard their NO_X SIP call obligations. (70 FR 25290). For NO_X SIP call states, the CAIR NO_X ozone season program provides a way to continue to meet the NO_X SIP call obligations for electric generating units (EGUs) and large non-electric generating units (nonEGUs). In addition, the anti-backsliding provisions of 40 CFR 51.905(f) specifically provide that the provisions of the NO_X SIP call, including the statewide NO_X emission budgets, continue to apply.

In summary, the requirements of the NO_X SIP call remain in force. They are permanent and enforceable as are state regulations developed to implement the requirements of the NO_X SIP call.

EPA also disagrees with the commenter's second argument—that the emission reductions associated with the NO_X SIP call cannot be considered permanent and enforceable because the NO_X SIP call provides for a trading program. There is no support for the commenter's argument that EPA must ignore all emission reductions achieved by the NO_X SIP call simply because the mechanism used to achieve the emission reductions is an emissions trading program. As a general matter, trading programs establish mandatory caps on emissions and permanently reduce the total emissions allowed by sources subject to the programs. The emission caps and associated controls are enforced through the associated SIP rules or Federal Implementation Plans (FIPs). Any purchase of allowances and increase in emissions by a utility necessitates a corresponding sale of allowances and results in an emission reduction by another utility. Given the regional nature of ozone formation and transport, the emission reductions will have an air quality benefit that will compensate, at least in part, for the impact of any emission increase.

In addition, the case cited by the commenter, *NRDC* v. *EPA,* 571 F.3d 1245 (D.C. Cir. 2009), does not support the commenter's position. The case addressed EPA's determination that the CAA nonattainment area RACT requirement was satisfied by the NO_X SIP call trading program. The court held that, because EPA had not demonstrated that the trading program would result in sufficient emission reductions within a nonattainment area, its determination that the program satisfied RACT was not supported. Id. 1256–58. The court explicitly noted that EPA might be able to reinstate the provision providing that compliance with the NO_X SIP call satisfies NO_X RACT for EGUs for particular nonattainment areas if, upon conducting a technical analysis, it could demonstrate that the NO_X SIP call results in greater emissions reductions in a nonattainment area than would be achieved if RACT-level controls were installed in that area. Id. at 1258. In this case, EPA's comparison of emissions in 2002 and 2008 in this rulemaking necessarily looked only at changes in emissions ''in the nonattainment area.'' As such, the commenter's reliance on *NRDC* v. *EPA* is misplaced.

Comment 4b: The commenter contends that EPA cannot rely on the Cross State Air Pollution Rule (CSAPR) to provide permanent and enforceable emission reductions because the implementation of this rule has been stayed by the U.S. Court of Appeals for the District of Columbia Circuit. The commenter contends that this stay makes CSAPR neither permanent nor enforceable. In addition, the commenter notes that CSAPR is to be implemented through a cap-and-trade program, and, therefore, as summarized in Comment 4a, CSAPR cannot be relied on to produce permanent and enforceable emission reductions. Further, EPA cannot take credit for the promise of any emission control program that would replace CSAPR should the Court remand or vacate CSAPR.

Response 4b: Illinois has not relied on CSAPR to demonstrate that attainment was due to permanent and enforceable emission reductions or to demonstrate that it will maintain the standard. EPA did not credit Illinois with NO_X emission reductions from the implementation of CSAPR for attainment or maintenance of the 1997 ozone standard. While CSAPR was listed by the State as a possible contingency measure in the State's ozone maintenance plan, EPA did not credit Illinois with NO_X emission reductions resulting from the implementation of CSAPR, nor did the State take credit for any such emission reduction when demonstrating maintenance of the 1997 ozone standard. As such, the stay of CSAPR is not relevant here.

In addition, modeling performed by EPA during the CSAPR rulemaking process also demonstrates that the counties in the Greater Chicago area will have ozone levels below the 1997 8-hour ozone standard in both 2012 and 2014 without emission reductions from CSAPR or CAIR, with the highest value for any county in the area projected to be 81.1 ppb without the implementation of CSAPR/CAIR-based emission controls. See ''Air Quality Modeling Final Rule Technical Support Document,'' Appendix B, pages B–9, B–10, B–11, and B–33, which is available in the docket for this rulemaking.

Although Illinois did list the ''Cross-State Air Pollution Rule'' as a possible contingency measure in the ozone maintenance plan, this measure is only one of many that may be selected should the contingency plan be triggered. EPA has concluded, in its consideration of the ozone maintenance plan contingency measures, that there are other contingency measures sufficient to satisfy the requirements of section 175A of the CAA, without the consideration of CSAPR.

With regard to the commenter's assertion that EPA cannot rely on the emission reductions resulting from the implementation of CSAPR because CSAPR would be implemented through the application of an emissions trading program, see our response to the commenter's similar comment with regard to emissions trading under EPA's NOx SIP call in the response to comment 4a above. In addition, CSAPR contains assurance provisions that guarantee that emission reductions will occur in specific states.

Comment 4c: The commenter asserts that Illinois emission control rules are not permanent and enforceable. To support this assertion, the commenter argues that Illinois' Consumer Products and Architectural and Industrial Coatings (AIM) rules have been adopted only by the State, and that, until these rules are approved by the EPA and incorporated into the SIP they cannot be relied upon for redesignation.

Response 4c: EPA in fact finalized approval of Illinois' consumer products and AIM rules on June 7, 2012, at 77 FR 33659. Thus, the commenter's concern

[2] EPA guidance regarding the NO_X SIP call transition to CAIR can be found at *http://www.epa.gov/airmarkets/progsregs/cair/faq-10.html.* EPA guidance regarding the NO_X SIP call transition for the Cross-State Air Pollution Rule (CSAPR) can be found at *http://www.epa.gov/crossstaterule/faqs.html.*

is moot. Moreover, EPA wishes to note that it is not necessary for every change in emissions between the nonattainment year (in this case 2002) and the attainment year (2008) to be permanent and enforceable. Rather, the improvement in air quality necessary for the area to attain must be reasonably attributable to permanent and enforceable reductions in emissions. As discussed in the proposed rule at 77 FR 6754 (February 9, 2012), Illinois and upwind areas have implemented a number of permanent and enforceable regulatory control measures which have reduced emissions and have resulted in a corresponding improvement in ozone air quality. Even if EPA did not finalize action on Illinois' consumer products and AIM rules before completing action on the State's ozone redesignation request, these emission reductions are not necessary to demonstrate that the improvement in air quality is reasonably attributable to permanent and enforceable emission reductions.

Comment 4d: The commenter asserts that the use of 2008 air quality data is inappropriate to demonstrate that the attainment of the 1997 8-hour ozone standard is due to the implementation of permanent and enforceable emission reductions. The commenter claims that EPA simply documented the changes in emissions between 2002 and 2008 to demonstrate that the observed ozone air quality improvement is due to permanent and enforceable emission reductions during this period. The commenter contends that this is unacceptable for a number of reasons.

First, the commenter asserts that EPA has done nothing to connect the emission changes with air quality impacts. The commenter claims that EPA has conducted no analyses to prove that emission reductions between 2002 and 2008 have led to reduced ozone concentrations and attainment of the 1997 8-hour ozone standard.

Second, the commenter argues that using a single attainment year, 2008, is arbitrary because, as explained in preceding comments, the impact of cap-and-trade emission control programs, such as the NO_X SIP call and CSAPR, can cause emissions to vary over time and location as sources buy, sell, and trade emission allowances.

Third, the commenter characterizes the choice of 2008 is further problematic because 2008 marked the beginning of a large economic recession in this country. The commenter contends that this resulted in decreased electricity demand, decreased automobile, truck, and shipping traffic, and decreased factory production. The commenter contends that EPA makes the ''unsupported and implicit conclusion'' that monitored changes in ozone levels between 2002 and 2008 were due to the implementation of permanent and enforceable emission controls rather than to changes in meteorology, economic conditions, temporary, or voluntary (not enforceable) emission controls. The commenter asserts that EPA provides no analysis showing that the recession was not the cause of the 2002–2008 emission reduction and observed ozone air quality improvement.

Finally, the commenter argues that EPA has not shown that the 2008 emissions inventory reflects permanent and enforceable emission reductions occurring between 2002 and 2008. The 2008 emissions inventory appears to be the ''actual'' or the ''projected'' emissions from an unidentified group of sources. The commenter argues that there is a significant difference between what sources actually emit and what sources are allowed to emit, and that the IEPA and EPA have incorrectly assumed that allowable emissions are equal to actual emissions.

Response 4d: EPA's conclusion here is fully supported by the facts and applicable legal criteria. EPA policy [3] and longstanding practice allows states to demonstrate permanent and enforceable emission reductions by comparing emissions occurring during the nonattainment period (represented by emissions during one of the years in the three-year period used to designate an area as nonattainment,[4] in this case 2002) with emissions occurring during the attainment period (represented by emissions during one of the three attainment years, in this case 2008, which is part of the three-year period, 2006–2008, in which Chicago-Gary-Lake County, IL–IN area first attained the 1997 8-hour ozone standard). In EPA's determination of attainment and proposed approval of the redesignation request, EPA considered data for the 2008–2010 time period, which was then the most recent quality-assured, certified three years of data available. See 77 FR 6743, 6746 (February 9, 2012). Therefore, selecting 2008 as the representative attainment year and comparing emissions for this year to those of the representative violation year, 2002, is an appropriate and long-established approach that demonstrates emission reductions in the period between the years of nonattainment and attainment. These emission reductions, therefore, can be reasonably seen to account for the observed air quality improvement.

EPA disagrees with the commenter's assertion that EPA has conducted no analyses to prove that emission reductions between 2002 and 2008 led to reduced ozone concentrations. EPA's analyses included comparison of emissions for the representative nonattainment year to the emissions for the representative attainment year. This comparison, which established the existence of significant emission reductions that resulted in attainment, and also linked these emission reductions to control measures, is consistent with longstanding practice and EPA policy for making such a demonstration. As noted in the proposed rulemaking for this redesignation (77 FR 6754, February 9, 2012), the State of Illinois documented changes in VOC and NO_X emissions between 2002 and 2008 in the Illinois portion of the Greater Chicago area and the emission control measures that have been implemented in the Illinois portion of the Greater Chicago area. These emission control measures resulted from the State's adoption and implementation of regulations, including regulations to: Control NO_X emissions at electric generating utilities and large industrial combustion sources under EPA's NO_X SIP call; control emissions and implement New Source Performance Standards (NSPS), National Emission Standards for Hazardous Air Pollutants (NESHAPS), and Maximum Available Control Technology (MACT) standards for new sources; control VOC solvent emissions for aerosol coatings and AIM coatings and consumer solvents; control vehicle emissions through the implementation of enhanced vehicle inspection and maintenance; control vehicle refueling emissions; and control vehicle evaporative emissions through use of low volatility fuels and reformulated gasoline. In addition to the State's implementation of state-specific emission control measures, Federal emission control measures have also been implemented in the Greater Chicago area, including: Tier 2 emission standards for vehicles; Tier 4 nonroad diesel engine standards; marine compression-ignition engine standards; and locomotive engine standards. As noted in the February 9, 2012, proposed rule, all of these emission controls have been implemented since the 2001–2003 ozone standard violation period for the Greater Chicago area. Therefore, it is

[3] See September 4, 1992, memorandum from John Calcagni entitled ''Procedures for Processing Requests to Redesignate Areas to Attainment,'' pp. 4 and 8–9.

[4] The nonattainment designation of the Greater Chicago area for the 1997 8-hour ozone standard was based on 2001–2003 ozone data.

reasonable to conclude that the emission reductions resulting from these emission controls contributed to the attainment of the 1997 8-hour ozone standard in the Greater Chicago area. See the February 9, 2012, proposed rule (77 FR 6754 and 6759) for discussions of implemented emission control measures and how Illinois derived the 2002 and 2008 VOC and NO_X emissions, demonstrating emission reductions between the 2002 violation year and 2008 attainment year.

The State demonstrated that the implementation of these emission controls along with other ongoing emission controls resulting from continued implementation of the Illinois SIP have led to the emission reductions used to demonstrate the emissions reduction in this area. To derive the 2008 emissions, the State determined source category-specific emission control factors associated with the implemented emission controls. Note that the State applied emission control factors only for those source categories covered by State or Federal emission control requirements and for specific sources subject to permanent, enforceable source closures. The State took no credit for temporary or non-permanent emission reductions resulting from voluntary emission control measures or source activity downturn resulting from the current downturn in the economy. The source category-specific emission control factors, along with source category-specific growth factors, were applied to the 2002 base year emissions to project the 2008 emissions. Emission reductions resulting from source closures occurring between 2002 and 2008 and determined to be permanent (including forfeiture of source permits) were also considered and factored into the emission projections, but produced relatively small emission reductions compared to the impacts of implemented emission controls. Since most source categories had positive growth factors, almost all projected emission reductions can be attributed to the impacts of implemented emission controls. Therefore, the State has demonstrated that the derived emission reduction that occurred between 2002 and 2008 is due to the implementation of emission controls.

The CAA does not specifically require the use of ozone modeling to make a demonstration that the observed ozone air quality improvement is due to permanent and enforceable emission reductions resulting from the implementation of emission controls. It has not been the general practice of states to do so in demonstrating emission reductions for purposes of ozone redesignation requests.

EPA disagrees with the commenter's contention that using emissions from a single attainment year is arbitrary due to the year-to-year variation in emission levels resulting from the implementation of cap-and-trade programs. As a general matter, trading programs establish mandatory caps on emissions and permanently reduce total emissions allowed for sources subject to the programs. The emission caps and associated controls are enforced through the associated SIP rules and FIPs. Any purchase of emission allowances and increase in emissions by a utility necessitates a corresponding sale of emission allowances and reduction in emissions by another utility. Given the regional nature of ozone formation and transport, the emissions reduction will have an ozone air quality benefit that will compensate, at least in part, for the impact of any emission increase.

With respect to NO_X SIP call emission reductions within the Greater Chicago area, there is no evidence of significant temporal variation in emissions levels. In fact, actual emissions from NO_X SIP call sources in the Chicago area have not varied much from year-to-year over the 2003–2011 time period. Some of the largest emitters in the Greater Chicago area that are covered by the NO_X SIP call are operating near full capacity. In addition, an analysis of ozone season NO_X emission rates and total operating hours for all NO_X SIP call sources in this area shows that annual levels of NO_X emission rates (tons per hour of operation) have generally trended downward subsequent to 2003 as a result of the implementation of emission controls.

While the commenter expressed concerns that an economic downturn was responsible for the observed air quality improvement, the commenter has made no demonstration that the reduction in emissions and observed improvement in air quality is due to an economic recession, changes in meteorology, or temporary or voluntary emission reductions. In addition, as noted previously, the CAA does not require modeling to make any such demonstration. There are no data demonstrating that the observed air quality improvement is due to the economic downturn, temporary changes in meteorology, or voluntary emission reductions, and, as discussed above, EPA's modeling for the CSAPR demonstrates that the Greater Chicago area would attain the NAAQS in 2012 and 2014 with or without implementation of CAIR, which is place only temporarily. We, thus, have no reason to believe that factors other than permanent and enforceable emission reductions let to attainment of the 1997 8-hour ozone standard in the Greater Chicago area.

Finally, with regard to consideration of actual versus allowable/permitted emission levels, longstanding practice and EPA policy allows for the use of actual emissions when demonstrating permanent and enforceable emission reductions. Sources seldom emit at maximum allowable emission levels, and assuming that all sources simultaneously operate at maximum capacity would grossly overestimate emission levels. For this reason, EPA believes actual emissions are the appropriate emission levels to consider when comparing nonattainment year emissions with attainment year emissions to demonstrate the basis for improvements in peak ozone levels. EPA also notes that the certified monitoring data establish that the area has been attaining the 1997 8-hour ozone standard continuously during the periods of 2006–2008, 2007–2009, 2008–2010, and 2009–2011, and that EPA's modeling demonstrates that the Greater Chicago area would have attainment air quality in 2012 and 2014 with or without the implementation of CAIR. Emissions reductions have continued during this extended period as the State has continued to implement and enforce emission controls in addition to those required by CAIR.

Comment 5: The commenter claims that EPA has not conducted an adequate analysis of the effect redesignation to attainment will have on attainment and maintenance of other NAAQS under section 110(l) of the CAA. The commenter complains that EPA has failed to conduct an adequate analysis of the ozone redesignation impacts with respect to the 1997 annual fine particulate ($PM_{2.5}$) NAAQS, the 2006 24-hour $PM_{2.5}$ NAAQS, the 1-hour nitrogen dioxide (NO_2) NAAQS, the 1-hour sulfur dioxide (SO_2) NAAQS, and 2008 8-hour ozone NAAQS.

Response 5: Section 110(l) of the CAA provides in part: ''the Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress * * *, or any other applicable requirement of this chapter.'' As a general matter, EPA must and does consider section 110(l) requirements for every SIP revision, including whether the revision would ''interfere with'' any applicable requirement. See, e.g., 70 FR 53, 57 (January 3, 2005); 70 FR 17029, 17033 (April 4, 2005); 70 FR 28429,

28431 (May 18, 2005); and 70 FR 58119, 58134 (October 5, 2005).

The Illinois redesignation request and maintenance plan for the 1997 8-hour ozone standard neither revises nor removes any existing emission control requirements. On that basis, EPA concludes that the redesignation will not interfere with attainment or maintenance of any of the air quality standards. Moreover, the maintenance plan itself demonstrates that the emission emissions of NO_X and VOC in the Greater Chicago area will remain at or below the attainment year (2008) levels through 2025, thus demonstrating non-interference with other pollutants, in particular fine pollutants, that are formed through reactions and processes involving NO_X and/or VOC. In addition, contingency measures, if subsequently activated, can be selected to ensure non-interference through lowered emission levels.

The commenter does not provide any information in the comment to indicate that approval of this redesignation would have any impact on the area's ability to comply with any of the referenced NAAQS. In fact, the ozone maintenance plan provided with the State's redesignation request demonstrates a decline in VOC and NO_X emissions over the timeframe of the 10-plus year maintenance period. This reflects the fact that the redesignation does not relax any existing emission control rules or emission limits, nor will the redesignation alter the status quo air quality. The commenter has not explained why the redesignation might interfere with attainment of any standard or with satisfaction of any other CAA requirement, and EPA finds no basis under section 110(l) for EPA to disapprove the SIP revision (ozone maintenance plan and emissions inventories) at issue or to disapprove the requested ozone redesignation.

Comment 6: The commenter asserts that EPA cannot approve Illinois' 2002 emissions inventory as meeting the emission inventory requirement of section 182(a)(1) of the CAA for a number of reasons. In particular, the commenter believes that Illinois' mobile source emission inventories, based on the use of EPA's MOVES model, does not account for the increase VOC and NO_X emissions that would result from the use of up to 15 percent ethanol content in gasoline recently approved by the EPA. The commenter argues that many car and light-duty truck emission control systems are not designed to control vehicle emissions with blends of 15 percent ethanol (Ethanol 15 or E15). The commenter believes that EPA has not accounted for the extra VOC and NO_X emissions that would result from the use of E15.

Response 6: First, it is noted that this comment was directed at EPA's proposed approval of Illinois' 2002 base period emissions. The commenter's concern is not relevant to approval of the 2002 base year emission inventories because the EPA-approved use of E15 fuels was not in place during 2002. The use of E15 fuels was approved by EPA well after 2002. Therefore, the mobile source emissions for 2002 could not have reflected the future use of E15 fuels.

With regard to the use of E15 fuels in later years, it is noted that, in 2010 and 2011, EPA granted partial waivers for the use of E15 fuels in Model Year (MY) 2001 and newer light-duty motor vehicles (75 FR 68094, November 4, 2010 and 76 FR 4662, January 26, 2011). As discussed in the waiver decisions, there may be some small emission impacts for the use of E15. E15 is expected to cause a small immediate emissions increase in NO_X emissions. However, due to its lower volatility than the E10 fuels currently in use, its use is also expected to result in lower evaporative emissions. Other possible emissions impacts may be from the misfueling of E15 in vehicles or engines for which its use is not approved, i.e., MY 2000 and older motor vehicles, heavy-duty engines and vehicles, motorcycles and all non-road engines, vehicles, and equipment. EPA has promulgated a separate rule dealing specifically with the mitigation of misfueling to reduce potential emissions impacts from misfueling (76 FR 44406, July 25, 2011).

EPA's partial waiver for E15 is based on extensive studies done by the Department of Energy, as well as EPA's engineering assessment, to determine the effects on exhaust and evaporative emissions for the vehicle fleet prior to and after the partial waiver. The criteria for granting the waiver was not that there are no emission impacts for E15, but rather that vehicles operating on E15 would not be expected to violate their emission standards in-use.

The E15 partial waivers do not require that E15 be made or sold, and it is unclear if and to what extent E15 may even be used in Illinois. Even if E15 is introduced into commerce in Illinois, considering the likely small and offsetting direction of the emission impacts, the limited set of motor vehicles approved for its use, and the measures required to mitigate misfueling, EPA believes that any potential emission impacts of E15 will be less than the margin of safety by which Illinois shows maintenance of the 1997 ozone standard.

Comment 7: The commenter argues that EPA has not accounted for the effects of changes in weather in its analysis of Illinois' ozone redesignation request. The commenter asserts that EPA should have adjusted monitored ozone levels to account for the varying impacts of meteorology. The commenter contends that EPA cannot approve Illinois' ozone resignation request without a weather adjusted analysis. In addition, the commenter believes that EPA has erred in not considering the impacts that climate change will have on ozone formation during the maintenance period.

Response 7: A determination that an area has attained the 1997 8-hour ozone standard is based on an objective review of the air quality data for a specified period. There are no provisions in the CAA for considering the impacts of changing meteorology and adjusting monitored ozone concentrations to reflect a standardized set of meteorological data or some historical range of meteorological data. Therefore, we disagree with the commenter's argument that EPA should have adjusted ozone levels to assess the impacts of meteorology during the attainment period versus meteorology more reflective of historical high ozone periods. In addition, it should be noted that the very nature of the three-year averaging of ozone concentrations used to assess compliance with the 1997 8-hour ozone standard is used, in part, to negate the impacts of year-to-year variations in meteorology on ozone formation.

By the same reasoning, we also disagree with the commenter that EPA must, in the context of a redesignation rulemaking, consider the impact of climate change on future ozone formation. While EPA agrees that climate change is a serious environmental issue, at this time EPA does not believe that an area-specific climate change analysis must occur in the context of rulemaking on a redesignation request and maintenance plan. Even if EPA chose to make such an assessment, it is virtually impossible, especially given the relatively limited spatial and temporal focus of a redesignation request and related maintenance plan, to project or predict the local meteorological changes that might result from climate change. Current modeling uncertainties result in conflicting projections of the spatial patterns of future changes in meteorological variables and the specific regional distributions of future ozone changes across the United States.

Modeling guidance is not yet available for the type of area-specific analysis of effects or climate change on ozone concentrations required for SIP planning. EPA, therefore, believes it is premature to require a precise mathematical accounting in the SIP process for the effect of higher ambient temperatures due to climate change on ozone concentrations. EPA is ready to reevaluate this position when the state of science and confidence in projection improve. Given the above, at this time, EPA is not in a position to forecast the impact climate change may have on future ozone considerations with the specificity needed for evaluating a state's ozone maintenance demonstration. See EPA's similar reasoning in its approval of Kentucky's section 110(a)(1) maintenance for Huntington-Ashland, Kentucky, 76 FR 21853 (April 14, 2011). Finally, EPA notes that the Greater Chicago area has continued to attain the 1997 8-hour ozone standard since the 2006–2008 monitoring period, and that its attainment of the standard has withstood the challenges of meteorological variability for many years longer than required. Elsewhere in this notice, EPA has addressed extensively its reasoning for concluding, as required for redesignation, that attainment is due to permanent and enforceable emissions reductions, rather than to unduly favorable meteorology.

Conclusion of Comment Review and Response

We conclude that none of the comments discussed above provides a basis for precluding EPA from finalizing the actions we proposed on February 9, 2012.

III. What actions is EPA taking?

After reviewing Illinois' ozone redesignation request, EPA has determined that it meets the redesignation criteria set forth in section 107(d)(3)(E) f the CAA. Therefore, EPA is approving the redesignation of the Illinois portion of the Greater Chicago area to attainment of the 1997 8-hour ozone NAAQS. EPA is also approving Illinois' ozone maintenance plan for the Illinois portion of the Greater Chicago area as a revision of the Illinois SIP based on Illinois' demonstration that the plan meets the requirements of section 175A of the CAA. EPA is approving the 2002 VOC and NO_X emission inventories for the Illinois portion of the Greater Chicago area as meeting the requirements of section 182(a)(1) of the CAA. Finally, EPA is also approving and finding adequate Illinois' 2008 and 2025 VOC and NO_X MVEBs for the Illinois portion of the Greater Chicago area. For 2008, these MVEBs are 117.23 tons per ozone season weekday for VOC and 373.52 tons per ozone season weekday for NO_X. For 2025, these MVEBs are 48.13 tons per ozone season weekday for VOC and 126.27 tons per ozone season weekday for NO_X.

In accordance with 5 U.S.C. 553(d), EPA finds there is good cause for this action to become effective immediately upon publication. This is because a delayed effective date is unnecessary due to the nature of a redesignation to attainment, which relieves the area from certain CAA requirements that would otherwise apply to it. The immediate effective date for this action is authorized under both 5 U.S.C. 553(d)(1), which provides that rulemaking activities may become effective less than 30 days after publication if the rule ''grants or recognizes an exemption or relieves a restriction,'' and section 553(d)(3), which allows an effective date less than 30 days after publication ''as otherwise provided by the agency for good cause found and published with the rule.'' The purpose of the 30-day waiting period prescribed in section 553(d) is to give affected parties a reasonable time to adjust their behavior and prepare before the final rule takes effect. Today's rule, however, does not create any new regulatory requirements such that affected parties would need time to prepare before the rule takes effect. Rather, today's rule relieves the State of planning requirements for this 8-hour ozone nonattainment area. For these reasons, EPA finds good cause under 5 U.S.C. 553(d)(3) for this action to become effective on the date of publication of this action.

IV. Statutory and Executive Order Reviews

Under the CAA, redesignation of an area to attainment and the accompanying approval of a maintenance plan under section 107(d)(3)(E) are actions that affect the status of a geographical area and do not impose any additional regulatory requirements on sources beyond those imposed by State law. A redesignation to attainment does not in and of itself create any new requirements, but rather results in the applicability of requirements contained in the CAA for areas that have been redesignated to attainment. Moreover, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the CAA. Accordingly, these actions do not impose additional requirements beyond those imposed by State law and the CAA. For that reason, these actions:

- Are not ''significant regulatory actions'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Do not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Are 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.*);
- Do 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);
- Do not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Are not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Are not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Are not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and,
- Do not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

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

the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 12, 2012. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen oxides, Ozone, Volatile organic compounds.

40 CFR Part 81

Air pollution control, Environmental protection, National parks, Wilderness areas.

Dated: July 27, 2012.

Susan Hedman,

Regional Administrator, Region 5.

40 CFR parts 52 and 81 are amended as follows:

PART 52—[AMENDED]

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

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

■ 2. Section 52.726 is amended by adding paragraphs (mm)(2) and (nn) to read as follows:

§ 52.726 Control strategy: Ozone.

* * * * *

(mm) * * *

(2) Approval—Illinois' 2002 volatile organic compounds and nitrogen oxides emission inventories satisfy the emissions inventory requirements of section 182(a)(1) of the Clean Air Act for the Illinois portion of the Chicago-Gary-Lake County, Illinois-Indiana area under the 1997 8-hour ozone standard.

(nn) Approval—On July 23, 2009, and September 16, 2011, Illinois submitted a request to redesignate the Illinois portion of the Chicago-Gary-Lake County, Illinois-Indiana area to attainment of the 1997 8-hour ozone standard. The Illinois portion of the Chicago-Gary-Lake County, Illinois-Indiana area includes Cook, DuPage, Kane, Lake, McHenry, and Will Counties and portions of Grundy (Aux Sable and Goose Lake Townships) and Kendall (Oswego Township) Counties. As part of the redesignation request, the State submitted a plan for maintaining the 1997 8-hour ozone standard through 2025 in the area as required by section 175A of the Clean Air Act. Part of the section 175A maintenance plan includes a contingency plan. The ozone maintenance plan establishes 2008 motor vehicle emissions budgets for the Illinois portion of the Chicago-Gary-Lake County, Illinois-Indiana area of 117.23 tons per day (tpd) for volatile organic compounds (VOC) and 373.52 tpd for nitrogen oxides (NO_X). In addition, the maintenance plan establishes 2025 motor vehicle emissions budgets for the Illinois portion of the Chicago-Gary-Lake County, Illinois-Indiana area of 48.13 tpd for VOC and 125.27 tpd for NO_X.

PART 81—[AMENDED]

■ 3. The authority citation for part 81 continues to read as follows:

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

■ 4. Section 81.314 is amended by revising the entry for Chicago-Gary-Lake County, IL-IN in the table entitled ''Illinois—1997 8-Hour Ozone NAAQS (Primary and Secondary)'' to read as follows:

§ 81.314 Illinois.

* * * * *

ILLINOIS—1997 8-HOUR OZONE NAAQS (PRIMARY AND SECONDARY)

Designated area	Designation [a]		Classification	
	Date [1]	Type	Date [1]	Type
Chicago-Gary-Lake County, IL-IN:				
Cook County	8/13/2012			
DuPage County	.....	Attainment.		
Grundy County (part).				
Aux Sable Township.				
Goose Lake Township.				
Kane County.				
Kendall County (part).				
Oswego Township.				
Lake County.				
McHenry County.				
Will County.				
* * * * * * *				

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is June 15, 2004, unless otherwise noted.

* * * * *

[FR Doc. 2012–19556 Filed 8–10–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 98

[EPA–HQ–OAR–2011–0028; FRL–9706–6]

RIN 2060–AQ70

Final Confidentiality Determinations for Regulations Under the Mandatory Reporting of Greenhouse Gases Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This action finalizes confidentiality determinations for certain data elements in regulations under the Mandatory Greenhouse Gas Reporting Rule. In addition, the EPA is finalizing amendments to defer the reporting deadline of certain data elements until 2013 and to defer the reporting deadline of certain data elements until 2015. Lastly, the EPA is finalizing amendments regarding the calculation and reporting of emissions from facilities that use best available monitoring methods. This action does not include final confidentiality determinations for data elements in the ''Inputs to Emission Equations'' data category.

DATES: This rule will be effective on September 12, 2012, except for the amendments to Tables A–6 and A–7 of 40 CFR part 98 subpart A and the amendments to 40 CFR part 98 subpart I (§ 98.94(a)(2)(iii), (a)(3)(iii), and (a)(4)(iii)), which are effective on August 13, 2012.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2011–0028. All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information may not be publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and is publicly available in hard copy only. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the EPA's Docket Center, EPA/DC, EPA West Building, Room 3334, 1301 Constitution Ave. NW., Washington, DC. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Carole Cook, Climate Change Division, Office of Atmospheric Programs (MC–6207J), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: (202) 343–9263; fax number: (202) 343–2342; email address: *GHGReportingRule@epa.gov*. For technical information and implementation materials, please go to the Web site *http://www.epa.gov/climatechange/emissions/CBI.html*. To submit a question, select ''Rule Help Center,'' followed by ''Contact Us.''

SUPPLEMENTARY INFORMATION: *Worldwide Web (WWW).* In addition to being available in Docket ID No. EPA–HQ–OAR–2011–0028, following the Administrator's signature, an electronic copy of this final rule will be available through the WWW on the EPA's Greenhouse Gas Reporting Program Web site at *http://www.epa.gov/climatechange/emissions/ghgrulemaking.html*.

What is the effective date? The final rule is effective on September 12, 2012, except for the amendments to Tables A–6 and A–7 of 40 CFR part 98 subpart A and the amendments to 40 CFR part 98 subpart I (section 98.94(a)(2)(iii), (a)(3)(iii), and (a)(4)(iii)), which are effective on August 13, 2012. Section 553(d) of the Administrative Procedure Act (APA), 5 U.S.C. chapter 5, generally provides that rules may not take effect earlier than 30 days after they are published in the **Federal Register**. EPA is issuing this final rule under section 307(d)(1) of the Clean Air Act, which states: ''The provisions of section 553 through 557 of Title 5 shall not, except as expressly provided in this section, apply to actions to which this subsection applies.'' Thus, section 553(d) of the APA does not apply to this rule. EPA is nevertheless acting consistently with the purposes underlying APA section 553(d) in making the amendments to subparts A and I effective on August 13, 2012. The amendments to subpart A defer the reporting deadline for several inputs to emission equations and the amendments to subpart I remove the requirement for some facilities to recalculate and report data under that subpart. An effective date less than 30 days after the date of publication in such circumstances is consistent with the purposes of APA section 553(d), which provides an exception for any action that grants or recognizes an exemption or relieves a restriction.

Judicial Review. Under section 307(b)(1) of the CAA, judicial review of this final rule is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit (the Court) by October 12, 2012. Under CAA section 307(d)(7)(B), only an objection to this final rule that was raised with reasonable specificity during the period for public comment can be raised during judicial review. Section 307(d)(7)(B) of the CAA also provides a mechanism for the EPA to convene a proceeding for reconsideration, ''[i]f the person raising an objection can demonstrate to EPA that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule.'' Any person seeking to make such a demonstration to us should submit a Petition for Reconsideration to the Office of the Administrator, Environmental Protection Agency, Room 3000, Ariel Rios Building, 1200 Pennsylvania Ave., NW., Washington, DC 20460, with a copy to the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20004. Note, under CAA section 307(b)(2), the requirements established by this final rule may not be challenged separately in any civil or criminal proceedings brought by the EPA to enforce these requirements.

Acronyms and Abbreviations. The following acronyms and abbreviations are used in this document.

BAMM Best Available Monitoring Methods
CAA Clean Air Act
CO_2 Carbon Dioxide
CBI Confidential Business Information
CBP U.S. Customs and Border Protection
CFR Code of Federal Regulations
EIA Energy Information Administration
ER Enhanced Recovery
EPA U.S. Environmental Protection Agency
F–GHG Fluorinated Greenhouse Gas
GHG Greenhouse Gas
ICR Information Collection Request
NTTAA National Technology Transfer and Advancement Act of 1995
OMB Office of Management & Budget
R&D Research and Development
RFA Regulatory Flexibility Act
UMRA Unfunded Mandates Reform Act of 1995
U.S. United States
WWW Worldwide Web

Organization of This Document. The following outline is provided to aid in locating information in this preamble.

I. General Information

A. What is the purpose and background of this action?
B. Does this action apply to me?
C. Legal Authority
D. Approach to Making Confidentiality Determinations
II. Confidentiality Determinations for Subparts I, W, DD, QQ, RR, SS, and UU and Responses to Public Comments
A. Final Confidentiality Determinations
B. Direct Emitter Data Categories
C. GHG Supplier Data Categories
III. Confidentiality Determinations for New Data Elements in Subparts II and TT and Responses to Public Comments
IV. Amendments to Table A–6 and A–7 To Defer Reporting of Certain Inputs to Emission Equations in Subparts W, FF and TT
V. Background and Amendments to the Best Available Monitoring Method for Subpart I
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VI. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review
B. Paperwork Reduction Act
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E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks
H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer and Advancement Act
J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
K. Congressional Review Act

I. General Information

A. What is the purpose and background of this action?

The first purpose of this action is to finalize confidentiality determinations for the data elements (except those in the ''Inputs to Emission Equations'' data category and certain additional subpart I data elements) in seven subparts of 40 CFR part 98 of the Mandatory Greenhouse Gases Reporting Rule (hereafter referred to as ''Part 98''):

- Subpart I—Electronics Manufacturing
- Subpart W—Petroleum and Natural Gas Systems
- Subpart DD—Use of Electric Transmission and Distribution Equipment
- Subpart QQ—Imports and Exports of Equipment Pre-Charged with Fluorinated GHGs or Containing Fluorinated GHGs in Closed-Cell Foams
- Subpart RR—Geologic Sequestration of Carbon Dioxide
- Subpart SS—Manufacture of Electric Transmission and Distribution Equipment
- Subpart UU—Injection of Carbon Dioxide

The second purpose of this action is to finalize confidentiality determinations for new data elements (that are not inputs to emission equations) added to subparts II and TT in the Technical Corrections final rule [1] after the EPA issued final confidentiality determinations for non-inputs to equations data elements in these two subparts.[2]

The third purpose of this action is to finalize amendments to subpart A of Part 98 to defer until 2013 or 2015 the reporting deadline for inputs to emission equations data elements recently added by the Technical Corrections final rule. These data elements are in subparts W, FF, and TT.

The fourth purpose of this action is to finalize amendments to subpart I regarding the calculation and reporting of emissions from facilities that use best available monitoring methods (BAMM). These amendments remove the obligation to recalculate and resubmit emission estimates for the period during which the facility used best available monitoring methods.

As noted above, we are making final confidentiality determinations for the data elements reported under the finalized subparts of Part 98 identified in Table 1 of this preamble. We are not making final confidentiality determinations for data elements in this action not identified in Table 1. We are also finalizing amendments to Tables A–6 and A–7 of subpart A for the subparts shown in Table 1 of this preamble.

TABLE 1—SUBPARTS AND DATA ELEMENTS COVERED IN THIS FINAL RULE

Subpart	Confidentiality determinations	Amendments to Table A–6 or A–7
I	Some data elements (excludes recipe-specific data elements, a manufacturing capacity data element, and inputs to emission equations).[a]	none.
W	All data elements except inputs to emission equations	Table A–7.
DD	All data elements except inputs to emission equations	none.
FF	None but finalizes two data elements recently added to 40 CFR 98.326(o)[c] as inputs to emission equations	none.[b]
II	Some data elements (only includes data elements added by 76 FR 73886)	none.
QQ	All data elements except inputs to emission equations	none.
RR	All data elements except inputs to emission equations	none.
SS	All data elements except inputs to emission equations	none.
TT	Some data elements (only includes data elements added by 76 FR 73886)	Table A–6.
UU	All data elements except inputs to emission equations	none.

[a] For the reasons provided in Section II of this preamble, certain subpart I data elements are not covered in this final rule. For a list of subpart I data elements not covered in this rule, see Table 4 in the Memorandum, ''Final Data Category Assignments and Confidentiality Determinations for the 2012 Final CBI Rule.''

[b] As explained in the 2012 CBI re-proposal, paragraph § 98.326(o) is already included in Table A–6 of subpart A for reporting by March 31, 2013; therefore, no amendments to Table A–6 of subpart A are necessary to include these two new subpart FF data elements in the list of deferred data elements.

[c] 76 FR 73886, November 29, 2011.

[1] 76 FR 73886, November 29, 2011.

[2] Final confidentiality determinations for subparts II and TT were made in the 2011 Final CBI Rule (76 FR 30782, May 26, 2011).

1. Background for CBI Determinations for All Data Elements That Are Not in the ''Inputs to Emissions Equations'' Data Category

This action finalizes confidentiality determinations for data elements specified in Table 1 of this preamble. For information on the history of CBI determinations for the data elements at issue, see the following notices (available at *http://www.epa.gov/climatechange/emissions/CBI.html*):

- 75 FR 39094, July 7, 2010; hereafter referred to as the ''July 7, 2010 CBI proposal.'' Proposed confidentiality determinations for Part 98 data elements, including subparts I, W, DD, II, QQ, RR, SS, and TT.
- 76 FR 30782, May 26, 2011; hereafter referred to as the ''2011 Final CBI Rule.'' Finalized confidentiality determinations for data categories, assigned data elements to data categories and published the final CBI determinations for the data elements in 34 Part 98 subparts, except for those assigned to the ''Inputs to Emission Equations'' data category. This included confidentiality determinations for subparts II and TT and excluded confidentiality determinations for subparts I, W, DD, QQ, RR, SS, and UU.[3]
- 77 FR 1434, January 10, 2012; hereafter referred to as ''2012 CBI re-proposal.'' The EPA re-proposed for public comment the confidentiality determinations for the data elements in subparts L,[4] DD, QQ, RR, SS, and UU, as well as new data elements (added by the Technical Corrections final rule) in subparts II and TT to reflect the reporting data elements in the final subparts and all subsequent amendments to these subparts up to the date of the 2012 CBI re-proposal.
- 77 FR 10434, February 22, 2012; hereafter referred to as ''Subpart I CBI re-proposal.'' The EPA re-proposed for public comment the confidentiality determinations for many data elements in subpart I to reflect the reporting data elements in the 2010 final subpart I and all subsequent amendments to subpart I up to the date of the Subpart I CBI re-proposal.
- 77 FR 11039, February 24, 2012; hereafter referred to as ''Subpart W CBI re-proposal.'' The EPA re-proposed for public comment the confidentiality determinations for the data elements in subpart W to reflect the data elements in the 2010 final subpart W and all subsequent amendments to subpart W up to the date of the Subpart W CBI re-proposal.

2. Background on Data Elements in the ''Inputs to Emissions Equations'' Data Category

This rule finalizes amendments to Tables A–6 and A–7 of subpart A to defer the deadline for reporting certain recently added data elements in subparts W, FF, and TT that we are assigning to the ''Inputs to Emission Equations'' data category. This action does not include final confidentiality determinations for data elements that are in the ''Inputs to Emission Equations'' data category. For information on the history of the deferral of the reporting deadline for inputs, see the following notices (available at *http://www.epa.gov/climatechange/emissions/CBI.html*):

- 75 FR 81366, December 27, 2010; hereafter referred to as the ''call for information.'' Requested comment on whether each data element used as an input to an emission equation for direct emitters was likely to cause substantial competitive harm if made publicly available.
- 76 FR 53057, August 25, 2011; hereafter referred to as the ''Final Deferral Notice.'' The EPA deferred the deadline for direct emitter reporters to report inputs to emission equations data elements. The EPA deferred the deadline for reporting some of these data elements to March 31, 2013, and others to March 31, 2015. Subpart FF and TT inputs were deferred to March 31, 2013, and are identified in Table A–6 of subpart A, and subpart W inputs were deferred to March 31, 2015, and are identified in Table A–7 of subpart A.

B. Does this action apply to me?

This final rule affects entities required to submit annual greenhouse gas (GHG) reports under certain subparts of Part 98. The Administrator determined that this action is subject to the provisions of Clean Air Act (CAA) section 307(d). See CAA section 307(d)(1)(V) (the provisions of CAA section 307(d) apply to ''such other actions as the Administrator may determine''). Part 98 and this action affect owners and operators of electronics manufacturing facilities, petroleum and natural gas systems, electric power systems, electrical equipment manufacturing facilities, carbon dioxide (CO_2) enhanced oil and gas recovery projects, acid gas injection projects, geologic sequestration projects, importers and exporters of pre-charged equipment and closed-cell foams, industrial wastewater treatment facilities, underground coal mines, and industrial waste landfills. Affected categories and entities include those listed in Table 2 of this preamble.

TABLE 2—EXAMPLES OF AFFECTED ENTITIES BY CATEGORY

Category	NAICS	Examples of affected facilities
Electronics Manufacturing	334111	Microcomputers manufacturing facilities.
	334413	Semiconductor, photovoltaic (solid-state) device manufacturing facilities.
	334419	Liquid crystal display unit screens manufacturing facilities.
	334419	Micro-electro-mechanical systems manufacturing facilities.
Petroleum and Natural Gas Systems	486210	Pipeline transportation of natural gas.
	221210	Natural gas distribution facilities.
	211	Extractors of crude petroleum and natural gas.
	211112	Natural gas liquid extraction facilities.
Electrical Equipment Use	221121	Electric bulk power transmission and control facilities.
Electrical Equipment Manufacture or Refurbishment	33531	Power transmission and distribution switchgear and specialty transformers manufacturing facilities.

[3] The EPA initially proposed subparts RR and UU as a single subpart (subpart RR); however, as a result of public comments on subpart RR, the EPA moved all definitions, requirements, and procedures for facilities conducting only CO_2 injection (without geologic sequestration) into a new subpart (subpart UU). Subpart RR retained all definitions, requirements, and procedures related to facilities conducting geologic sequestration.

[4] For subpart L, the EPA received comments raising concerns that the release of certain data elements that the EPA proposed to classify as emissions data, and that therefore would not be eligible for treatment as CBI, would reveal trade secrets and may violate export control laws. The EPA is not finalizing confidentiality determinations for subpart L data elements in this action. The confidentiality determinations for subpart L will be addressed separately. Please see Docket ID No. EPA–HQ–OAR–2011–0147 for more information.

TABLE 2—EXAMPLES OF AFFECTED ENTITIES BY CATEGORY—Continued

Category	NAICS	Examples of affected facilities
Importers and Exporters of Pre-charged Equipment and Closed-Cell Foams.	423730	Air-conditioning equipment (except room units) merchant wholesalers.
	333415	Air-conditioning equipment (except motor vehicle) manufacturing.
	336391	Motor vehicle air-conditioning manufacturing.
	423620	Air-conditioners, room, merchant wholesalers.
	443111	Household appliance stores.
	423730	Automotive air-conditioners merchant wholesalers.
	326150	Polyurethane foam products manufacturing.
	335313	Circuit breakers, power, manufacturing.
	423610	Circuit breakers merchant wholesalers.
CO_2 Enhanced Oil and Gas Recovery Projects	211	Oil and gas extraction projects using CO_2 enhanced recovery.
Acid Gas Injection Projects	211111 or 211112	Projects that inject acid gas containing CO_2 underground.
Geologic Sequestration Projects	N/A	CO_2 geologic sequestration projects.
Underground Coal Mines	212113	Underground anthracite coal mining operations.
	212112	Underground bituminous coal mining operations.
Industrial Wastewater Treatment	322110	Pulp mills.
	322121	Paper mills.
	322122	Newsprint mills.
	322130	Paperboard mills.
	311611	Meat processing facilities.
	311411	Frozen fruit, juice, and vegetable manufacturing facilities.
	311421	Fruit and vegetable canning facilities.
	325193	Ethanol manufacturing facilities.
	324110	Petroleum refineries.
Industrial Waste Landfills	562212	Solid waste landfills.
	322110	Pulp mills.
	322121	Paper mills.
	322122	Newsprint mills.
	322130	Paperboard mills.
	311611	Meat processing facilities.
	311411	Frozen fruit, juice, and vegetable manufacturing facilities.
	311421	Fruit and vegetable canning facilities.
	221320	Sewage treatment facilities.

Table 2 of this preamble lists the types of entities that potentially could be affected by the confidentiality determinations and amendments under the subparts covered by this action. However, this list is not intended to be exhaustive, but rather provides a guide for readers regarding facilities and suppliers likely to be affected by this action. Other types of facilities and suppliers not listed in the table could also be subject to this action. To determine whether you are affected by this action, you should carefully examine the applicability criteria found in 40 CFR part 98, subpart A as well as 40 CFR part 98 subparts I, W, DD, FF, II, QQ, RR, SS, TT, and UU. If you have questions regarding the applicability of this action to a particular facility, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

C. Legal Authority

The EPA is finalizing certain amendments to Part 98 under its existing CAA authority, specifically authorities provided in CAA section 114. As stated in the preamble to the 2009 Mandatory Reporting of Greenhouse Gases final rule (74 FR 56260, October 30, 2009) and the Response to Comments on the Proposed Rule, Volume 9, Legal Issues, CAA section 114 provides the EPA broad authority to obtain the information in Part 98 because such data inform and are relevant to the EPA's carrying out a wide variety of CAA provisions. As discussed in the preamble to the initial Part 98 proposal (74 FR 16448, April 10, 2009), CAA section 114(a)(1) authorizes the Administrator to require emissions sources, persons subject to the CAA, manufacturers of control or process equipment, or persons whom the Administrator believes may have necessary information to monitor and report emissions and provide such other information the Administrator requests for the purposes of carrying out any provision of the CAA.

In addition, the EPA is finalizing confidentiality determinations for certain Part 98 data under its authorities provided in sections 114, 301 and 307 of the CAA. As mentioned above, CAA section 114 provides the EPA authority to obtain the information in Part 98. Section 114(c) of the CAA requires that the EPA make publicly available information obtained under CAA section 114 except for information (excluding emission data) that qualifies for confidential treatment. The Administrator has determined that this action (Part 98 amendment and confidentiality determinations) is subject to the provisions of CAA section 307(d).

D. Approach to Making Confidentiality Determinations

As explained in the 2012 CBI reproposal, we are applying the same approach to making confidentiality determinations as was used in the 2011 Final CBI Rule. Specifically, we have assigned each data element specified in Table 1 of this preamble to one of 21 data categories [5] based on the type and characteristics of the data element. The

[5] As previously mentioned, this final rule does not address the confidentiality of data elements in the ''Inputs to Emission Equations'' data category. For data elements in subparts W, FF, and TT that we are assigning to the ''Inputs to Emission Equations'' data category in this action, please see Table 3 of the Memorandum titled ''Final Data Category Assignments and Confidentiality Determinations for the 2012 Final CBI Rule.''

data categories are listed in Tables 3 and 4 of this preamble. For a description of each data category and the type and characteristics of data elements assigned to each, please see Sections II.C and II.D of the July 7, 2010 CBI proposal.

In the 2011 Final CBI Rule, the EPA made categorical confidentiality determinations (i.e., one determination that applies to all data elements in that category) for 16 data categories (eight direct emitter data categories and eight supplier data categories). The categorical determinations for each of these 16 data category are specified in Tables 3 and 4 of this preamble. In this action, we have similarly assigned each of the data elements at issue (see Table 1 of this preamble) to one of the data categories created in the 2011 Final CBI rule. We have applied the categorical determinations made for 16 of the data categories to the data elements that assigned to those data categories.

In the 2011 Final CBI rule, the EPA determined that the data elements assigned to the remaining five data categories (two direct emitter data categories (see Table 3 of this preamble) and three supplier data categories (see Table 4 of this preamble) are not ''emission data'' (as defined at 40 CFR 2.301(a)(2)(i)). However, instead of categorical determinations, we made final CBI determinations for individual data elements assigned to those five data categories. In making these individual CBI determinations, we considered the confidentiality determination criteria at 40 CFR 2.208, in particular whether release of the data is likely to cause substantial harm to the business' competitive position. See 40 CFR 2.208(e)(1). Consistent with that approach, in this action we determined that data elements identified in Table 1 of this preamble that are assigned to these five data categories are not emission data and made final confidentiality determinations for these data elements in accordance with 40 CFR 2.208.

TABLE 3—SUMMARY OF FINAL CONFIDENTIALITY DETERMINATIONS FOR DIRECT EMITTER DATA CATEGORIES

Data category	Confidentiality determination for data elements in each category		
	Emission data [a]	Data that are not emission data and not CBI	Data that are not emission data but are CBI [b]
Facility and Unit Identifier Information	X		
Emissions	X		
Calculation Methodology and Methodological Tier	X		
Data Elements Reported for Periods of Missing Data that are Not Inputs to Emission Equations	X		
Unit/Process ''Static'' Characteristics that are Not Inputs to Emission Equations		X [c]	X [c]
Unit/Process Operating Characteristics that are Not Inputs to Emission Equations		X [c]	X [c]
Test and Calibration Methods		X	
Production/Throughput Data that are Not Inputs to Emission Equations			X
Raw Materials Consumed that are Not Inputs to Emission Equations			X
Process-Specific and Vendor Data Submitted in BAMM Extension Requests			X

[a] Under CAA section 114(c), ''emission data'' are not entitled to confidential treatment. The term ''emission data'' is defined at 40 CFR 2.301(a)(2)(i).

[b] Section 114(c) of the CAA affords confidential treatment to data (except emission data) that are considered CBI.

[c] In the 2011 Final CBI Rule, this data category contains both data elements determined to be CBI and those determined not to be CBI.

TABLE 4—SUMMARY OF FINAL CONFIDENTIALITY DETERMINATIONS FOR SUPPLIER DATA CATEGORIES

Data category	Confidentiality determinations for data elements in each category		
	Emission Data [a]	Data that are not emission data and not CBI	Data that are not emission data but are CBI [b]
GHGs Reported		X [c]	X [c]
Production/Throughput Quantities and Composition		X [c]	X [c]
Identification Information		X	
Unit/Process Operating Characteristics		X [c]	X [c]
Calculation, Test, and Calibration Methods		X	
Data Elements Reported for Periods of Missing Data that are Not Related to Production/Throughput or Materials Received		X	
Emission Factors			X
Amount and Composition of materials received			X
Data Elements Reported for Periods of Missing Data That are Related to Production/Throughput or Materials Received			X
Supplier Customer and Vendor Information			X
Process-Specific and Vendor Data Submitted in BAMM Extension Requests			X

[a] Under CAA section 114(c), ''emission data'' are not entitled to confidential treatment. The term ''emission data'' is defined at 40 CFR 2.301(a)(2)(i).

[b] Section 114(c) of the CAA affords confidential treatment to data (except emission data) that are considered CBI.

[c] In the 2011 Final CBI Rule, this data category contains both data elements determined to be CBI and those determined not to be CBI.

II. Confidentiality Determinations for Subparts I, W, DD, QQ, RR, SS, and UU and Responses to Public Comments

A. Final Confidentiality Determinations

In this action, the EPA is finalizing the confidentiality determinations for Part 98 data elements specified in Table 1 of this preamble using the approach outlined in Section I.D of this preamble.

The data category assignments and final confidentiality determinations for the Part 98 data elements specified in Table 1 of this preamble are provided in the memorandum ''Final Data Category Assignments and Confidentiality Determinations for the 2012 Final CBI Rule'' (see Docket EPA–HQ–OAR–2011–0028 and the Web site, *http://www.epa.gov/climatechange/emissions/CBI.html*).

In Section II.B of this preamble, the EPA describes final confidentiality determinations and summarizes comments and responses for direct emitter data elements in subparts I, W, DD, RR, and SS, which we proposed in 2012 in three actions (see Section I.A.1 of this preamble). In Section II.C of this preamble, the EPA describes final confidentiality determinations and summarizes comments and responses for all supplier data elements in subparts QQ, RR, and UU, which we proposed in the 2012 CBI re-proposal.

B. Direct Emitter Data Categories

For direct emitter subparts I, W, DD, RR,[6] and SS, the EPA is finalizing the assignment of each data element to one of 10 direct emitter data categories shown in Table 3 of this preamble and the confidentiality determinations for these data elements. Sections II.B.1 though II.B.3 of this preamble discuss the data category assignments and confidentiality determinations of direct emitter data elements in subparts I, W, DD, RR, and SS.

1. Subpart I—Electronics Manufacturing

Summary of Changes.

In the subpart I CBI re-proposal, the EPA proposed confidentiality determinations for certain data elements in this direct emitter subpart. The EPA received comments raising concerns about finalizing the confidentiality determinations for some data elements and requesting the EPA delay finalizing confidentiality determinations for certain reporting elements until after the EPA has concluded settlement discussions regarding alternatives to the recipe-specific method for semiconductor manufacturing facilities. The EPA did not intend to take action on reporting elements that are currently the subject of these settlement discussions. Due to the number and complexity of data elements included in the proposal, the EPA inadvertently included a few recipe-specific reporting elements that were in data categories for which we proposed categorical confidentiality determinations. EPA is therefore not finalizing confidentiality determinations for any recipe-specific data reporting elements in this action. Additionally, the EPA does not expect facilities will use the recipe-specific method for the 2011 reporting year;[7] however, facilities using the recipe-specific method would report recipe-specific data elements. Before the EPA could disclose such information, either on its own initiative or upon request, we would evaluate the confidentiality status of these data elements on a case-by-case basis, in accordance with existing CBI regulations in 40 CFR part 2, subpart B. The recipe-specific subpart I data elements that were inadvertently included in the proposal and have been removed from this final rule are listed in Table 4 in the memorandum titled ''Final Data Category Assignments and Confidentiality Determinations for the 2012 Final CBI Rule.''

Additionally, for the same reason provided above for recipe-specific data elements, we have decided to make no confidentiality determination for one additional data element (the annual manufacturing capacity of a facility as determined in Equation I–5 (listed at 40 CFR 98.96(a))) because it is also the subject of a petition for reconsideration of the December 1, 2010[8] subpart I rule.

Finally, we are not addressing confidentiality determinations for data elements in the ''Inputs to Emission Equations'' data category in this final rule. For the remaining subpart I data elements, we are finalizing the confidentiality determinations as proposed. The final confidentiality determinations for these subpart I data elements can be found in the memorandum, ''Final Data Category Assignments and Confidentiality Determinations for the 2012 Final CBI Rule.''

Summary of Comments.

This section contains summaries of the significant public comments and our responses thereto. Additional public comments were also received. Response to these comments can be found in ''Confidentiality Determinations in the 2012 CBI re-proposals: Responses to Public Comments'' in Docket EPA–HQ–OAR–2011–0028 and on the Web site, *http://www.epa.gov/climatechange/emissions/CBI.html.*

Comment: Two commenters raised concerns about the EPA initiating a rulemaking to determine the confidentiality status of subpart I data elements at the same time the EPA is also considering petitions from the Semiconductor Industry Association for review and reconsideration of the December 1, 2010 subpart I rule.[9] The commenters stated that the initiation of a rule to address confidentiality determinations that is disconnected from these proceedings may exacerbate instead of resolve the objections and raises unspecified legal and policy issues.

Response: The EPA did not intend to propose confidentiality determinations for data elements that relate to portions of subpart I covered by petitions for reconsideration and review where active settlement negotiations are ongoing. Thus, we are not issuing confidentiality determinations for recipe-specific data reporting elements or for the annual manufacturing capacity in this final rule. These data elements relate to portions of subpart I addressed in the petition entitled ''Semiconductor Industry Association Petition for Reconsideration and Request for Stay Pending Reconsideration of Subpart I of the Final Rule for Mandatory Reporting of Greenhouse Gases'' (January 31, 2011). However, the EPA does not agree that we need to wait to finalize confidentiality determinations for non-input data elements that are outside the scope of that reconsideration petition, since we do not anticipate proposing any changes in the requirements to report those data elements. Thus, the EPA is finalizing confidentiality determinations for those subpart I data elements listed in Table 1 of the Memorandum, ''Final Data Category Assignments and Confidentiality Determinations for the 2012 Final CBI Rule.''

Comment: Commenters argued that the release of the following data elements would reveal trade secrets and intellectual property:

- Annual emissions of each fluorinated greenhouse gas (F–GHG)

[6] Subpart RR contains elements of both direct emitter and supplier categories and is therefore, listed as both a direct emitter and a supplier source category. For the purposes of this action, EPA placed each subpart RR data element into the appropriate category based on its data type and characteristics, and whether it related to direct emissions from the facility or to GHG supply.

[7] The *Mandatory Reporting of Greenhouse Gases: Changes to Provisions for Electronics Manufacturing To Provide Flexibility* Final Rule (76 FR 59542, September 27, 2011) allows reporters the opportunity to report using default emission factors instead of using the recipe-specific utilization and by-product formation rates.

[8] 75 FR 74774, December 1, 2010.

[9] 75 FR 74774, December 1, 2010.

emitted from each process type for which your facility is required to calculate emissions as calculated in Equations I–6 and I–7. (40 CFR 98.96(c)(1))

• Annual emissions of each F–GHG emitted from each process subtype as calculated in Equations I–8 and I–9. (40 CFR 98.96(c)(2))

Specifically, the commenters stated that the release of these data elements could allow competitors to more easily reverse-engineer recipes and back-calculate sensitive information such as the relative proportion of gas-by-gas usage in a recipe or sub-process type.

Response: The data noted are emission data and, therefore, under Section 114(c) of the CAA must be made publicly available. In any case, the reverse engineering which the commenter cites as a potential that would reveal trade secret information can only be accomplished if more data is publicly available, in particular certain inputs to emission equations. The reporting of inputs to emission equations has been deferred. As discussed in the preamble to the Final Deferral Notice, we will in the future make a judgement about the sensitivity of deferred data elements in combination with other data elements.

Comment: Commenters argued that the annual manufacturing capacity as determined by Equation I–5 of subpart I (40 CFR 98.96(a) and proposed as non-CBI) should receive confidential treatment as it will likely generate a capacity different from that reported by the ''World Fab Forecast,'' which may be instructive to competitors. The commenters suggested that the EPA either determine that this data element is CBI or amend subpart I to remove Equation I–5 of subpart I and alternatively use the maximum manufacturing capacity published by the ''World Fab Forecast.''

Response: For the reason provided previously in this Summary to Comments section, the EPA is not finalizing the confidentiality determination for this data element for two reasons. First, this data element is related to a portion of subpart I addressed in the petition entitled ''Semiconductor Industry Association Petition for Reconsideration and Request for Stay Pending Reconsideration of Subpart I of the Final Rule for Mandatory Reporting of Greenhouse Gases.'' The EPA is actively engaged in settlement negotiations concerning the associated petition for review of the December 1, 2010 subpart I rule. Second, we concluded that making a final confidentiality determination for this data element would be inappropriate because its sensitivity varies from reporter to reporter. We will instead evaluate the confidentiality status of this data element on a case-by-case basis, in accordance with existing CBI regulations in 40 CFR part 2, subpart B.

2. Subpart W—Petroleum and Natural Gas Systems Summary of Changes

In our subpart W CBI re-proposal, we proposed category assignments and confidentiality determinations for all of the data elements reported under subpart W that are not inputs to emission equations. In this action, we are finalizing without change the category assignments and confidentiality determinations proposed in the Subpart W CBI re-proposal. For a list of the final data category assignments and confidentiality determinations for all of the non-input subpart W data elements as identified in the Subpart W CBI re-proposal, please see the memorandum titled ''Final Data Category Assignments and Confidentiality Determinations for the 2012 Final CBI Rule'' (see Docket EPA–HQ–OAR–2011–0028 and the GHGRP Web site, *http://www.epa.gov/climatechange/emissions/CBI.html*).

Summary of Comments.

This section contains summaries of the significant public comments and our responses thereto. Other public comments were also received. Responses to these comments can be found in ''Confidentiality Determinations in the 2012 CBI re-proposals: Responses to Public Comments'' in Docket EPA–HQ–OAR–2011–0028 and on the Web site, *http://www.epa.gov/climatechange/emissions/CBI.html.*

Comment: One commenter stated that data reported for exploratory wells should be held confidential for a period of at least 24 months. This commenter noted that the oil and gas industry makes substantial investments in exploration and development projects and that information regarding exploratory wells is considered to be proprietary by the industry. They state competitive harm may occur if the public can obtain detailed high resolution operational information on a well-by-well basis and on a daily or weekly basis. The commenter also asserted that the EPA's proposed determinations are inconsistent with other state and federal regulations that allow information regarding exploratory wells to be held confidential. The commenter did not specify which particular data elements would be sensitive for exploratory wells, but stated that oil and gas reserve information for new wells, geological assessments of new prospects, drilling plans, and detailed well-by-well operational information (such as post-flowback flaring/venting volumes) are considered sensitive. However, the commenter indicated that the identity and location of exploratory wells are not sensitive.

Response: We disagree with the commenter's recommendation that all non-input to emission equations data elements reported for exploratory wells should be held confidential for a period of two years for the following reasons. First, many of these data elements meet the definition of emission data in 40 CFR 2.301(a)(2)(i) because they are actual GHGs emitted by the facility. Under CAA section 114(c), the EPA must make available emission data, whether or not such data are CBI. For the data elements that are assigned to the ''Emissions'' data category, the commenter did not claim or provide any justification for why these data elements do not meet the definition of emission data. Furthermore, the emissions from well venting during completions are reported at the sub-basin level by well type (horizontal or vertical). Since the emissions are not reported for each individual well, this information cannot be used to estimate future production levels or any other operational information for any individual exploratory well.

With respect to the non-inputs to emission equations data elements which we proposed would not be emission data but also not CBI, we disagree that they disclose any CBI relative to exploratory wells for the following reasons. First, reporters are not required to report sensitive information on oil and gas reserves, geological assessments of new prospects, drilling plans, or detailed well-by-well operational information. As explained in the re-proposal, these non-input data elements that are not emissions data relate to well completions (e.g., number of completions, number of days gas was vented during completions) and testing (e.g., number of wells tested during the calendar year, average gas-to-oil ratio for each basin, average number of days wells are tested). None of these data elements reveal information regarding the production characteristics or production rates of any individual production well or the potential production rates for exploratory wells. The commenter did not explain why these specific data elements would be likely to cause competitive harm; rather, the commenter provided only very broad comments that certain information on exploratory wells can be

competitively sensitive and did not dispute our rationale that the specific data elements reported under subpart W were unlikely to cause substantial competitive harm.

Second, reporters are not required to identify which wells are exploratory and which are production wells, nor do they report information for individual wells. The non-input data elements reported under subpart W are reported for each basin, sub-basin, tubing diameter/pressure group, or well type (i.e., horizontal or vertical). For example, the reporting of the number of wells tested in a basin within a calendar year (40 CFR 98.236(c)(10)(i)) does not provide any insight into exactly which wells within that basin were tested or whether the wells are being tested after completion of exploratory wells or after workovers on existing wells.

Lastly, we disagree that our decision to consider these data elements to be non-CBI is inconsistent with other state and federal regulations that allow data for exploratory wells to be held confidential. The data reported under subpart W does not include any sensitive information about the underlying geology or potential productivity of an exploratory well, which are the types of information being held as confidential under the state and federal rules mentioned by the commenter. We further note that many of the subpart W data elements are in fact publicly available. For example, the number of well completions for each sub-basin (40 CFR 98.236(c)(6)(i)(A) and (G)) is publicly available from commercial databases (e.g., see *http://www.didesktop.com/products/*) and the EIA.

Therefore, we conclude that our proposed determinations regarding the non-input data elements are appropriate and finalize those determinations in this action.

Comment: One commenter disagreed with our proposed determination that we should afford confidential treatment to the explanation of when an owner or operator will receive the services or equipment necessary to comply with subpart W monitoring requirements (40 CFR 98.234(f)(8)(ii)(C)). This commenter argues that disruptions of oil and gas production from installing monitoring equipment would be brief and unlikely to cause substantial competitive harm to the reporter's competitive position.

Response: We disagree with the commenter's assertion that disruptions from disclosure of this data element would be brief and therefore unlikely to cause substantial competitive harm to the reporter's competitive position. As we noted in the preamble to the Subpart W CBI re-proposal, this data element comprises forward-looking information about the dates on which an owner or operator will receive the services or equipment necessary to comply with all of the subpart W monitoring requirements. This data element would reveal information to a competitor about when a facility would be installing equipment or when the facility would plan to perform the necessary modifications to their processes in order to comply with the rule. The disclosure of this type of forward-looking information about a facility's operation provides insight into periods when oil and gas production will be reduced at a particular site. This type of information can be used to adjust pricing to take advantage of short-term supply disruptions. Our decision to make this data element CBI is consistent with our previous determination in the 2011 Final CBI Rule that the installation date reported by facilities using BAMM (reported under 40 CFR 98.3(d)(2)(ii)(F)) is entitled to CBI treatment because it provides forward-looking production-related information that would likely cause substantial competitive harm if disclosed. Although this commenter claimed the potential harm from disclosure would be insignificant because the disruption would be brief, no supporting information was provided to show that disclosing forward-looking information regarding a short-term disruption in production would not cause harm to a reporter's competitive position.

Therefore, we conclude that our proposed determination that this data element (40 CFR 98.234(f)(8)(ii)(C)) is entitled to confidential treatment is appropriate; we therefore finalize that determination in this action.

Comment: One commenter disagreed with the EPA's proposal to defer the deadline for reporting subpart W data elements used as inputs to emissions equations until 2015. This commenter alleged that the proposed deferral of the reporting deadline for all subpart W inputs was contrary to the intent of the Appropriations Act [10] by contravening Congress's mandate to develop a transparent, economy-wide greenhouse gas inventory. The commenter believes disclosure of the subpart W inputs to emissions equations would not cause competitive harm and claimed that disclosure of these data elements was important for furthering public understanding of the GHG emissions from this industry.

Response: The EPA has extended the reporting deadlines for inputs to emission equations data elements in all Part 98 subparts, including subpart W, in the Final Deferral Notice. As explained in that final rule, the EPA is evaluating the sensitivity of subpart W equation inputs together (as with other subparts) and therefore is requiring all subpart W inputs to be reported by the same deferral deadline.[11] Today's action simply imposes the same reporting deadline to subpart W inputs to emission equations that were subsequently added to subpart W and therefore not included in the Final Deferral Notice.[12] We are not revisiting in this action our decision in the Final Deferral Notice to defer reporting of subpart W equation inputs to 2015. See the Response to Comments document published with the Final Deferral Notice for more information on the EPA's rationale for deferring inputs to emission equations. The commenter did not claim that these remaining subpart W equation inputs should have a different deadline from the other subpart W data elements that are inputs to emission equations, nor do we see any reason to do so. We are therefore finalizing our proposal to defer reporting of these data elements to 2015.

3. Subparts DD, RR, and SS

In the 2012 CBI re-proposal, the EPA proposed category assignments and confidentiality determinations for direct emitter subparts DD and SS and the direct emitter data elements in subpart RR. The EPA did not receive comment on the proposed data category assignments or confidentiality determinations for any data elements in subparts DD and SS, nor did we receive comment on the proposed data category assignments or confidentiality determinations for direct emitter data elements in subpart RR. (We did, however, receive comment on the proposed confidentiality determinations for supplier data elements in subpart RR, which are summarized in Section II.C.2 of this preamble.) The EPA is now finalizing the category assignment and confidentiality determinations for the subpart DD and SS data elements and subpart RR direct emitter data elements as proposed. The final category assignments and confidentiality determinations for these data elements

[10] Consolidated Appropriations Act, 2008, Public Law 110–161, 121 Stat. 1844, 2128.

[11] 76 FR 53057, August 25, 2011.

[12] As mentioned elsewhere in this notice and not relevant to this specific comment, we are also removing certain subpart W data elements from the ''Inputs to Emission Equations'' category and making confidentiality determinations for a number of subpart W data elements previously assigned to the ''Inputs to Emission Equations'' category.

can be found in the memorandum, ''Final Data Category Assignments and Confidentiality Determinations for the 2012 Final CBI Rule.''

C. GHG Supplier Data Categories

For supplier subparts QQ, RR, and UU, the EPA is finalizing the assignment of each data element to one of 11 supplier data categories. No change has been made to the data category assignments since proposal. The following section lists changes since proposal to confidentiality determinations of supplier data elements assigned to categories with no categorical determination covered in this action (organized by supplier subpart). This section also includes summaries of the major public comments and our responses, organized by subpart. Other public comments and responses thereto can be found in ''Confidentiality Determinations in the 2012 CBI re-proposals: Responses to Public Comments'' in Docket EPA–HQ–OAR–2011–0028 and on the Web site, *http://www.epa.gov/climatechange/emissions/CBI.html.*

1. Subpart QQ—Importers and Exporters of Fluorinated Greenhouse Gases Contained in Pre-charged Equipment or Closed-cell Foams

Summary of Changes.

In the 2012 CBI re-proposal, the EPA proposed confidentiality determinations for data elements in supplier subpart QQ. The EPA received comments raising concerns that the release of certain data elements could allow competitors to link import and export data to publicly available customs data, thereby allowing them to discern import and export practices and potentially sensitive shipment data. As discussed in the summary of the comments section below, after considering these comments, the EPA has decided not to make a final confidentiality determination for the six subpart QQ data elements that reveal the date of import or export (see Table 5 of this preamble for the list of affected data elements). For the remaining subpart QQ data elements that are not listed in Table 5 of this preamble, we are finalizing confidentiality determinations as proposed. The final confidentiality determinations for all subpart QQ data elements can be found in the Memorandum, ''Final Data Category Assignments and Confidentiality Determinations for the 2012 Final CBI Rule.''

TABLE 5—SUBPART QQ DATA ELEMENTS FOR WHICH CONFIDENTIALITY STATUS HAS CHANGED SINCE PROPOSAL

Data element	Citation	Finalized data category and determination
Dates on which pre-charged equipment were imported ..	40 CFR 98.436(a)(5)	Unit/Process Operating Characteristics (''No determination'').
Dates on which closed-cell foams were imported	40 CFR 98.436(a)(5)	Unit/Process Operating Characteristics (''No determination'').
If the importer does not know the identity and mass of the F–GHGs within the closed-cell foam: Dates on which the closed-cell foams were imported.	40 CFR 98.436(a)(6)(iv)	Unit/Process Operating Characteristics (''No determination'').
Dates on which pre-charged equipment were exported ..	40 CFR 98.436(b)(5)	Unit/Process Operating Characteristics (''No determination'').
Dates on which closed-cell foams were exported	40 CFR 98.436(b)(5)	Unit/Process Operating Characteristics (''No determination'').
If the exporter does not know the identity and mass of the F–GHGs within the closed-cell foam: Dates on which the closed-cell foams were exported.	40 CFR 98.436(b)(6)(iv)	Unit/Process Operating Characteristics (''No determination'').

Summary of Comments.

This section contains summaries of the significant public comments and our responses thereto. Additional public comments were also received. Response to these comments can be found in ''Confidentiality Determinations in the 2012 CBI re-proposals: Responses to Public Comments'' in Docket EPA–HQ–OAR–2011–0028 and on the Web site, *http://www.epa.gov/climatechange/emissions/CBI.html.*

Comment: Two commenters disagreed with EPA's proposed non-CBI determination for eight data elements in the ''Unit/Process Operating'' Data Category. The commenters claimed that competitors can cross-reference these data elements with publicly available information to discern business-sensitive information. These data elements include (each listing is a separate data element for both importers and exporters):

- Dates on which pre-charged equipment were imported/exported (40 CFR 98.436(a)(5) and (b)(5));
- Dates on which closed-cell foams were imported/exported (40 CFR 98.436(a)(5) and (b)(5));
- If the importer/exporter does not know the identity and mass of the F–GHGs within the closed-cell foam: Dates on which the closed-cell foams were imported/exported (40 CFR 98.436(a)(6)(iv) and (b)(6)(iv)); and
- If the importer/exporter does not know the identity and mass of the F–GHGs within the closed-cell foam: Certification that the importer/exporter was unable to obtain information on the identity and mass of the F–GHGs within the closed-cell foam from the closed-cell foam manufacturer(s) (40 CFR 98.436(a)(6)(vi) and (b)(6)(vi)).

The commenters stated that importers and exporters often submit confidentiality requests to U.S. Customs and Border Protection (CBP) to protect as confidential the information contained in the shipment manifest. In such cases, the CBP protects as confidential the name and address of the importer or exporter, but allows other information contained in the manifest to be made public. Since the name and address of the importer or exporter are held confidential, the commenter stated that other competitively sensitive information contained in the manifest, such as shipment data (e.g., type and quantities of products imported or exported), cannot be attributed to a particular importer or exporter.

The commenters asserted that the EPA's proposal would undermine confidentiality requests granted by the CBP because it would release information on the company name, dates of import/export, and certification statements that could be cross-referenced with public information available in manifests. For example, commenters suggested that the manifest provides information on the country of origin and type and volumes of commodities imported or exported. This information is currently available to the public but cannot be linked to a particular importer or exporter where

the CBP has granted confidential treatment of the importer or exporter's name and address.

Response: The EPA agrees with the commenters that competitors could cross-reference the company name and date of import or export with publicly available information to discern competitively sensitive information from the manifest (e.g., country of origin and type and volume of commodities imported or exported). Pursuant to 19 CFR 103.31(d), CBP keeps the name and address of importers and exporters confidential where importers and exporters submit a certification claiming the information in their manifest is confidential. CBP then keeps the name and address of the importer/exporter confidential for a period of two years, which can be extended provided the importer/exporter submits a renewal request within 60 days prior to expiration of the two year period. Although the EPA was aware that manifest data was published, we previously considered matching of individual manifests with the correct importer/exporter would be very difficult. However, the public can request manifest data for specific dates in accordance with 19 CFR 103.31(e) and the CBP makes manifest data (excluding the name and addresses for those claiming confidentiality) available to the public on CD–ROMs. We also agree with the commenter that some of the information contained in manifests could be competitively sensitive for some reporters. For example, the volumes and types of commodities imported or exported by a company can provide information on a competitor's annual production data for individual appliances and foams where the importer/exporter is also the manufacturer of those products. Such information would provide competitors with information on the market share of a competitor's products in the U.S. market (for imports) and in other countries (for exports). Since the quantity of products imported/exported would be available from the manifest information on an annual basis, competitors would have insight into changes in annual sales of a competitor's products. For example, a decrease in the number of units exported to a particular market would indicate a declining demand for a competitor's product in that particular market.

However, we note that the CBP holds the name and addresses of importers/exporters confidential only when specifically requested by the importer/exporter and that confidentiality is for a period of only two years unless a request for extension is made. We also note that manifest information may not be sensitive for all importers and exporters. Therefore, the EPA has concluded that the date of import or export (40 CFR 98.436(a)(5), (a)(6)(iv), (b)(5), and (b)(6)(iv)) may cause competitive harm for some but not all importers and exporters. As a result, we are not finalizing a confidentiality determination for these data elements. We will evaluate the confidentiality status of these data elements on a case-by-case basis, in accordance with existing CBI regulations in 40 CFR part 2, subpart B.

The EPA disagrees with comments that releasing certification data (40 CFR 98.436(a)(6)(vi) and (b)(6)(vi)) would likely cause substantial competitive harm to the importer or exporter. The certification is a statement that the importer or exporter was unable to obtain information on the identity and mass of the fluorinated GHG imported or exported in foams. The certification statement consists of a statement indicating whether the reporter was able to obtain information on the identity and mass of F–GHGs within the imported or exported products, and does not include any information that a competitor could cross reference with publicly available information to link manifest data to a particular reporter. The commenters did not provide any supporting rationale for how the certification statement, if disclosed, can cause competitive harm. The EPA has concluded the disclosure of the very limited information in the certification statement is unlikely to cause competitive harm; therefore, the EPA is finalizing a determination that the certification statements (40 CFR 98.436(a)(6)(vi) and (b)(6)(vi)) are not eligible for CBI treatment.

2. Subpart RR—Geologic Sequestration of Carbon Dioxide [13]

Summary of Changes.

In the 2012 CBI re-proposal, the EPA proposed non-CBI confidentiality determinations for the supplier data elements in subpart RR. Based on public comment, and for the reasons explained in the Summary of Comments section below, we have decided not to make CBI determinations in this final rule for the subpart RR supplier data elements that are listed in Table 6 of this preamble. We will evaluate the confidentiality status of these data elements on a case-by-case basis, in accordance with existing CBI regulations in 40 CFR part 2, subpart B. The EPA did not receive comments on the remaining subpart RR data elements, and is finalizing confidentiality determinations as proposed for the subpart RR data elements that are not listed in Table 6 of this preamble. The final confidentiality determinations for all subpart RR data elements can be found in the Memorandum, ''Final Data Category Assignments and Confidentiality Determinations for the 2012 Final CBI Rule'' in Docket EPA–HQ–OAR–2011–0028 and on EPA's Web site (see *http://www.epa.gov/climatechange/emissions/CBI.html*).

TABLE 6—SUBPART RR DATA ELEMENTS FOR WHICH CONFIDENTIALITY STATUS HAS CHANGED SINCE PROPOSAL

Data element	Citation	Finalized data category and determination
If you receive CO_2 by pipeline, report the following for each receiving flow meter: Total net mass of CO_2 received (metric tons) annually.	40 CFR 98.446(a)(1)	Production/Throughput Quantities and Composition [a] (''No Determination'').
If a volumetric flow meter is used to receive CO_2 report the following unless you reported yes to 40 CFR 98.446(a)(4): Volumetric flow through a receiving flow meter at standard conditions (in standard cubic meters) in each quarter.	40 CFR 98.446(a)(2)(i)	Production/Throughput Quantities and Composition (''No Determination'').

[13] Subpart RR is neither an exclusively direct emitter nor a supplier source category, so for the purposes of this action the EPA assigned each subpart RR data element to one of the two groups based on its type and characteristics. The EPA assigned subpart RR data elements that pertain to emissions to one of the direct emitter data categories and the remaining subpart RR data elements to one of the supplier data categories.

TABLE 6—SUBPART RR DATA ELEMENTS FOR WHICH CONFIDENTIALITY STATUS HAS CHANGED SINCE PROPOSAL—Continued

Data element	Citation	Finalized data category and determination
If a volumetric flow meter is used to receive CO_2 report the following unless you reported yes to 40 CFR 98.446(a)(4): The volumetric flow through a receiving flow meter that is redelivered to another facility without being injected into your well (in standard cubic meters) in each quarter.	40 CFR 98.446(a)(2)(ii)	Production/Throughput Quantities and Composition (''No Determination'').
If a volumetric flow meter is used to receive CO_2 report the following unless you reported yes to 40 CFR 98.446(a)(4): CO_2 concentration in the flow (volume percent CO_2 expressed as a decimal fraction) in each quarter.	40 CFR 98.446(a)(2)(iii)	Production/Throughput Quantities and Composition (''No Determination'').
If a mass flow meter is used to receive CO_2 report the following unless you reported yes to 40 CFR 98.446(a)(4): The mass flow through a receiving flow meter (in metric tons) in each quarter.[1]	40 CFR 98.446(a)(3)(i)	Production/Throughput Quantities and Composition (''No Determination'').
If a mass flow meter is used to receive CO_2 report the following unless you reported yes to 40 CFR 98.446(a)(4): The mass flow through a receiving flow meter that is redelivered to another facility without being injected into your well (in metric tons) in each quarter.	40 CFR 98.446(a)(3)(ii)	Production/Throughput Quantities and Composition (''No Determination'').
If a mass flow meter is used to receive CO_2 report the following unless you reported yes to 40 CFR 98.446(a)(4): The CO_2 concentration in the flow (weight percent CO_2 expressed as a decimal fraction) in each quarter.	40 CFR 98.446(a)(3)(iii)	Production/Throughput Quantities and Composition (''No Determination'').
If you receive CO_2 in containers, report: The mass (in metric tons) or volume at standard conditions (in standard cubic meters) of contents in containers in each quarter.	40 CFR 98.446(b)(1)	Production/Throughput Quantities and Composition (''No Determination'').
If you receive CO_2 in containers: Concentration of CO_2 of contents in containers (volume or wt. % CO_2 expressed as a decimal fraction) in each quarter.	40 CFR 98.446(b)(2)	Production/Throughput Quantities and Composition (''No Determination'').
If you receive CO_2 in containers, report: The mass (in metric tons) or volume (in standard cubic meters) of contents in containers that is redelivered to another facility without being injected into your well in each quarter.	40 CFR 98.446(b)(3)	Production/Throughput Quantities and Composition (''No Determination'').
If you receive CO_2 in containers: Net mass of CO_2 received (metric tons) annually.	40 CFR 98.446(b)(4)	Production/Throughput Quantities and Composition[a] (''No Determination'').
If you use more than one receiving flow meter: Total net mass of CO_2 received (metric tons) through all flow meters annually.	40 CFR 98.446(c)	Production/Throughput Quantities and Composition[a] (''No Determination'').
If the date specified in 40 CFR 98.446(e) is during the reporting year for this annual report, report the following starting on the date specified in 40 CFR 98.446(e): For each separator flow meter (mass or volumetric), report CO_2 mass produced (metric tons) annually.	40 CFR 98.446(f)(4)(i)	Production/Throughput Quantities and Composition[a] (''No Determination'').
If the date specified in 40 CFR 98.446(e) is during the reporting year for this annual report, report the following starting on the date specified in 40 CFR 98.446(e): For each separator flow meter (mass or volumetric), report CO_2 concentration in flow (volume or wt. % CO_2 expressed as a decimal fraction) in each quarter.	40 CFR 98.446(f)(4)(ii)	Production/Throughput Quantities and Composition (''No Determination'').
If the date specified in 40 CFR 98.446(e) is during the reporting year for this annual report, report the following starting on the date specified in 40 CFR 98.446(e): If a volumetric flow meter is used, volumetric flow rate at standard conditions (standard cubic meters) in each quarter.	40 CFR 98.446(f)(4)(iii)	Production/Throughput Quantities and Composition (''No Determination'').
If the date specified in 40 CFR 98.446(e) is during the reporting year for this annual report, report the following starting on the date specified in 40 CFR 98.446(e): If a mass flow meter is used, mass flow rate (metric tons) in each quarter.	40 CFR 98.446(f)(4)(iv)	Production/Throughput Quantities and Composition (''No Determination'').

[a] These data elements could have also been placed in the ''Greenhouse Gases Reported'' data category because the product is also the GHG reported.

Summary of Comments.

This section contains summaries of the significant public comments and our responses thereto. Other public comments were also received. Response to these comments can be found in ''Confidentiality Determinations in the 2012 CBI re-proposals: Responses to Public Comments'' in Docket EPA–HQ–OAR–2011–0028 and on the Web site, *http://www.epa.gov/climatechange/emissions/CBI.html.*

Comment: One commenter that injects CO_2 for enhanced oil and gas recovery (ER) stated that data elements related to the quantity of CO_2 received onsite must be protected as CBI. The commenter asserted that information on the quantity of CO_2 received at individual flow meters and the total quantity of CO_2 received at a facility that conducts ER is not publicly available. The commenter also disagreed with the EPA's conclusion that public release of

the quantity of CO_2 received does not create a substantial competitive disadvantage for the company. Combined with publicly available information on CO_2 pipeline capacities, the commenter asserted that CO_2 suppliers and pipeline transportation companies could use data on the quantity of CO_2 reported as received by specific facilities to their advantage in price negotiations on future contracts with the CO_2 purchasers (i.e., the reporting facilities under subparts RR and UU). The commenter stated that this risk is amplified because there are so few CO_2 suppliers in the market.

Response: EPA had proposed that the data elements in Table 6, which relate to the quantity of CO_2 received onsite, are not CBI on the basis that they are either publicly available or may be derived from publicly available data. However, the commenter claims this is not the case for data from facilities that conduct ER. Our initial review of available information lends support to the comment, which suggests that EPA may need to assess the confidentiality determination of these data elements separately for ER and non-ER facilities. However, EPA had not analyzed these data elements in Table 6 separately for ER and non-ER activities in the re-proposal. Further, facilities subject to the reporting requirements in Table 6 are not required to include in their annual report whether they are conducting ER. Therefore, even if EPA were to make separate determinations in this final rule for ER and non-ER facilities, EPA would not be able to withhold or disclose any of the data elements in Table 6 upon finalizing and in accordance with the determinations, which is the reason for making these confidentiality determinations through rulemaking. See 40 CFR 2.301(d). EPA would need additional information, in particular whether the facilities conduct ER, before it can complete its confidentiality determinations for any of these data. In light of the above, the EPA is not making a confidentiality determination for the data elements in Table 6 in this final rule. Should we decide to make available any of these data in the future, we will at that time evaluate the confidentiality status of these data elements on a case-by-case basis, in accordance with existing CBI regulations in 40 CFR part 2, subpart B.

Comment: One commenter that conducts ER asserted that certain data elements related to the quantity of produced CO_2 measured at a separator meter should be protected as CBI. This commenter stated that the total mass of produced CO_2 by well or within a field is not already in the public domain and that the fact that some data from ER wells is publicly available does not demonstrate that publication of this data would not cause competitive harm.

The commenter asserted that CO_2 is an essential commodity in ER projects, and because of its cost, companies go to great lengths to use it efficiently and to recycle as much of it as possible. The commenter stated that publication of produced CO_2 data, when coupled with publicly available information on oil and gas production by well, would enable competitors to calculate CO_2 utilization rates for both individual wells and fields. The commenter noted that because this data would be available annually, it would be possible to track changes in CO_2 utilization over time. The commenter stated that from these CO_2 utilization rates, competitors would gain insight into production costs, as well as information on how the reservoir was performing over time. The commenter stated that this information could be used in contract negotiations for CO_2 supply, as well as enabling competitors to fine tune investment, acquisition, and development strategies.

The commenter also asserted that if data on the quantities of both injected CO_2 and produced CO_2 are publicly available, competitors can determine the quantity of CO_2 received by a site, because the total quantity of CO_2 injected equals the amount of CO_2 received on site plus the amount of CO_2 produced, less any surface emissions (which will be made public under subpart RR because they are ''emission data'').

Response: After reviewing the additional information provided by the commenter, the EPA agrees that the mass of produced CO_2 measured at a separator meter could be sensitive information for some facilities that report under Subpart RR and not for others. Therefore, the EPA decided not to make categorical confidentiality determinations for the data elements related to the mass of produced CO_2 measured per separator meter at this time (40 CFR 98.446(f)(4)(i) through (iv) listed in Table 6 of this preamble). We will evaluate the confidentiality status of these data elements on a case-by-case basis, in accordance with existing CBI regulations in 40 CFR part 2, subpart B.

3. Subpart UU—Injection of Carbon Dioxide

Summary of Changes.

In the 2012 CBI re-proposal, the EPA proposed confidentiality determinations for subpart UU.[14] We received comment that, for ER projects, information related to the quantity of CO_2 received is not publicly available and may be likely to cause substantial competitive harm if made publicly available. For the reasons explained below, we have determined that the data elements that are listed in Table 7 of this preamble are CBI for facilities without an EPA-approved subpart RR R&D project exemption and non-CBI for facilities with an EPA-approved subpart RR R&D project exemption. The EPA did not receive comments on the remaining subpart UU data elements, and is finalizing confidentiality determinations as proposed for the subpart UU data elements that are not listed in Table 7 of this preamble. The final confidentiality determinations for all subpart UU data elements can be found in the Memorandum, ''Final Data Category Assignments and Confidentiality Determinations for the 2012 Final CBI Rule'' in Docket EPA–HQ–OAR–2011–0028 and on the EPA's Web site (*see http://www.epa.gov/climatechange/emissions/CBI.html*).

TABLE 7—SUBPART UU DATA ELEMENTS WITH CHANGED CONFIDENTIALITY DETERMINATIONS SINCE PROPOSAL

Data element	Citation	Finalized data category and CBI determination for facilities without an R&D exemption	Finalized data category and CBI determination for facilities with an R&D exemption
If you receive CO_2 by pipeline, report the following for each receiving flow meter: Total net mass of CO_2 received (metric tons) annually.	40 CFR ..... 98.476(a)(1)	GHGs Reported and Production/Throughput Quantities and Composition [a] (CBI).	Production/Throughput Quantities and Composition [a] (non-CBI).

[14] Subpart UU is neither a direct emitter nor a supplier source category; for the purposes of this action, the EPA assigned the subpart UU data elements to one of the supplier data categories because they are most similar in type and characteristics to supplier data.

TABLE 7—SUBPART UU DATA ELEMENTS WITH CHANGED CONFIDENTIALITY DETERMINATIONS SINCE PROPOSAL—Continued

Data element	Citation	Finalized data category and CBI determination for facilities without an R&D exemption	Finalized data category and CBI determination for facilities with an R&D exemption
If you receive CO_2 by pipeline, report the following for each receiving flow meter: If a volumetric flow meter is used to receive CO_2: Volumetric flow through a receiving flow meter at standard conditions (standard cubic meters) in each quarter.	40 CFR ..... 98.476(a)(2)(i) ...	Production/Throughput Quantities and Composition (CBI).	Production/Throughput Quantities and Composition (non-CBI).
If you receive CO_2 by pipeline, report the following for each flow meter: If a volumetric flow meter is used to receive CO_2: The volumetric flow through a receiving flow meter that is redelivered to another facility without being injected into your well (standard cubic meters) in each quarter.	40 CFR ..... 98.476(a)(2)(ii) ..	Production/Throughput Quantities and Composition (CBI).	Production/Throughput Quantities and Composition (non-CBI).
If you receive CO_2 by pipeline, report the following for each receiving flow meter: If a volumetric flow meter is used to receive CO_2: CO_2 concentration in the flow (volume % CO_2 expressed as a decimal fraction) in each quarter.	40 CFR ..... 98.476(a)(2)(iii) ..	Production/Throughput Quantities and Composition (CBI).	Production/Throughput Quantities and Composition (non-CBI).
If you receive CO_2 by pipeline, report the following for each flow meter: If a mass flow meter is used to receive CO_2, report the mass flow through a receiving flow meter (in metric tons) in each quarter.	40 CFR ..... 98.476(a)(3)(i) ...	Production/Throughput Quantities and Composition (CBI).	Production/Throughput Quantities and Composition (non-CBI).
If you receive CO_2 by pipeline, report the following for each flow meter: If a mass flow meter is used to receive CO_2, report the mass flow through a receiving flow meter that is redelivered to another facility without being injected into your well (in metric tons) in each quarter.	40 CFR ..... 98.476(a)(3)(ii) ..	Production/Throughput Quantities and Composition (CBI).	Production/Throughput Quantities and Composition (non-CBI).
If you receive CO_2 by pipeline, report the following for each flow meter: If a mass flow meter is used to receive CO_2, report CO_2 concentration in the flow (wt. % CO_2 expressed as a decimal fraction) in each quarter.	40 CFR ..... 98.476(a)(3)(iii) ..	Production/Throughput Quantities and Composition (CBI).	Production/Throughput Quantities and Composition (non-CBI).
If you receive CO_2 in containers, report: The mass (metric tons) or volume at standard conditions (standard cubic meters) of contents in containers in each quarter.	40 CFR ..... 98.476(b)(1)	Production/Throughput Quantities and Composition (CBI).	Production/Throughput Quantities and Composition (non-CBI).
If you receive CO_2 in containers, report: The concentration of CO_2 of contents in containers (volume or wt. % CO_2 expressed as a decimal fraction) in each quarter.	40 CFR ..... 98.476(b)(2)	Production/Throughput Quantities and Composition (CBI).	Production/Throughput Quantities and Composition (non-CBI).
If you receive CO_2 in containers, report: The mass (metric tons) or volume (standard cubic meters) of contents in containers that is redelivered to another facility without being injected into your well in each quarter.	40 CFR ..... 98.476(b)(3)	Production/Throughput Quantities and Composition (CBI).	Production/Throughput Quantities and Composition (non-CBI).
If you receive CO_2 in containers, report: The net total mass of CO_2 received (in metric tons) annually.	40 CFR ..... 98.476(b)(4)	Production/Throughput Quantities and Composition[a] (CBI).	Production/Throughput Quantities and Composition[a] (non-CBI).
If you use more than one receiving flow meter, report the net total mass of CO_2 received (metric tons) through all flow meters annually.	40 CFR ..... 98.476(c)	GHGs Reported and Production/Throughput Quantities and Composition[a] (CBI).	Production/Throughput Quantities and Composition[a] (non-CBI).

[a] These data elements could have also been placed in the ''Greenhouse Gases Reported'' data category because the product is also the GHG reported.

Summary of Comments.

This section contains summaries of the significant public comments and our responses thereto. Other public comments were also received. Response to these comments can be found in ''Confidentiality Determinations in the 2012 CBI re-proposals: Responses to Public Comments'' in Docket EPA–HQ–OAR–2011–0028 and on the Web site, *http://www.epa.gov/climatechange/emissions/CBI.html*.

Comment: One commenter that injects CO_2 for ER stated that certain data elements related to the quantity of CO_2 received on-site must be protected as CBI. The commenter asserted that information on the quantity of CO_2 received at individual flow meters and the total quantity of CO_2 received at a facility that conducts ER is not publicly available. The commenter also disagreed with the EPA's conclusion that public release of the quantity of CO_2 received does not create a substantial competitive disadvantage for the company. The commenter asserted that, combined with publicly available information on CO_2 pipeline capacities, CO_2 suppliers and pipeline transportation companies could use data on the quantity of CO_2 reported as received by specific facilities to their advantage in price negotiations on future contracts with the CO_2 purchasers (i.e., the reporting facilities under subparts RR and UU). The commenter stated that this risk is amplified because there are so few CO_2 suppliers in the market.

Response: After reviewing the additional information provided by the commenter, the EPA agrees that the quantity of CO_2 reported as received on site could be sensitive information. The EPA proposed that the data elements related to the quantity of CO_2 received would not be entitled to CBI protection because we believed that none of the data elements on CO_2 received included information on CO_2 prices or contract terms, and would not allow a competitor to deduce the reporter's operating costs and cause competitive harm. After reviewing this comment and

publicly available information, the EPA agrees that facilities that report under subpart UU and conduct ER activities are likely to experience substantial competitive harm if data on CO_2 received were released to the public. As the commenter notes, the information on the quantity of CO_2 received per flow meter or per reporting facility is not publicly available. If this data were public, knowledge of a CO_2–ER purchaser's demand for CO_2 could give the CO_2 suppliers an unfair advantage in price negotiations. In addition, a small number of companies supply most of the CO_2 to the economy, which further exacerbates the CO_2–ER purchaser's competitive disadvantage. The majority of CO_2 sold to ER operations in the United States is produced from natural CO_2 bearing formations. According to Reporting Year 2010 data from the Greenhouse Gas Reporting Program, two companies dominated the CO_2 supply market, producing approximately 80 percent of the CO_2 available for purchase from natural CO_2 bearing formations.[15]

In addition to facilities that conduct ER, acid gas operations (facilities that separate a CO_2 stream during natural gas processing and inject it underground) will report under subpart UU. The amount of CO_2 separated in acid gas operations is reported by these facilities under subpart PP. These facilities are allowed to report the amount of CO_2 received under subpart UU by using the amount of CO_2 reported under subpart PP, following the subpart PP methods and requirements.[16] This subpart PP data was determined to be CBI in the 2011 Final CBI rule. Therefore, the EPA has decided to change the confidentiality determination to treat as CBI 12 subpart UU data elements related to the quantity of CO_2 received (see Table 7 of this preamble for the list of affected data elements).

Other than facilities conducting ER or acid gas operations, the facilities that must report under subpart UU include facilities that have received a Research and Development (R&D) project exemption from subpart RR. The EPA notes that data on the quantity of CO_2 received would not be competitively sensitive for facilities that have received an R&D project exemption from subpart RR. It is standard practice that CO_2 that is received by non-ER facilities for R&D geologic sequestration projects is wholly injected underground without a recycled component. The quantity of CO_2 injected for these projects is readily available from public sources and thus the quantity of CO_2 received by these projects is widely known.[17] The EPA has concluded that the disclosure of the amount of CO_2 received is unlikely to cause competitive harm to facilities with a R&D project exemption. Therefore, the EPA is finalizing a determination that for the subcategory of subpart UU reporters that have received an R&D project exemption from subpart RR, the 12 data elements related to CO_2 received are not eligible for CBI treatment and will not be protected as CBI (see Table 7 of this preamble for the list of affected data elements).

[15] See *www.ghgdata.epa.gov.*

[16] 40 CFR 98.474(a)(1)(iii) and (a)(3)(iii).

[17] For example, see the proceedings of the Department of Energy National Energy Technology Laboratory Carbon Storage Program Infrastructure Annual Review Meeting.

III. Confidentiality Determinations for New Data Elements in Subparts II and TT and Responses to Public Comments

The Technical Corrections final rule, which was issued after the 2011 Final CBI Rule, added seven new non-input data elements to subparts II and TT. Confidentiality determinations for the remainder of the data elements in these subparts have already been finalized in the 2011 Final CBI Rule. Subsequent to the 2011 Final CBI Rule, we proposed category assignments and confidentiality determinations for these new data elements in the 2012 CBI re-proposal. The EPA did not receive any comment on the data category assignments or confidentiality determinations for any data elements for which we proposed confidentiality determinations for these two subparts in the 2012 CBI re-proposal. Thus, the EPA is finalizing confidentiality determinations for these new subpart II and TT data elements as proposed. The final confidentiality determinations for these new subpart II and TT data elements can be found in the memorandum, ''Final Data Category Assignments and Confidentiality Determinations for the 2012 Final CBI Rule.''

IV. Amendments to Table A–6 and A–7 To Defer Reporting of Certain Inputs to Emission Equations in Subparts W, FF and TT

We are finalizing the proposed amendments made in the Subpart W CBI re-proposal to Table A–7 of subpart A, which included amendments to address the renumbering of 11 inputs, the addition of 10 new inputs, and the deletion of 21 data elements that were re-categorized to other data categories because the data elements are not the actual values used in the equations. (The deletions recognized, for example, the distinction between individual measured values used to calculate emissions, which are inputs, and the reported average of these measured values, which is not used as an input to emissions equations.) We are finalizing these amendments as proposed with the exception that we are correcting a typographical error in the Subpart W CBI re-proposal by replacing the word ''required'' with ''recovered'' in two entries (40 CFR 98.236(c)(6)(i)(G) and (H)) for subpart W of Table A–7 of subpart A of Part 98. We are finalizing Table A–7 of subpart A with this minor wording change in response to public comment and to more accurately reflect the actual reporting requirements. As proposed in the Subpart W CBI re-proposal, we are deferring the deadline for reporting all subpart W inputs until March 31, 2015 to allow sufficient time to: (1) Evaluate the extent to which potential competitive harm may result if any of the inputs to equations were reported and made publicly available; and (2) determine whether emissions can be calculated or verified using additional methodologies, consistent with the transparency and accuracy goals of Part 98.

The Technical Corrections final rule added one new subpart TT data element that is used as an input to an emission equation (the methane correction factor (MCF) value used in the calculations (40 CFR 98.446(b)(4)). In the 2012 CBI re-proposal, we proposed to assign this data element to the inputs to equations category. We also proposed that this data element be added to Table A–6 of subpart A to defer its reporting to March 31, 2013. We received no comments on the proposal described above. The EPA is therefore finalizing the assignment of this data element to the ''Inputs to Emission Equations'' data category and its addition to Table A–6 of subpart A to require its reporting by March 31, 2013.

The Technical Corrections final rule similarly added two new subpart FF data elements that are used as inputs to emission equations:

- Moisture content used in Equation FF–1 and FF–3 (40 CFR 98.326(o)).
- The gaseous organic concentration correction factor used, if Equation FF–9 was required (40 CFR 98.326(o)).

In the 2012 CBI re-proposal, we proposed to assign these two data elements in 98.236(o) to the ''Inputs to Emission Equations'' data category and defer their reporting deadline to March 31, 2013. As explained in the proposed rule, the paragraph citation for these two data elements (40 CFR 98.326(o)) is already included in Table A–6 of subpart A deferring the reporting

deadline until March 31, 2013; therefore, no amendment to Table A–6 of subpart A is required to defer their reporting to March 31, 2013. We received no public comments on our proposal, and we are finalizing the category assignment and deferral of the reporting deadline for these two new subpart FF data elements as proposed.

In the Technical Corrections final rule, we also re-numbered the rule citations for three subpart TT data reporting elements. In the 2012 CBI re-proposal, the EPA proposed to amend Table A–6 of subpart A list of paragraph references for subpart TT data elements to reflect the revision to the paragraph citations. We did not receive any comment, and we are finalizing as proposed the amendments to Table A–6 of subpart A in this action.

V. Background and Amendments to the Best Available Monitoring Method for Subpart I

A. Background

Following the publication of the final subpart I rule,[18] an industry association requested reconsideration of numerous provisions in the final rule. The final amendments in this action are in response to the request for reconsideration of the specific provision that requires facilities that have been granted extensions to use BAMM to recalculate their emissions for the time period for which BAMM was used at a later date using methods that are fully compliant with subpart I.

B. Amendments to the Best Available Monitoring Method Provisions for Subpart I

For the reasons explained in Section IV of the subpart I CBI re-proposal, we are finalizing amendments to the subpart I BAMM provisions. These amendments to subpart I eliminate the requirement that facilities granted an extension to use BAMM must recalculate and resubmit the emissions estimate for the BAMM extension period. The EPA received comments in support of these amendments and no comments opposing them. Accordingly, we are finalizing as proposed these amendments to subpart I.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action, which finalizes confidentiality determinations for data elements in the 9 subparts included in the preamble, finalizes amendments to subpart A of Part 98, and removes the requirement that facilities that are granted an extension to use BAMM must recalculate and resubmit the emissions estimate for the BAMM extension period is not a ''significant regulatory action'' under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act

This action, which finalizes confidentiality determinations for data elements in the 9 subparts included in the preamble, finalizes amendments to subpart A of Part 98, and removes the requirement that facilities that are granted an extension to use BAMM must recalculate and resubmit the emissions estimate for the BAMM extension period does not impose any new information collection burden and does not increase the existing reporting burden. The Office of Management and Budget (OMB) has previously approved the information collection requirements contained in these subparts, under 40 CFR part 98, under the provisions of the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) documents prepared by the EPA have been assigned the following OMB control numbers: 2060–0650, for subparts I, DD, and SS; 2060–0651, for subpart W; 2060–0649, for subparts RR and UU; and 2060–0647 for subparts FF, II, and TT. The OMB control numbers for EPA's regulations in 40 CFR are listed at 40 CFR part 9.

C. Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this rule on small entities, a small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of a regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the rule on small entities.'' 5 U.S.C. 603,604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no burden, or otherwise has a positive economic effect on all of the small entities subject to the rule. This action, which finalizes confidentiality determinations for data elements in the 9 subparts included in the preamble, finalizes amendments to subpart A of Part 98, and removes the requirement that facilities that are granted an extension to use BAMM must recalculate and resubmit the emissions estimate for the BAMM extension period does not increase the existing reporting burden on small entities. We have therefore concluded that today's final rule will relieve or have no burden on small entities subject to the rule.

D. Unfunded Mandates Reform Act (UMRA)

These final rule amendments and confidentiality determinations do not contain a federal mandate that may result in expenditures of $100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year. The amendment to subpart I removes the requirement that facilities that are granted an extension to use BAMM must recalculate and resubmit the emissions estimate for the BAMM extension period and the confidentiality determinations are administrative in nature and do not increase the costs of compliance for facilities to comply with Part 98. Thus, this rule is not subject to the requirements of sections 202 or 205 of the UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. The confidentiality determinations for data

[18] 75 FR 74774, December 1, 2010.

elements that this action finalizes are administrative in nature, and this action removes the requirement that facilities that are granted an extension to use BAMM must recalculate and resubmit the emissions estimate for the BAMM extension period.

E. Executive Order 13132: Federalism

This action, which finalizes confidentiality determinations for data elements in the 9 subparts included in the preamble, finalizes amendments to subpart A of Part 98, and removes the requirement that facilities that are granted an extension to use BAMM must recalculate and resubmit the emissions estimate for the BAMM extension period does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. For a more detailed discussion about how Part 98 relates to existing state programs, please see Section II of the preamble to the final Greenhouse Gas Reporting Rule (74 FR 56266, October 30, 2009).

This action applies to suppliers of GHGs and facilities that directly emit GHGs above threshold levels. Relatively few government facilities are affected by this action since Part 98 applies only to government entities that own a facility that directly emits GHGs above threshold levels. This action also does not limit the power of states or localities to collect GHG data and/or regulate GHG emissions, nor does it directly affect the power of states or localities to disclose or protect information reported to those states or localities. Thus, Executive Order 13132 does not apply to this action.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action, which finalizes confidentiality determinations for data elements in the 9 subparts included in the preamble, finalizes amendments to subpart A of Part 98, and removes the requirement that facilities that are granted an extension to use BAMM must recalculate and resubmit the emissions estimate for the BAMM extension period does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This action does not increase the reporting burden. Thus, Executive Order 13175 does not apply to this action. For a summary of the EPA's consultations with tribal governments and representatives, see Section VIII.F of the preamble to the final Greenhouse Gas Reporting Rule (74 FR 56371, October 30, 2009).

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

The EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

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

This action, which finalizes confidentiality determinations for data elements in the 9 subparts included in the preamble, finalizes amendments to subpart A of Part 98, and removes the requirement that facilities that are granted an extension to use BAMM must recalculate and resubmit the emissions estimate for the BAMM extension period is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

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

This final action, which finalizes confidentiality determinations for data elements in the 9 subparts included in the preamble, finalizes amendments to subpart A of Part 98, and removes the requirement that facilities that are granted an extension to use BAMM must recalculate and resubmit the emissions estimate for the BAMM extension period does not add any new technical standards or revise any existing technical standards included in Part 98. Therefore, the EPA did not consider the use of any voluntary consensus standards.

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

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

The EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations. This final rule does not affect the level of protection provided to human health or the environment because it addresses information collection and reporting procedures.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). Therefore, this rule will be effective on September 12, 2012, except for the amendments to Tables A–6 and A–7 of 40 CFR part 98 subpart A and the amendments to 40 CFR part 98 subpart I (section 98.94(a)(2)(iii), (a)(3)(iii), and (a)(4)(iii), which are effective on August 13, 2012.

List of Subjects in 40 CFR Part 98

Environmental protection, Administrative practice and procedure,

Greenhouse gases, Reporting and recordkeeping requirements.

Dated: August 2, 2012.

Lisa P. Jackson,

Administrator.

For the reasons stated in the preamble, title 40, chapter I, of the Code of Federal Regulations is amended as follows:

PART 98—[AMENDED]

■ 1. The authority citation for Part 98 continues to read as follows:

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

Subpart A—[Amended]

■ 2. Table A–6 to subpart A of Part 98 is amended by revising the entries for subpart TT to read as follows:

TABLE A–6 TO SUBPART A OF PART 98—DATA ELEMENTS THAT ARE INPUTS TO EMISSION EQUATIONS AND FOR WHICH THE REPORTING DEADLINE IS MARCH 31, 2013

Subpart	Rule citation (40 CFR part 98)	Specific data elements for which reporting date is March 31, 2013 (''All'' means all data elements in the cited paragraph are not required to be reported until March 31, 2013)
*	* *	* * * * *
TT	98.466(a)(2)	All.
TT	98.466(a)(3)	Only last year the landfill accepted waste (for closed landfills using Equation TT–4).
TT	98.466(a)(4)	Only capacity of the landfill in metric tons (for closed landfills using Equation TT–4).
TT	98.466(b)(3)	Only fraction of CH_4 in landfill gas.
TT	98.466(b)(4)	Only the methane correction factor (MCF) value used in the calculations.
TT	98.466(c)(1)	All.
TT	98.466(c)(4)(i)	All.
TT	98.466(c)(4)(ii)	All.
TT	98.466(c)(4)(iii)	All.
TT	98.466(d)(2)	All.
TT	98.466(d)(3)	Only degradable organic carbon (DOCx) value used in calculations.
TT	98.466(e)(2)	Only surface area (in square meters) at the start of the reporting year for the landfill sections that contain waste and that are associated with the selected cover type (for facilities using a landfill gas collection system).
TT	98.466(f)	All.

■ 3. Table A–7 to subpart A of Part 98 is amended by revising the entries for subpart W to read as follows:

TABLE A–7 TO SUBPART A OF PART 98—DATA ELEMENTS THAT ARE INPUTS TO EMISSION EQUATIONS AND FOR WHICH THE REPORTING DEADLINE IS MARCH 31, 2015

Subpart	Rule Citation (40 CFR part 98)	Specific Data Elements for Which Reporting Date is March 31, 2015 (''All'' means all data elements in the cited paragraph are not required to be reported until March 31, 2015)
*	* * * *	* * *
W	98.236(c)(1)(i)	All.
W	98.236(c)(1)(ii)	All.
W	98.236(c)(1)(iii)	All.
W	98.236(c)(2)(i)	All.
W	98.236(c)(3)(i)	All.
W	98.236(c)(3)(ii)	Only Calculation Methodology 2.
W	98.236(c)(3)(iii)	All.
W	98.236(c)(3)(iv)	All.
W	98.236(c)(4)(i)(A)	All.
W	98.236(c)(4)(i)(B)	All.
W	98.236(c)(4)(i)(C)	All.
W	98.236(c)(4)(i)(D)	All.
W	98.236(c)(4)(i)(E)	All.
W	98.236(c)(4)(i)(F)	All.
W	98.236(c)(4)(i)(G)	All.
W	98.236(c)(4)(i)(H)	All.
W	98.236(c)(4)(ii)(A)	All.
W	98.236(c)(5)(i)(D)	All.
W	98.236(c)(5)(ii)(C)	All.
W	98.236(c)(6)(i)(B)	All.
W	98.236(c)(6)(i)(D)	All.
W	98.236(c)(6)(i)(E)	All.
W	98.236(c)(6)(i)(F)	All.
W	98.236(c)(6)(i)(G)	Only the amount of natural gas required.
W	98.236(c)(6)(i)(H)	Only the amount of natural gas required.
W	98.236(c)(6)(ii)(A)	All.

TABLE A–7 TO SUBPART A OF PART 98—DATA ELEMENTS THAT ARE INPUTS TO EMISSION EQUATIONS AND FOR WHICH THE REPORTING DEADLINE IS MARCH 31, 2015—Continued

Subpart	Rule Citation (40 CFR part 98)	Specific Data Elements for Which Reporting Date is March 31, 2015 ("All" means all data elements in the cited paragraph are not required to be reported until March 31, 2015)
W	98.236(c)(6)(ii)(B)	All.
W	98.236(c)(7)(i)(A)	Only for Equation W–14A.
W	98.236(c)(8)(i)(F)	All.
W	98.236(c)(8)(i)(K)	All.
W	98.236(c)(8)(ii)(A)	All.
W	98.236(c)(8)(ii)(H)	All.
W	98.236(c)(8)(iii)(A)	All.
W	98.236(c)(8)(iii)(B)	All.
W	98.236(c)(8)(iii)(G)	All.
W	98.236(c)(12)(ii)	All.
W	98.236(c)(12)(v)	All.
W	98.236(c)(13)(i)(E)	All.
W	98.236(c)(13)(i)(F)	All.
W	98.236(c)(13)(ii)(A)	All.
W	98.236(c)(13)(ii)(B)	All.
W	98.236(c)(13)(iii)(A)	All.
W	98.236(c)(13)(iii)(B)	All.
W	98.236(c)(13)(v)(A)	All.
W	98.236(c)(14)(i)(B)	All.
W	98.236(c)(14)(ii)(A)	All.
W	98.236(c)(14)(ii)(B)	All.
W	98.236(c)(14)(iii)(A)	All.
W	98.236(c)(14)(iii)(B)	All.
W	98.236(c)(14)(v)(A)	All.
W	98.236(c)(15)(ii)(A)	All.
W	98.236(c)(15)(ii)(B)	All.
W	98.236(c)(16)(viii)	All.
W	98.236(c)(16)(ix)	All.
W	98.236(c)(16)(x)	All.
W	98.236(c)(16)(xi)	All.
W	98.236(c)(16)(xii)	All.
W	98.236(c)(16)(xiii)	All.
W	98.236(c)(16)(xiv)	All.
W	98.236(c)(16)(xv)	All.
W	98.236(c)(16)(xvi)	All.
W	98.236(c)(17)(ii)	All.
W	98.236(c)(17)(iii)	All.
W	98.236(c)(17)(iv)	All.
W	98.236(c)(18)(i)	All.
W	98.236(c)(18)(ii)	All.
W	98.236(c)(19)(iv)	All.
W	98.236(c)(19)(vii)	All.

* * * * * * *

Subpart I—[Amended]

■ 4. Section 98.94 is amended by revising paragraphs (a)(2)(iii), (a)(3)(iii), and (a)(4)(iii) to read as follows:

§ 98.94 Monitoring and QA/QC requirements.

(a) * * *

(2) * * *

(iii) *Approval criteria.* To obtain approval, the owner or operator must demonstrate to the Administrator's satisfaction that by July 1, 2011, it is not reasonably feasible to acquire, install, or operate the required piece of monitoring equipment, or procure necessary measurement services to comply with the requirements of this subpart.

(3) * * *

(iii) *Approval criteria.* To obtain approval, the owner or operator must demonstrate to the Administrator's satisfaction that by December 31, 2011 it is not reasonably feasible to acquire, install, or operate the required piece of monitoring equipment or procure necessary measurement services to comply with the requirements of this subpart.

(4) * * *

(iii) *Approval criteria.* To obtain approval, the owner or operator must demonstrate to the Administrator's satisfaction that by December 31, 2011 (or in the case of facilities that are required to calculate and report emissions in accordance with § 98.93(a)(2)(ii)(A), December 31, 2012), it is not reasonably feasible to acquire, install, or operate the required piece of monitoring equipment according to the requirements of this subpart.

* * * * *

[FR Doc. 2012–19559 Filed 8–10–12; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 0

[DA 12–1263]

List of Office of Management and Budget Approved Information Collection Requirements

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document revises the Commission's list of Office of Management and Budget (OMB) approved public information collection requirements with their associated OMB expiration dates. This list will provide the public with a current list of public information collection requirements approved by OMB and their associated control numbers and expiration date as of June 30, 2012.

DATES: Effective August 13, 2012.

FOR FURTHER INFORMATION CONTACT: Judith B. Herman, Office of the Managing Director, (202) 418–0214 or by email to *Judith-B.Herman@fcc.gov.*

SUPPLEMENTARY INFORMATION: This document adopted on August 3, 2012 and released on August 6, 2012 by the Managing Director in DA 12–1263 revised 47 CFR 0.408 in its entirety.

1. Section 3507(a)(3) of the Paperwork Reduction Act of 1995, 44 U.S.C. 3507(a)(3), requires agencies to display a current control number assigned by the Director, Office of Management and Budget (''OMB'') for each agency information collection requirement.

2. Section 0.408 of the Commission's rules displays the OMB control numbers assigned to the Commission's public information collection requirements that have been reviewed and approved by OMB.

3. Authority for this action is contained in Section 4(i) of the Communications Act of 1934 (47 U.S.C. 154(i)), as amended, and section 0.231(b) of the Commission's Rules. Since this amendment is a matter of agency organization procedure or practice, the notice and comment and effective date provisions of the Administrative Procedure Act do not apply. See 5 U.S.C. 553(b)(A)(d). For this reason, this rulemaking is not subject to the Congressional Review Act and will not be reported to Congress and the Government Accountability Office. See 5 U.S.C. 801.

4. Accordingly, *it is ordered, that* section 0.408 of the rules is *revised* as set forth in the revised text effective on August 13, 2012.

5. Persons having questions on this matter should contact Judith B. Herman at (202) 418–0214 or email to *Judith-B.Herman@fcc.gov.*

List of Subjects in 47 CFR Part 0

Reporting and recordkeeping requirements.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Accordingly, 47 CFR part 0 is amended as follows:

PART 0—COMMISSION ORGANIZATION

■ 1. The authority citation for part 0 continues to read as follows:

Authority: Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155, 225, unless otherwise noted.

■ 2. Section 0.408 is revised to read as follows:

§ 0.408 OMB control numbers and expiration dates assigned pursuant to the Paperwork Reduction Act of 1995.

(a) *Purpose.* This section displays the OMB control numbers and expiration dates for the Commission information collection requirements assigned by the Office of Management and Budget (''OMB'') pursuant to the Paperwork Reduction Act of 1995, Public Law 104–13. The Commission intends that this section comply with the requirement that agencies ''display'' current control numbers and expiration dates assigned by the Director, OMB, for each approved information collection requirement. Notwithstanding any other provisions of law, 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 currently valid OMB control number. Questions concerning the OMB control numbers and expiration dates should be directed to the Associate Managing Director—Performance Evaluation and Records Management, (''AMD–PERM''), Office of Managing Director, Federal Communications Commission, Washington, DC 20554 by sending an email to *Judith-B.Herman@fcc.gov.*

(b) *Display.*

OMB Control No.	FCC form number or 47 CFR section or part, docket number or title identifying the collection	OMB expiration date
3060–0004	Secs. 1.1307 and 1.1311, Guidelines for Evaluating the Environmental Effects of Radio-frequency Radiation, ET Docket No. 93–62.	05/31/14
3060–0009	FCC 316	05/31/13
3060–0010	FCC 323	10/31/12
3060–0016	FCC 346	03/31/14
3060–0017	FCC 347	11/30/14
3060–0027	FCC 301	04/30/15
3060–0029	FCC 340	07/31/14
3060–0031	FCC 314 and FCC 315	05/31/13
3060–0053	FCC 702 and FCC 703	07/31/14
3060–0055	FCC 327	02/28/15
3060–0056	Part 68—Connection of Terminal Equipment to the Telephone Network	03/31/14
3060–0057	FCC 731	03/31/14
3060–0059	FCC 740	03/31/13
3060–0061	FCC 325	06/30/14
3060–0065	FCC 442	06/30/14
3060–0075	FCC 345	04/30/15
3060–0076	FCC 395	09/30/13
3060–0084	FCC 323–E	01/31/14
3060–0093	FCC 405	10/31/14
3060–0095	FCC 395–A	08/31/14
3060–0106	Sec. 43.61, Part 43, Reporting Requirements for U.S. Providers of International Telecommunications Services and Affiliates.	10/31/14
3060–0110	FCC 303–S	02/28/14
3060–0113	FCC 396	04/30/15

OMB Control No.	FCC form number or 47 CFR section or part, docket number or title identifying the collection	OMB expiration date
3060–0120	FCC 396–A	06/30/15
3060–0126	Sec. 73.1820	09/30/14
3060–0132	FCC 1068A	05/31/15
3060–0139	FCC 854	04/30/15
3060–0147	Sec. 64.804	09/30/14
3060–0149	Part 63, Section 214, Secs. 63.01, 63.602; 63.50, 63.51, 63.52, 63.53; 63.61, 63.62, 63.63; 63.65, 63.66; 63.71; 63.90; 63.500, 63.501; 63.504, 63.505 and 63.601.	12/31/12
3060–0157	Sec. 73.99	08/31/14
3060–0161	Sec. 73.61	01/31/15
3060–0166	Part 42, Secs. 42.4, 42.5, 42.6 and 42.7	09/30/13
3060–0168	Sec. 43.43	09/30/12
3060–0169	Sec. 43.51	10/31/14
3060–0170	Sec. 73.1030	08/31/13
3060–0171	Sec. 73.1125	08/31/13
3060–0174	Secs. 73.1212, 76.1615, and 76.1715	06/30/15
3060–0175	Sec. 73.1250	03/31/14
3060–0176	Sec. 73.1510	08/31/14
3060–0178	Sec. 73.1560	06/30/14
3060–0179	Sec. 73.1590	09/30/13
3060–0180	Sec. 73.1610	07/31/13
3060–0182	Sec. 73.1620	02/28/13
3060–0185	Sec. 73.3613	11/30/13
3060–0188	Call Sign Reservation and Authorization System	08/31/13
3060–0190	Sec. 73.3544	10/31/12
3060–0192	Sec. 87.103	10/31/13
3060–0202	Sec. 87.37	04/30/15
3060–0204	Sec. 90.20(a)(2)(v) and 90.20(a)(2)(xi)	10/31/14
3060–0207	Part 11—Emergency Alert System (EAS)	02/28/15
3060–0208	Sec. 73.1870	02/28/15
3060–0213	Sec. 73.3525	02/28/15
3060–0214	Secs. 73.3526 and 73.3527; Secs. 76.1701 and 73.1943	06/30/15
3060–0216	Secs. 73.3538 and 73.1690(e)	11/30/13
3060–0221	Sec. 90.155	01/31/14
3060–0222	Sec. 97.213	06/30/15
3060–0223	Sec. 90.129	09/30/14
3060–0228	Sec. 80.59 and FCC 806, 824, 827 and 829	07/31/13
3060–0233	Part 36—Separations	11/30/12
3060–0236	Sec. 74.703	03/31/14
3060–0248	Sec. 74.751	11/30/13
3060–0249	Secs. 74.781, 74.1281, and 78.69	04/30/15
3060–0250	Secs. 73.1207, 74.784 and 74.1284	08/31/12
3060–0259	Sec. 90.263	08/31/12
3060–0261	Sec. 90.215	07/31/13
3060–0262	Sec. 90.179	04/30/14
3060–0264	Sec. 80.413	08/31/12
3060–0265	Sec. 80.868	05/31/13
3060–0270	Sec. 90.443	01/31/13
3060–0281	Sec. 90.651	05/31/13
3060–0286	Sec. 80.302	02/28/13
3060–0288	Sec. 78.33	07/31/14
3060–0289	Secs. 76.601, 76.1704, 76.1705, and 76.1717	05/31/14
3060–0290	Sec. 90.517	03/31/14
3060–0291	Sec. 90.477(a), (b)(2), (d)(2) and (d)(3)	07/31/14
3060–0292	Part 69 and Sec. 69.605	02/28/13
3060–0295	Sec. 90.607(b)(1) and (c)(1)	04/30/13
3060–0297	Sec. 80.503	08/31/12
3060–0298	Part 61, Tariffs (Other than Tariff Review Plan)	05/31/15
3060–0307	Parts 1, 22 and 90 Rules to Facilitate Development of SMR Systems in the 800 MHz Frequency Band.	01/31/13
3060–0308	Sec. 90.505	04/30/13
3060–0310	Sec. 76.1801 and FCC 322	01/31/15
3060–0311	Sec. 76.54	03/31/14
3060–0316	Secs. 76.1700, 76.1702, 76.1703, 76.1704, 76.1707, and 76.1711	12/31/13
3060–0320	Sec. 73.1350	11/30/12
3060–0325	Sec. 80.605	08/31/14
3060–0329	Sec. 2.955	01/31/15
3060–0331	FCC 321	01/31/15
3060–0332	Secs. 76.614 and 76.1706	08/31/13
3060–0340	Sec. 73.51	10/31/12
3060–0341	Sec. 73.1680	01/31/15
3060–0346	Sec. 78.27	10/31/12
3060–0347	Sec. 97.311	09/30/14
3060–0349	Secs. 73.2080, 76.73, 76.75, 76.79, and 76.1702	12/31/12
3060–0355	FCC 492 and FCC 492A	05/31/13

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3060–0357	Sec. 63.701	02/28/14
3060–0360	Sec. 80.409	01/31/14
3060–0370	Part 32—Uniform System of Accounts for Telecommunications Companies	01/31/14
3060–0384	Secs. 64.901, 64.904 and 64.905	12/31/13
3060–0386	Secs. 1.5, 73.1615, 73.1635, 73.1740, 73.3598, 74.788, and FCC 337	11/30/14
3060–0387	Secs. 15.201(d), 15.209, 15.211, 15.213 and 15.221	05/31/15
3060–0390	FCC 395–B	09/30/14
3060–0391	Parts 54 and 36, Program to Monitor the Impacts of the Universal Service Support Mechanisms.	03/31/14
3060–0392	47 CFR Part 1, Subpart J, Pole Attachment Complaint Procedures	12/31/12
3060–0394	Sec. 1.420	04/30/14
3060–0395	FCC Reports 43–02, FCC 43–05 and FCC 43–07	09/30/14
3060–0398	Secs. 2.948 and 15.117(g)(2)	09/30/13
3060–0400	Tariff Review Plan (TRP)	05/31/15
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3060–0405	FCC 349	04/30/13
3060–0410	FCC 495A and FCC 495B	09/30/14
3060–0411	FCC 485	09/30/14
3060–0414	Terrain Shielding Policy	10/31/12
3060–0419	Secs. 76.94, 76.95, 76.105, 76.106, 76.107, and 76.1609	06/30/14
3060–0422	Sec. 68.5	08/31/13
3060–0423	Sec. 73.3588	04/30/14
3060–0430	Sec. 1.1206	12/31/14
3060–0433	FCC 320	05/31/14
3060–0434	Sec. 90.20(e)(6)	07/31/14
3060–0439	Sec. 64.201	09/30/13
3060–0441	Secs. 90.621 and 90.693	08/31/12
3060–0454	Secs. 43.51, 64.1001 and 64.1002	06/30/14
3060–0463	Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Report and Order and Declaratory Ruling, CG Doc. No. 03–123, FCC 07–186.	06/30/14
3060–0466	Secs. 73.1201, 74.783 and 74.1283	10/31/13
3060–0470	Secs. 64.901 and 64.903, and RAO Letters 19 and 26	06/30/14
3060–0473	Sec. 74.1251	05/31/14
3060–0474	Sec. 74.1263	09/30/14
3060–0484	Secs. 4.1 and 4.2 and Part 4 of the Commission's Rules Concerning Disruptions to Communications (NORS).	02/28/14
3060–0489	Sec. 73.37	06/30/15
3060–0496	FCC Report 43–08	04/30/13
3060–0500	Sec. 76.1713	08/31/13
3060–0501	Secs. 73.1942, 76.206 and 76.1611	10/31/14
3060–0506	FCC 302–FM	11/30/14
3060–0508	Part 1 and Part 22 Reporting and Recordkeeping Requirements	09/30/14
3060–0511	FCC Report 43–04	11/30/14
3060–0512	FCC Report 43–01	04/30/15
3060–0519	Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, Order, CG Docket No. 02–278.	10/31/14
3060–0526	Sec. 69.123, Density Pricing Zone Plans, Expanded Interconnection with Local Telephone Company Facilities.	05/31/14
3060–0531	Secs. 101.1011, 101.1325(b), 101.1327(a), 101.527, 101.529, and 101.103	01/31/13
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3060–0548	Secs. 76.1708, 76.1709, 76.1620, 76.56 and 76.1614	06/30/14
3060–0550	FCC 328	05/31/14
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3060–0562	Sec. 76.916	12/31/12
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3060–0580	Sec. 76.1710	11/30/12
3060–0584	FCC 44 and FCC 45	03/31/15
3060–0589	FCC 159, FCC 159–B, FCC 159–C, FCC 159–E and 159–W	03/31/14
3060–0594	FCC 1220	05/31/13
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3060–0633	Secs. 73.1230, 74.165, 74.432, 74.564, 74.664, 74.765, 74.832 and 74.1265	08/31/13
3060–0634	Sec. 73.691	11/30/12
3060–0636	Secs. 2.906, 2.909, 2.1071, 2.1075, 2.1076, 2.1077 and 15.37	05/31/15
3060–0645	Secs. 17.4, 17.48 and 17.49	04/30/15
3060–0647	Cable Price Survey and Supplemental Questions and FCC 333	08/31/13
3060–0649	Secs. 76.1601, 76.1617, 76.1697 and 76.1708	08/31/13
3060–0652	Secs. 76.309, 76.1602, 76.160 and 76.1619	07/31/14
3060–0653	Sec. 64.703(b) and (c)	03/31/14
3060–0655	Requests for Waivers of Regulatory and Application Fees	07/31/13
3060–0665	Sec. 64.707	10/31/13
3060–0667	Secs. 76.630, 76.1621 and 76.1622	03/31/14
3060–0668	Sec. 76.936	09/30/13
3060–0669	Sec. 76.946	11/30/13
3060–0674	Sec. 76.1618	06/30/14
3060–0678	Part 25 of the Commission's Rules Governing the Licensing of, and Spectrum Usage by, Satellite Network Stations and Space Stations.	09/30/13
3060–0685	FCC 1210 and FCC 1240	12/31/14
3060–0686	Secs. 63.10, 63.11, 63.13, 63.18, 63.19, 63.21, 63.24, 63.25 and 1.1311, International Section 214 Process and Tariff Requirements and FCC 214, FCC 214TC and FCC 214STA.	02/28/14
3060–0687	Access to Telecommunications Equipment and Services by Persons with Disabilities, CC Docket No. 87–124.	05/31/15
3060–0688	FCC 1235	08/31/13
3060–0690	Sec. 101.17	04/30/15
3060–0691	Sec. 90.665	07/31/13
3060–0692	Secs. 76.613, 76.802 and 76.804	02/28/13
3060–0695	Sec. 87.219	10/31/14
3060–0698	Secs. 25.203(i) and 73.1030(a)(2), Radio Astronomy Coordination Zone in Puerto Rico	03/31/14
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3060–0703	FCC 1205	01/31/15
3060–0704	Secs. 42.10, 42.11 and 64.1900 and Section 254(g), Policy and Rule Concerning the Interstate, Interexchange Marketplace.	09/30/14
3060–0706	Secs. 76.952 and 76.990, Cable Act Reform	06/30/14
3060–0707	Over-the Air Reception Devices (OTARD)	03/31/14
3060–0710	Policy and Rules Under Parts 1 and 51 Concerning the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996—CC Docket No. 96–98.	07/31/13
3060–0713	Alternative Broadcast Inspection Program (ABIP) Compliance Notification	04/30/14
3060–0715	Telecommunications Carriers' Use of Customer Proprietary Network Information (CPNI) and Other Customer Information—CC Docket No. 96–115.	07/31/14
3060–0716	Secs. 73.88, 73.718, 73.685 and 73.1630	04/30/15
3060–0717	Secs. 64.703(a), 64.709 and 64.710	06/30/14
3060–0718	Part 101 Rule Sections Governing the Terrestrial Microwave Fixed Radio Service	04/30/15
3060–0719	Quarterly Report of IntraLATA Carriers Listing Payphone Automatic Number Identifications (ANIs).	03/31/13
3060–0723	47 U.S.C. Section 276, Public Disclosure of Network Information by Bell Operating Companies (BOCs).	10/31/12
3060–0725	Quarterly Filing of Nondiscrimination Reports (on Quality of Service, Installation, and Maintenance) by Bell Operating Companies (BOC's).	05/31/15
3060–0727	Sec. 73.213	10/31/12
3060–0734	Secs. 53.209, 53.211 and 53.213	08/31/14
3060–0737	Disclosure Requirements for Information Services Provided Under a Presubscription or Comparable Arrangement.	01/31/15
3060–0740	Sec. 95.1015	10/31/14
3060–0741	Implementation of the Local Competition Provisions on the Telecommunications Act of 1996—CC Docket No. 96–98.	01/31/14
3060–0742	Secs. 52.21, 52.22, 52.23, 52.24, 52.25, 52.26, 52.27, 52.28, 52.29, 52.30, 52.31, 52.32, 52.33, 52.34, 52.35 and 52.36; and CC Docket No. 95–116.	07/31/13
3060–0743	Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996—CC Docket No. 96–128.	02/28/13
3060–0745	Implementation of the Local Exchange Carrier Tariff Streamlining Provisions of the Telecommunications Act of 1996, CC Docket No. 96–187.	10/31/12
3060–0748	Secs. 64.1504, 64.1509 and 64.1510, Pay-Per-Call and Other Information Services	04/30/13
3060–0750	Secs. 73.671 and 73.673	06/30/14
3060–0751	Sec. 43.51	08/31/14
3060–0754	FCC 398	04/30/15
3060–0755	Secs. 59.1, 59.2, 59.3 and 59.4	01/31/15
3060–0758	Secs. 5.55, 5.61, 5.75, 5.85, and 5.93, Experimental Radio Service Regulations, ET Docket No. 96–256.	04/30/13
3060–0760	272 Sunset Order; WC Docket No. 06–120; Access Charge Reform, CC Docket No. 96–262, First Report and Order; Second Order on Reconsideration and Memorandum Opinion and Order; and Fifth Report and Order.	09/30/14
3060–0761	Sec. 79.1	Pending OMB review and approval.
3060–0763	FCC Report 43–06	02/28/15

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3060–0767	Secs. 1.2110, 1.2111 and 1.2112, Auction and Licensing Disclosures—Ownership and Small Business Status.	06/30/14
3060–0768	28 GHz Band Segmentation Plan Amending the Commission's Rules to Redesignate the 27.5–29.5 GHz Frequency Band, to Reallocate the 29.5–30.0 GHz Frequency Band, and to Establish Rules and Policies.	08/31/14
3060–0770	Secs. 1.774, 61.49, 61.55, 61.58, 69.4, 69.707, 69.713 and 69.729	10/31/14
3060–0773	Sec. 2.803	12/31/12
3060–0774	Parts 36 and 54, Federal-State Joint Board on Universal Service	06/30/14
3060–0775	Sec. 64.1903	04/30/13
3060–0779	Secs. 90.20(a)(1)(iii), 90.769, 90.767, 90.763(b)(l)(i)(a), 90.763(b)(l)(i)(B), 90.771(b) and 90.743, Rules for Use of the 220 MHz Band by the Private Land Mobile Radio Service (PLMRS).	11/30/13
3060–0782	Petition for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service (ELCS) at Various Locations.	11/30/12
3060–0783	Sec. 90.176	01/31/15
3060–0787	Implementation of Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers.	07/31/14
3060–0788	DTV Showings/Interference Agreements	10/31/13
3060–0790	Sec. 68.110(c)	09/30/12
3060–0791	Sec. 32.7300	09/30/12
3060–0795	FCC 606	08/31/14
3060–0798	FCC 601	04/30/15
3060–0799	FCC 602	09/30/13
3060–0800	FCC 603	02/28/14
3060–0804	FCC 465, FCC 466, FCC 466–A and FCC 467	11/30/14
3060–0805	Secs. 90.523, 90.527, 90.545 and 90.1211	07/31/14
3060–0806	FCC 470 and FCC 471	10/31/13
3060–0807	Sec. 51.803 and Supplemental Procedures for Petitions to Section 252(e)(5) of the Communications Act of 1934, as amended.	07/31/13
3060–0809	Communications Assistance for Law Enforcement Act (CALEA)	02/28/14
3060–0812	Exemption from Payment of Regulatory Fees When Claiming Non-Profit Status	12/31/14
3060–0813	Sec. 20.18, Enhanced 911 Emergency Calling Systems	02/28/15
3060–0814	Sec. 54.301, Local Switching Support and Local Switching Support Data Collection Form and Instructions.	12/31/13
3060–0816	FCC 477	04/30/13
3060–0817	Computer III Further Remand Proceedings: BOC Provision of Enhanced Services (ONA Requirements), CC Docket No. 95–20.	06/30/15
3060–0819	Secs. 54.400–54.707 and FCC 497	10/31/12
3060–0823	Part 64, Pay Telephone Reclassification	03/31/14
3060–0824	FCC 498	11/30/12
3060–0833	Implementation of Section 255 of the Telecommunications Act of 1996: Complaint Filings	05/31/14
3060–0835	FCC 806, FCC 824, FCC 827 and FCC 829	09/30/12
3060–0837	FCC 302–TV	04/30/13
3060–0844	Carriage of the Transmissions of Digital Television Broadcast Stations	10/31/13
3060–0848	Deployment of Wireline Services Offering Advanced Telecommunications Capability—CC Docket No. 98–147.	02/28/15
3060–0849	Commercial Availability of Navigation Devices	07/31/14
3060–0850	FCC 605	06/30/14
3060–0853	FCC 479, FCC 486 and FCC 500	10/31/13
3060–0854	Truth-in-Billing Format, CC Docket No. 98–170 and CG Docket No. 04–208	09/30/14
3060–0855	FCC 499–A and FCC 499–Q	10/31/14
3060–0856	FCC 472, FCC 473 and FCC 474	06/30/13
3060–0859	Public Notice—Suggested Guidelines for Petitions for Ruling under Section 253 of the Telecommunications Act.	05/31/15
3060–0862	Handling Confidential Information	07/31/14
3060–0863	Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act (SHVA).	06/30/14
3060–0865	Wireless Telecommunications Bureau Universal Licensing System Recordkeeping and Third-Party Disclosure Requirements.	08/31/13
3060–0874	FCC 475B, FCC 501, FCC 2000 Series A–F, FCC 1088A, B, C, D, E, F, and H	Pending OMB review and approval.
3060–0876	Sec. 54.703 and Secs. 54.719, 54.720, 54.721, 54.722, 54.723, 54.724 and 54.725	10/31/12
3060–0881	Sec. 95.861	07/31/14
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3060–0888	Secs. 1.221, 1.229, 1.248, 76.7, 76.9, 76.61, 76.914, 76.1001, 76.1003, 76.1302 and 76.1513	01/31/15
3060–0895	Sec. 52.15, CC Docket No. 99–200 and FCC 502	06/30/13
3060–0896	Broadcast Auction Form Exhibits	10/31/14
3060–0905	Sec. 18.213	08/31/14
3060–0906	FCC 317 and Sec. 73.624(g)	11/30/14
3060–0910	Third Report and Order in CC Docket No. 94–102 to Ensure Compatibility with Enhanced 911 Emergency Calling Systems.	09/30/12
3060–0912	Secs. 76.501, 76.503 and 76.504, Cable Attribution Rules	03/31/15
3060–0917	FCC 160	05/31/13

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3060–0920	FCC 318	05/31/14
3060–0922	FCC 397	03/31/15
3060–0927	Auditor's Annual Independence and Objectivity Certification	02/28/15
3060–0928	FCC 302–CA	10/31/12
3060–0931	Sec. 80.103, Digital Selective Calling (DSC) Operating Procedures; Maritime Mobile Services Identity (MMSI).	07/31/12
3060–0932	FCC 301–CA and Sec. 74.793(d)	11/30/13
3060–0936	Secs. 95.1215 and 95.1217	06/30/15
3060–0937	Establishment of a Class A Television Service, MM Docket No. 00–10	07/31/13
3060–0938	FCC 319	02/28/15
3060–0942	Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long Distance Users, Federal-State Joint Board on Universal Service.	06/30/13
3060–0944	Secs. 1.767 and 1.768,; Executive Order (E.O.) 10530, Cable Landing License Act; FCC 220	02/28/14
3060–0950	Bidding Credits for Tribal Lands	08/31/13
3060–0951	Sec. 1.1204(b) Note, and Sec. 1.1206(a) Note 1	03/31/13
3060–0952	Proposed Demographic Information and Notifications, Second FNPRM, CC Docket Nos. 98–147.	03/31/13
3060–0953	Secs. 95.1111 and 95.1113	05/31/13
3060–0955	Secs. 25.114, 25.115, 25.133, 25.137, 25.143, 25.203, and 25.279; 2 GHz Mobile Satellite Service Reports.	01/31/13
3060–0957	Sec. 20.18(i) and (g)	12/31/13
3060–0960	Secs. 76.122, 76.123, 76.124 and 76.127	03/31/14
3060–0962	Redesignation of the 18 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the Ka-Band, and the Allocation of Additional Spectrum for Broadcast Satellite Service Use.	08/31/14
3060–0967	Sec. 79.2	08/31/13
3060–0971	Sec. 52.15	02/28/14
3060–0972	FCC 507, FCC 508 and FCC 509, Multi-Association Group (MAG) Plan Order, Parts 54 and 69 Filing Requirements for Regulation of Interstate Services of Non-Price Cap Incumbent LECs and Interexchange Carriers.	02/28/14
3060–0973	Sec. 64.1120(e)	09/30/13
3060–0975	Secs. 68.3 and 1.4000	11/30/13
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3060–0980	Sec. 76.66, Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 1999; (SHVERA) Rules, Local Broadcast Signal Carriage Issues, Retransmission Consent Issues.	07/31/14
3060–0984	Secs. 90.35(b)(2) and 90.175(b)(1)	01/31/14
3060–0986	FCC 525	04/30/15
3060–0987	Sec. 20.18(l)(1)(i–iii) and 20.18(l)(2)(i–iii), 911 Callback Capability; Non-initialized Handsets	09/30/14
3060–0989	Secs. 63.01, 63.03 and 63.04	07/31/14
3060–0991	AM Measurement Data	01/31/15
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3060–0996	AM Auction Section 307(b) Submissions	07/31/14
3060–0997	Sec. 52.15(k)	04/30/14
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3060–0999	Sec. 20.19 and Hearing Aid Compatibility Status Report	12/31/13
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3060–1003	Communications Disaster Information Reporting System (DIRS)	06/30/15
3060–1004	Commission Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems	08/31/12
3060–1005	Numbering Resource Optimization—Phase 3	05/31/14
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3060–1014	Ku-Band NGSO FSS	12/31/14
3060–1015	Ultra Wideband Transmission Systems Operating Under Part 15	01/31/15
3060–1021	Sec. 25.139	03/31/14
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3060–1028	International Signaling Point Code (ISPC)	02/28/14
3060–1029	Data Network Identification Code (DNIC)	02/28/14
3060–1030	Service Rules for Advanced Wireless Services (AWS) in the 1.7 GHz and 2.1 GHz Bands	06/30/13
3060–1031	Commission's Initiative to Implement Enhanced 911 (E911) Emergency Services	10/31/12
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3060–1034	Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service and FCC 335–AM, FCC 335–FM.	06/30/13
3060–1035	FCC 309, FCC 310 and FCC 311, Part 73, Subpart F, International Broadcast Stations	01/31/15
3060–1039	FCC 620 and FCC 621	09/30/14
3060–1042	Request for Technical Support—Help Request Form	08/31/13
3060–1043	Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Report and Order, CC Docket No. 98–67; FCC 04–137.	03/31/14
3060–1044	Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01–338, and WC Docket No. 04–313, FCC 04–290, Order on Remand.	04/30/13
3060–1045	FCC 324 and Sec. 76.1610	02/28/15

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3060–1046	Part 64, Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996.	06/30/14
3060–1047	Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Report and Order, FCC 03–112.	01/31/15
3060–1048	Sec. 1.929(c)(1)	02/28/13
3060–1050	Sec. 97.303	10/31/13
3060–1053	Sec. 64.604, Telecommunications Relay Services, and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Two-Line Captioned Telephone Order.	04/30/13
3060–1054	FCC 422–IB	02/28/13
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3060–1059	Global Mobile Personal Communications by Satellite (GMPCS)/E911 Call Centers	11/30/13
3060–1060	Wireless E911 Coordination Initiative Letter to State 911 Coordinators	11/30/13
3060–1061	Earth Stations on Board Vessels (ESVs)	12/31/12
3060–1062	Schools and Libraries Universal Service Support Mechanism—Notification of Equipment Transfers.	06/30/13
3060–1063	Global Mobile Personal Communications by Satellite (GMPCS) Authorization, Marketing and Importation Rules.	02/28/13
3060–1064	Regulatory Fee Assessment True-Ups	06/30/14
3060–1066	FCC 312–R and Secs. 25.121(e) and 25.131(h)	02/28/13
3060–1067	FCC 312–EZ	03/31/13
3060–1069	Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets, NPRM, MB Docket No. 94–256, FCC 04–173.	05/31/13
3060–1070	Sec. 101.1523 and Allocation and Service Rules for the 71–76 GHz, 81–86 GHz and 92–95 GHz Bands.	10/31/14
3060–1078	Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN–SPAM Act), CG Docket No. 04–53.	11/30/13
3060–1079	Sec. 15.240, Radio Frequency Identification Equipment (RFID)	02/28/14
3060–1080	Improving Public Safety Communications in the 800 MHz Band; TA–13.1 and TA–14.1	09/30/14
3060–1081	Secs. 54.202, 54.209, 54.307, 54.313, 54.314 and 54.809	07/31/14
3060–1084	Rules and Regulations Implementing Minimum Customer Account Record Obligations on All Local and Interexchange Carriers (CARE), CG Docket No. 02–386.	06/30/13
3060–1085	Sec. 9.5, Interconnected Voice Over Internet Protocol (VoIP) E911 Compliance	06/30/15
3060–1086	Secs. 74.786, 74.787, 74.790, 74.794 and 74.796	08/31/14
3060–1087	Sec. 15.615	06/30/14
3060–1088	Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, CG Docket No. 05–338, FCC 06–42.	05/31/13
3060–1089	Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, E911 Requirements for IP–Enabled Service.	12/31/13
3060–1092	FCC 609–T and FCC 611–T	01/31/14
3060–1094	Secs. 27.14 and 27.1221	03/31/14
3060–1095	Surrenders of Authorizations for International Carrier, Space Station and Earth Station Licensees.	01/31/15
3060–1096	Prepaid Calling Card Service Provider Certification, WC Docket No. 05–68	04/30/13
3060–1097	Service Rules and Policies for the Broadcasting Satellite Service (BSS)	11/30/14
3060–1100	Sec. 15.117(k)	06/30/13
3060–1101	Children's Television Requests for Preemption Flexibility	04/30/13
3060–1103	Sec. 76.41	06/30/13
3060–1104	Sec. 83.682(d)	03/31/14
3060–1105	FCC 387	03/31/14
3060–1106	Licensing and Service Rules for Vehicle Mounted Earth Stations (VMES)	12/31/12
3060–1108	Consummations of Assignments and Transfers of Control of Authorization	06/30/13
3060–1110	Sunset of the Cellular Radiotelephone Service Analog Service Requirement and Related Matters, FCC 07–103.	10/31/13
3060–1111	Secs. 225 and 255, Interconnected Voice Over Internet Protocol (VoIP) Services	04/30/14
3060–1112	Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight.	11/30/13
3060–1113	Commercial Mobile Alert System (CMAS)	07/31/14
3060–1115	DTV Consumer Education Initiative; Sec. 73.674, and FCC 388	09/30/12
3060–1116	Submarine Cable Reporting	12/31/14
3060–1120	Service Quality Measurement Plan for Interstate Special Access and Monthly Usage Reporting Requirements (272 Sunset Rulemaking).	09/30/14
3060–1122	Preparation of Annual Reports to Congress for the Collection & Expenditure of Fees or Charges for Enhanced 911 (E911) Services under the NET 911 Improvement Act of 2008.	05/31/15
3060–1124	Sec. 80.231	01/31/15
3060–1126	Sec. 10.350	06/30/15
3060–1127	First Responder Emergency Contact Information in the Universal Licensing System (ULS)	03/31/13
3060–1128	National Broadband Plan Survey of Consumers	03/31/13
3060–1129	Broadband Speed Test and Unavailability Registry	02/28/13
3060–1130	National Broadband Plan Survey of Businesses	02/28/13
3060–1131	Implementation of the NET 911 Improvement Act of 2008: Location Information from Owners and Controllers of 911 and E911 Capabilities.	12/31/12
3060–1133	FCC 308 and Secs. 73.3545 and 73.3580	01/31/13

OMB Control No.	FCC form number or 47 CFR section or part, docket number or title identifying the collection	OMB expiration date
3060–1135	Rules Authorizing the Operation of Low Power Auxiliary Stations (including Wireless Microphones).	08/31/13
3060–1136	Spectrum Dashboard Customer Feedback	08/31/13
3060–1138	Secs. 1.49 and 1.54	04/30/13
3060–1139	Residential Fixed Broadband Services Testing and Measurement	02/28/14
3060–1140	Requests for Waiver of Various Petitioners to Allow the Establishment of 700 MHz Interoperable Public Safety Wireless Broadband Networks, Order, PS Docket No. 06–229, DA 10–2342.	06/30/14
3060–1142	Electronic Tariff Filing System (ETFS),WC Docket No. 10–141, FCC 10–127, NPRM	09/30/13
3060–1143	E–Rate Deployed Ubiquitously (EDU) 2011 Pilot Program	04/30/14
3060–1144	Consumer Survey	02/28/14
3060–1145	Structure and Practices of the Video Relay Service Program, CG Docket No. 10–51	09/30/14
3060–1146	Implementation of the 21st Century Communications and Video Accessibility Act of 2010, Section 105, Relay Services for Deaf-Blind Individuals, CG Docket No. 10–210.	Pending OMB review and approval.
3060–1147	Wireless E911 Phase II Location Accuracy Requirements	05/31/15
3060–1148	Sec. 79.3	Pending OMB review and approval.
3060–1150	Structure and Practices of the Video Relay Service Program, Second Report and Order, CG Docket No. 10–51.	06/30/15
3060–1151	Secs. 1.1420, 1.1422, and 1.1424	01/31/15
3060–1152	Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band (Third Report and Order, PS Docket No. 06–229, FCC 11–6).	06/30/14
3060–1153	Satellite Digital Radio Service (SDARS)	07/31/14
3060–1154	Commercial Advertisement Loudness Mitigation (''CALM'') Act; Financial Hardship and General Waiver Requests.	06/30/15
3060–1155	Secs. 15.713, 15.714, 15.715 and 15.717	02/28/15
3060–1157	Formal Complaint Procedures, Preserving the Open Internet and Broadband Industry Practices, Report and Order, GN Docket No. 09–191 and WC Docket No. 07–52.	09/30/14
3060–1158	Disclosure of Network Management Practices, Preserving the Open Internet and Broadband Industry Practices, Report and Order, GN Docket No. 09–191 and WC Docket No. 07–52.	09/30/14
3060–1159	Part 25—Satellite Communications; and Part 27—Miscellaneous Wireless Communications Services in the 2.3 GHz Band.	09/30/14
3060–1161	Sec. 27.14(g)–(l)	10/31/14
3060–1162	Closed Captioning of Video Programming Delivered Using Internet Protocol, and Apparatus Closed Caption Requirements.	Pending OMB review and approval.
3060–1165	Sec. 74.605	03/31/15
3060–1166	FCC 180	04/30/15
3060–1167	Accessible Telecommunications and Advanced Communications Services and Equipment	04/30/15
3060–1168	FCC 680	04/30/15
3060–1169	Part 11—Emergency Alert System (EAS), Fifth Report and Order, FCC 12–7	11/30/12
3060–1171	Secs. 73.682(e) and 76.607(a), Commercial Advertisement Loudness Mitigation (''CALM'') Act	06/30/15

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 15

[ET Docket Nos. 11–90 and 10–28, RM–11555; FCC 12–72]

Operation of Radar Systems in the 76–77 GHz Band

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document amends the Commission's rules to provide a more efficient use of the 76–77 GHz band, and to enable the automotive and aviation industries to develop enhanced safety measures for drivers and the general public. Specifically, the Commission is eliminating the in-motion and not-in-motion distinction for vehicular radars, and instead adopting new uniform emission limits for forward, side, and rear-looking vehicular radars. This will facilitate enhanced vehicular radar technologies to improve collision avoidance and driver safety. The Commission is also amending its rules to allow the operation of fixed radars at airport locations in the 76–77 GHz band for purposes of detecting foreign object debris on runways and monitoring aircraft and service vehicles on taxiways and other airport vehicle service areas that have no public vehicle access. The Commission takes this action in response to petitions for rulemaking filed by Toyota Motor Corporation (''TMC'') and Era Systems Corporation (''Era'').

DATES: Effective September 12, 2012.

FOR FURTHER INFORMATION CONTACT: Aamer Zain, Office of Engineering and Technology, 202–418–2437, *aamer.zain@fcc.gov*.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, ET Docket Nos. 11–90, 10–28, FCC 11–171, adopted July 3, 2012 and released July 5, 2012. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Center (Room CY–A257), 445 12th Street SW., Washington, DC 20554. The complete text of this document also may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street SW., Room, CY–B402, Washington, DC 20554. The full text may also be downloaded at: *www.fcc.gov*. People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

Summary of Report and Order

1. In the Report and Order (Order), the Commission modified §§ 15.35 and 15.253 of the rules to enable enhanced vehicular radar technologies in the 76–

77 GHz band for improved collision avoidance and driver safety and to allow fixed radar applications at airport locations to improve safety for airport personnel and equipment. With respect to § 15.253, the Commission eliminated the requirement that vehicular radars decrease power when the vehicles on which the radar is mounted is not in motion. In addition, the Commission also modified § 15.253 to specify a new emission limit for 76–77 GHz vehicular radars that will apply to front, side, and rear illuminating vehicular radars. The Commission takes this action in response to petitions for rulemaking filed by Toyota Motor Corporation (TMC) and Era Systems Corporation (Era).

2. The Commission also modified § 15.253 to allow fixed radar applications in the 76–77 GHz band at airport locations. These fixed radars can detect foreign object debris (FOD) on runways and monitor aircraft traffic as well as service vehicles on taxiways and other airport vehicle service areas that have no public access. The modifications to the rules that the Commission adopted will provide more efficient use of the spectrum, and enable the automotive and aviation industries to develop enhanced safety measures for drivers and the general public.

3. The 76–77 GHz band, which is allocated to the Radio Astronomy service (RAS) and the Radiolocation service on a primary basis and to the Amateur and Space research (space-to-Earth) services on a secondary basis, is in the region of the radiofrequency spectrum known as ''millimeter wave'' spectrum. The frequencies above 30 GHz are commonly called millimeter wave frequencies because of their wavelength. At these frequencies, radio propagation decreases more rapidly with distance than at other frequencies and antennas that can narrowly focus transmitted energy are practical and of modest size. While the limited range of such transmissions might appear to be a major disadvantage for many applications, it does allow the reuse of frequencies within very short distances and, thereby enables a higher concentration of transmitters to be located in a geographical area than is possible at lower frequencies.

4. On July 21, 2009, the Toyota Motor Corporation (TMC) filed a petition for rulemaking requesting that the Commission modify the emission limits for vehicular radar systems operating within the 76–77 GHz band. Specifically, TMC requested that the Commission eliminate the in-motion and not-in-motion distinctions in the emission limits for vehicular radar systems and establish a single emission limit that applies in all directions from a vehicle. On September 8, 2009, Era filed comments in CB Docket No. 09–102 requesting that the Commission amend § 15.253 to permit fixed use of 76–77 GHz radars at airports for monitoring air traffic and airport service vehicles only. Emissions from these fixed radars would not illuminate any public access roads.

5. On May 24, 2011, the Commission issued a *Notice of Proposed Rule Making (NPRM),* 77 FR 35176, June 16, 2011, in which it sought public comment on proposed amendments to §§ 15.35 and 15.253 of the rules regarding operation within the 76.0–77.0 GHz band. Specifically, the *NPRM* proposed modifications to § 15.253 to increase the average power density limit to 88 μW/cm² at 3 m (average EIRP of 50 dBm) and to decrease the peak power density limit to 279 μW/cm² at 3 m (peak EIRP of 55 dBm) regardless of the illumination direction of the vehicular radar, and to eliminate the in-motion and not-in-motion distinction for vehicles equipped with such radars. In the NPRM, the Commission also proposed to allow fixed radars to operate in the 76–77 GHz band in addition to vehicular radar systems, and to require that such fixed radar systems meet the proposed limits for vehicular radar systems.

6. The Commission finds that the 76–77 GHz band is well suited for unlicensed use by vehicular radar technologies and by fixed radar systems limited to airport locations, and are adopting the proposed modifications to §§ 15.35 and 15.253 accordingly. The modifications to the rules that the Commission adopted are intended to foster the development of improved radar systems that will offer significant safety benefits to the public. Studies show that use of collision avoidance technology can prevent or lessen the severity of a significant number of traffic accidents. By modifying our rules for 76–77 GHz radars to align generally with international automotive industry standards, the Commission expects these life-saving devices to be placed on more passenger vehicles by enabling economies of scale. Furthermore, it believes that the changes in power levels and use as discussed will not result in a significant increase in the potential of interference to other users of the 76–77 GHz band. The Commission notes that these rule changes facilitate expanded use of existing technologies and do not appear to impose any new costs. While no party has provided any specific data, these technologies have the potential to help avoid accidents thereby save lives and damage to property.

7. The Commission also finds that the use of 76–77 GHz fixed radars at airports for detecting foreign objects on runways, as well as for monitoring aircraft and service vehicles on taxiways and other airport vehicle service areas that have no public access (*e.g.,* gate areas) to be in the public interest and compatible with vehicular radar use. The Commission finds that the benefits of allowing fixed radar systems at airports for these applications will improve the safety of the general public and airport personnel without increasing the potential for inference to licensed users. The Commission notes that these rule changes enable expanded use of existing technologies and do not appear to impose any new costs. Recent studies estimate the annual direct and indirect cost to U.S. aviation industry caused by the FOD damage to be approximately $1 billion and $4 billion, respectively. Enhanced technologies for FOD detection and for other airport monitoring services will help prevent accidents and substantially mitigate damage attributable to FOD.

Vehicular Radars

8. *Proposal.* In the *NPRM,* the Commission proposed to modify § 15.253 to eliminate the in-motion and not-in-motion distinction for vehicular radars and to adopt uniform emission limits for forward, side, and rear-looking radars. In lieu of separate emission limits for in-motion and not-in-motion, the Commission proposed to increase the average power density limit to 88 μW/cm² at 3 meters (average EIRP of 50 dBm) and to decrease the peak power density limit to 279 μW/cm² at 3 meters (peak EIRP of 55 dBm) for vehicular radar systems regardless of the direction of illumination. The Commission also sought comment on TMC's request to modify § 15.253 to specify a limit on peak EIRP instead of average power density in addition to, or as an alternative to, the limits currently specified in the rules. Furthermore, because the Commission proposed to modify § 15.253(b) to specify a peak emission limit that is less than 20 dB above the average limit, it also proposed to modify § 15.35(b) to specify that the 20 dB peak to average limit does not apply to vehicular radars authorized under § 15.253(b).

9. *Decision.* The Commission modified § 15.253 to (1) Eliminate the in-motion and not-in-motion distinction for vehicular radars, (2) adopt a single set of emission limits for forward, side, and rear-looking radars, and (3) amend the emission limits for vehicular radars

to specify the average and peak radiated emission limits as both EIRP and a power density limit of 88 μW/cm ² at 3 m (average EIRP of 50 dBm) and 279 μW/cm ² at 3m (peak EIRP of 55 dBm), respectively. In light of this, the Commission modified § 15.35(b) to specify that the 20 dB peak limit provision will no longer apply to vehicular radars in the 76–77 GHz band. Devices operating under the provisions of these rules continue to be subject to the radiofrequency radiation exposure requirements specified in §§ 1.1307(b), 2.1091 and 2.1093 of the FCC rules, as appropriate.

10. The Commission finds that the new set of emission limits will not measurably increase potential for interference from vehicular radar systems to RAS operations in the 76–77 GHz band. First, the reduced peak limit adopt for vehicular radars will increase the level of interference protection afforded to RAS system because it is lower than the current peak limit. Second, the average power limit is being increased by only 1.7 dB from the current maximum for vehicular radars in the 76–77 GHz band, i.e., from 48.3 dBm to 50 dBm. Under worst-case free space conditions a 1.7 dB increase is only a 1.2-fold increase in signal range. The very short distances that these radars operate under, plus the propagation characteristics of the band, translate in practice to a minimal increase in interference potential that the Commission does not believe will yield any increase in actual interference to RAS operations. Because the radio astronomy observatories typically have control over access to a distance of one kilometer from the telescopes to provide protection from interference caused by automobile spark plugs and other uncontrolled RFI sources, the potential for interference caused by the incremental increase in average power limits at that distance (one kilometer) would be negligible. Furthermore, the effect of an increase in average power level of 1.7 dB is negligible when also taking into account the variability in propagation characteristics due to terrain, weather and other propagation factors.

11. The Commission agrees with the automotive industry that given the horizontal direction of vehicular radar beams, the propagation characteristics of terrain and the geographical location of the RAS equipment, the modified emission limits pose no additional risk of interference or damage to the RAS equipment compared to the current rules. Accordingly, it believes that there is no need to restrict vehicular radar systems based on coordination zones or to impose requirements for a GPS-aware automatic or a user operated cut-off switch.

12. The National Telecommunications and Information Administration (NTIA) noted that the National Science Foundation (NSF)-sponsored a study documenting measurements performed jointly by representatives from the radio astronomy community and several vehicular radar manufacturers. The measurements performed using the University of Arizona's 12 Meter Telescope located at Kitt's Peak examined the impact that vehicular radar emissions would have on radio astronomy installations. Emissions of two different vehicular radars manufactured by Robert Bosch GmbH and Continental Corporation were measured in the adjacent 77–80 GHz band. The measurements of the emissions from a single vehicular radar system at two distances (1.7 km and 26.9 km from the radio astronomy installation) indicated that the received signal level at the radio astronomy installation exceeded the protection criteria specified in Recommendation International Telecommunication Union Radiocommunications Sector (ITU–R) RA.769–2. The study acknowledges that mitigation factors such as terrain shielding, orientation of the vehicular radar transmitter antenna with respect to the observatory, or attenuation of the vehicular radar transmitter if mounted behind the vehicle bumper were not taken into account and would tend to reduce the distance at which interference occurred. NTIA requested that this study be included as part of the public record for this proceeding, and asked that the Commission encourage the radio astronomy community and the vehicular radar manufacturers to continue this cooperative effort to examine and implement mitigation techniques that can be employed to address the potential interference concerns. The Commission recognizes the concerns of the radio astronomy community in both the 76–77 GHz band at issue in this proceeding and in the 77–80 GHz band examined in the study. As discussed, the Commission's rules have permitted vehicular radars to operate in the 76–77 GHz band since 1995. Further, it expects any increase in potential interference in the 76–77 GHz band as a result of the technical rules changes the Commission makes here to be negligible when compared to the overall effect caused by the variability in propagation characteristics due to terrain, weather and other propagation factors. The Commission has not found anything in the NSF study that suggests that the increase in the potential for harmful interference resulting from these rule revisions will not be negligible. Further, it always encourage cooperation between parties with respect to compatibility of systems that use the radio spectrum, thus we specifically encourage continued cooperation between the radio astronomy community and the vehicular radar industry.

13. Finally, the Commission agrees with the commenters that there has been significant growth in the use of automobile radar systems, and it anticipates that these systems will become relatively commonplace within a few years because of consumer demand for increased vehicle safety. The Commission believes that these developments will make automotive safety and convenience more affordable and readily available to the public, as the automotive industry will be able to develop new and improved vehicular radars with no measurable increase in potential interference to licensed services.

Fixed Radar in the 76–77 GHz Band

14. *Proposal.* The Commission proposed to allow the use of fixed radar systems at any location rather than restrict their use to only airport locations, as requested by Era in its petition for rulemaking. It stated that Era's proposal to limit fixed radar operations to specific locations such as airports or other places where fixed radars would not illuminate public roads may be overly restrictive and could cause unnecessary burdens to the public if implemented. The Commission stated that fixed radars operating at the same maximum power levels as vehicular-mounted radars would be even less likely to interfere with the RAS and Radiolocation services than vehicle-mounted radars because the locations where they are used would not change. It stated that fixed radars should be able to co-exist with vehicular radars because they both would operate with the same power level and use antennas with narrow beamwidths, thus reducing the chances that the signal from one radar would be within the main lobe of the receive antenna of the other. In a worst-case scenario, where two radars are aiming directly at each other, fixed radar should have no more impact on a vehicular radar system than another vehicular system would.

15. The Commission sought comment on whether it should allow unlicensed fixed radar applications to operate within the 76–77 GHz band at the same power levels as those proposed for vehicular radars. The Commission also

sought comment on whether there is a need to limit fixed radar applications to specific locations such as airports and/or locations where they are not aimed at publicly accessible roads, or if some alternative criteria would be more appropriate.

16. *Comments.* The commenters overwhelmingly opposed the use of fixed radar applications in the 76–77 GHz band without regard to location as proposed by the Commission, although some argued that fixed radars could be permitted for airport use only. The opponents cited increased interference potential to vehicular radars and a lack of technical analysis and study for fixed radar in the 76–77 GHz band.

17. *Decision.* The Commission modified § 15.253 of its rules to allow the operation of fixed radars at airport locations with the same emission limits as those for vehicular radars in the 76–77 GHz band for purposes of detecting foreign object debris on runways and monitoring aircraft and service vehicles on taxiways and other airport vehicle service areas that have no public vehicle access (*e.g.,* gate areas). Limiting the location of fixed radars in this way should prevent them from illuminating public roads, and thus reduce the likelihood of interference to vehicular radars while enabling airports to better monitor airport service vehicles and taxiways and to improve debris detection on the runways.

18. Moreover, airports are challenged with managing increasing congestion on the ground. This rule modification will add to the tools that enhance an airport's ability to determine the location of airplanes and airport ground vehicles that are operating in taxiways and runways. The presence of FOD in an airport's air operations area (AOA) poses a significant threat to the safety of air travel. Foreign object debris on taxiways and runways has the potential to damage aircraft during the critical phases of takeoffs and landings, which can lead to catastrophic loss of life and at the very least increased maintenance and operating costs. This rule modification will help reduce FOD hazards through the implementation of a FOD management program and the effective use of FOD detection and removal equipment.

19. The Commission disagrees with the commenters who state that only vehicular radars should be allowed to operate under the part 15 rules. It concludes that both vehicular radars and fixed radars at airports, under the limited circumstances we are providing for here, will be able to operate successfully in the 76–77 GHz band. Airport runways, taxiways and other non-public areas at airports are generally not near public roadways, and fixed radars at airports should not illuminate public roadways in the vicinity. With respect to the use of fixed radars outside of airports, we continue to believe that vehicular radars should be able to share the band with fixed radars operating at the same levels and note that there are no conclusive test results indicating that there would be incompatibility issues between the two types of radars. The Commission recognizes, however, that no parties have come forward to support fixed radar applications beyond airport locations in this band. Therefore, in the absence of a clear demand, the Commission is not adopting provisions for unlicensed fixed radar operations outside of airport locations in the 76–77 GHz band at this time.

Procedural Matters

Paperwork Reduction Analysis

20. This document does not contain a proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA, Pub. L. 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).

Final Regulatory Flexibility Analysis

21. As required by the Regulatory Flexibility Act (RFA),[1] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rulemaking* (NPRM) in this Docket 11–90.[2] The Commission sought written public comment on the proposals in the NPRM, including comment on the IRFA. As described more fully, the Commission finds that the rules it adopted in the Report and Order will not have a significant economic impact on a substantial number of small entities.[3] The Commission did not receive comments from The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO). It has nonetheless provided this Final Regulatory Flexibility Analysis (FRFA) to provide a fuller record in this proceeding. This FRFA conforms to the RFA.[4]

Need for, and Objectives of, the Report and Order

22. On May 24, 2011, the Commission released a NPRM seeking comments regarding petitions for rulemaking filed by Toyota Motor Corporation (TMC) and Era Systems Corporation (Era) requesting modifications to § 15.253 of the rules for vehicular radar systems operating in the 76–77 GHz band. Vehicular radars can determine the exact distance and relative speed of objects in front of, beside, or behind a car to improve the driver's ability to perceive objects under bad visibility conditions or objects that are in blind spots. Some examples of vehicular radar systems include collision warning and mitigation systems, blind spot detection systems, lane change assist and parking aid systems. The NPRM proposed to eliminate the requirement that vehicular radars decrease power when the vehicle on which the radar is mounted is stopped, or not in motion, and to expand the use of unlicensed 76–77 GHz band radars to fixed infrastructure systems. These modifications to the rules will provide more efficient use of spectrum, and enable the automotive radar application industries and fixed radar applications, operating at airports only, to develop enhanced safety measures for drivers and the general public. In addition, these modifications would make the rules governing the vehicle radars in United States more comparable to those outside the United States and benefit the automotive and aviation industries in terms of enabling new product development and cost reduction.

Summary of Significant Issues Raised by Public Comments in Response to the IRFA

23. There were no public comments filed that specifically addressed the rules and policies in the IRFA.

Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration

24. Pursuant to the Small Business Jobs Act of 2010, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration, and to provide a detailed statement of any change made to the proposed rules as a result of those comments. The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

[1] *See* 5 U.S.C. 603. The RFA, *see* 5 U.S.C. 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Public Law 104–121, Title II, 110 Stat. 857 (1996), and the Small Business Jobs Act of 2010, Public Law 111–240, 124 Stat. 2504 (2010).

[2] *NPRM,* 26 FCC Rcd 8107.

[3] Thus, we could certify that an analysis is not required. *See* 5 U.S.C. 605(b).

[4] *See* 5 U.S.C. 604.

Small Businesses, Small Organizations and Small Governmental Jurisdictions

25. Our action may, over time, affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive, statutory small entity size standards.[5] First, nationwide, there are a total of approximately 27.5 million small businesses, according to the SBA.[6] In addition, a ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' [7] Nationwide, as of 2007, there were approximately 1.6 million small organizations.[8] Finally, the term ''small governmental jurisdiction'' is defined generally as ''governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' [9] Census Bureau data for 2007 indicate that there were 89,476 local governmental jurisdictions in the United States.[10] We estimate that, of this total, as many as 88,506 entities may qualify as ''small governmental jurisdictions.'' [11]

Radio Broadcasting

26. This Economic Census category ''comprises establishments primarily engaged in broadcasting aural programs by radio to the public. Programming may originate in their own studio, from an affiliated network, or from external sources.'' [12] The SBA has established a small business size standard for this category, which is: Such firms having $7 million or less in annual receipts.[13] According to Commission staff review of BIA Publications, Inc.'s *Master Access Radio Analyzer Database* on March 31, 2005, about 10,840 (95%) of 11,410 commercial radio stations had revenues of $6 million or less. Therefore, the majority of such entities are small entities.

27. We note, however, that in assessing whether a business concern qualifies as small under the above size standard, business affiliations must be included.[14] In addition, to be determined to be a ''small business,'' the entity may not be dominant in its field of operation.[15] We note that it is difficult at times to assess these criteria in the context of media entities, and our estimate of small businesses may therefore be over-inclusive.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

28. Radars operating in the 76–77 GHz band are required to be authorized under the Commission's certification procedure as a prerequisite to marketing and importation, and the Report and Order proposes no change to that requirement. *See* 47 CFR 15.101, 15.201, 15.305, and 15.405. The changes adopted in this proceeding would not change any of the current reporting or recordkeeping requirements. However, it will eliminate the requirement that a radar must reduce power when a vehicle is not in motion and to establish a single emission limit that applies in all directions from a vehicle. It also expands the use of unlicensed 76–77 GHz band radars to fixed infrastructure systems at airport locations only.

Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

29. 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 coverage of the rule, or any part thereof, for small entities.[16]

30. At this time the Commission believes that the new rules adopted in this Report and Order are deregulatory in nature, which we expect will simplify compliance requirements for all parties, particularly small entities, and permit the development of improved radar systems. Elimination of requirement for radars to reduce power when a vehicle is not in motion will simplify equipment design, and establishment of a single emission limit that applies in all directions from a vehicle would allow the development of omni-directional monitoring systems. The allowance of unlicensed fixed radar systems in the 76–77 GHz band at airport locations only along with the unlicensed vehicular radars will improve spectrum efficiency and promote collaboration for shared unlicensed spectrum. We believe that the adopted rules will apply equally to large and small entities. Therefore, there is no inequitable impact on small entities.

Report to Congress

31. The Commission will send a copy of the Report and Order, including this FRFA, in a report to Congress pursuant to the Congressional Review Act.[17] In addition, the Commission will send a copy of the Report and Order, including this FRFA, to the Chief, Counsel for Advocacy of the SBA.

Ordering Clauses

32. Pursuant to sections 1, 2, 4(i), 301, 302, and 303(f) of the Communications Act of 1934, 47 U.S.C. 151, 152, 154(i), 301, 302a, and 303(f), that this Report and Order is hereby *adopted.*

33. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

34. *It is further ordered* that these proceedings, ET Docket No. 11–90 and ET Docket No. 10–28, *are hereby terminated.*

List of Subjects in 47 CFR Part 15

Communications equipment, Radio.

[5] *See* 5 U.S.C. 601(3)–(6).

[6] *See* SBA, Office of Advocacy, ''Frequently Asked Questions,'' web.sba.gov/faqs (last visited May 6, 2011; figures are from 2009).

[7] 5 U.S.C.601(4).

[8] Independent Sector, The New Nonprofit Almanac & Desk Reference (2010).

[9] *See* 5 U.S.C. 601(5).

[10] U.S. Census Bureau, Statistical Abstract of the United States: 2012, Section 8, at 267, Table 428.

[11] The 2007 U.S Census data for small governmental organizations indicate that there were 89,476 ''Local Governments'' in 2007. (*U.S. Census Bureau, Statistical Abstract of the United States 2012,* Table 428.) The criterion by which the size of such local governments is determined to be small is a population of 50,000. However, since the Census Bureau does not specifically apply that criterion, it cannot be determined with precision how many of such local governmental organizations is small. Measured by a criterion of a population of 50,000, many specific sub-entities in this category seem more likely than larger county-level governmental organizations to have small populations. Accordingly, of the 89,746 small governmental organizations identified in the 2007 Census, the Commission estimates that a substantial majority is small.

[12] U.S. Census Bureau, 2007 NAICS Definitions, ''515112 Radio Stations''; *http://www.census.gov/naics/2007/def/ND515112.HTM#N515112*.

[13] 13 CFR 121.201, NAICS code 515112 (updated for inflation in 2008).

[14] ''Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists.'' 13 CFR 121.103(a)(1) (an SBA regulation).

[15] 13 CFR 121.102(b) (an SBA regulation).

[16] *See* 5 U.S.C. 603(c).

[17] *See* 5 U.S.C. 801(a)(1)(A).

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Final rules

For the reasons set forth in the preamble, the Federal Communications Commission amends part 15 of Title 47 of the Code of Federal Regulations to read as follows:

PART 15—RADIO FREQUENCY DEVICES

■ 1. The authority citation for part 15 continues to read as follows:

Authority: 47 U.S.C. 154, 302a, 303, 304, 307, 336, 544a and 549.

■ 2. Section 15.35 is amended by revising paragraph (b) to read as follows:

§ 15.35 Measurement detector functions and bandwidths.

* * * * *

(b) Unless otherwise specified, on any frequency or frequencies above 1000 MHz, the radiated emission limits are based on the use of measurement instrumentation employing an average detector function. Unless otherwise specified, measurements above 1000 MHz shall be performed using a minimum resolution bandwidth of 1 MHz. When average radiated emission measurements are specified in this part, including average emission measurements below 1000 MHz, there also is a limit on the peak level of the radio frequency emissions. Unless otherwise specified, *e.g.,* see §§ 15.250, 15.252, 15.253(d), 15.255, and 15.509–15.519, the limit on peak radio frequency emissions is 20 dB above the maximum permitted average emission limit applicable to the equipment under test. This peak limit applies to the total peak emission level radiated by the device, *e.g.,* the total peak power level. Note that the use of a pulse desensitization correction factor may be needed to determine the total peak emission level. The instruction manual or application note for the measurement instrument should be consulted for determining pulse desensitization factors, as necessary.

* * * * *

■ 3. Section 15.253 is revised to read as follows:

§ 15.253 Operation within the bands 46.7–46.9 GHz and 76.0–77.0 GHz.

(a) Operation within the band 46.7–46.9 GHz is restricted to vehicle-mounted field disturbance sensors used as vehicle radar systems. The transmission of additional information, such as data, is permitted provided the primary mode of operation is as a vehicle-mounted field disturbance sensor. Operation under the provisions of this section is not permitted on aircraft or satellites.

(b) The radiated emission limits within the bands 46.7–46.9 GHz are as follows:

(1) If the vehicle is not in motion, the power density of any emission within the bands specified in this section shall not exceed 200 nW/cm^2 at a distance of 3 meters from the exterior surface of the radiating structure.

(2) For forward-looking vehicle mounted field disturbance sensors, if the vehicle is in motion the power density of any emission within the bands specified in this section shall not exceed 60 μW/cm^2 at a distance of 3 meters from the exterior surface of the radiating structure.

(3) For side-looking or rear-looking vehicle-mounted field disturbance sensors, if the vehicle is in motion the power density of any emission within the bands specified in this section shall not exceed 30 μW/cm^2 at a distance of 3 meters from the exterior surface of the radiating structure.

(4) The provisions in § 15.35 limiting peak emissions apply.

(c) Operation within the band 76.0–77.0 GHz is restricted to vehicle-mounted field disturbance sensors used as vehicle radar systems and to fixed radar systems used at airport locations for foreign object debris detection on runways and for monitoring aircraft as well as service vehicles on taxiways and other airport vehicle service areas that have no public vehicle access. The transmission of additional information, such as data, is permitted provided the primary mode of operation is as a field disturbance sensor. Operation under the provisions of this section is not permitted on aircraft or satellites.

(d) The radiated emission limits within the band 76.0–77.0 GHz are as follows:

(1) The average power density of any emission within the bands specified in this section shall not exceed 88 μW/cm^2 at a distance of 3 meters from the exterior surface of the radiating structure (average EIRP of 50 dBm).

(2) The peak power density of any emission within the band 76–77 GHz shall not exceed 279 μW/cm^2 at a distance of 3 meters from the exterior surface of the radiating structure (peak EIRP of 55 dBm).

(e) The power density of any emissions outside the operating band shall consist solely of spurious emissions and shall not exceed the following:

(1) Radiated emissions below 40 GHz shall not exceed the general limits in § 15.209.

(2) Radiated emissions outside the operating band and between 40 GHz and 200 GHz shall not exceed the following:

(i) For field disturbance sensors operating in the band 46.7–46.9 GHz: 2 pW/cm^2 at a distance of 3 meters from the exterior surface of the radiating structure.

(ii) For field disturbance sensors operating in the band 76–77 GHz: 600 pW/cm^2 at a distance of 3 meters from the exterior surface of the radiating structure.

(3) For radiated emissions above 200 GHz from field disturbance sensors operating in the 76–77 GHz band: the power density of any emission shall not exceed 1000 pW/cm^2 at a distance of 3 meters from the exterior surface of the radiating structure.

(4) For field disturbance sensors operating in the 76–77 GHz band, the spectrum shall be investigated up to 231 GHz.

(f) Fundamental emissions must be contained within the frequency bands specified in this section during all conditions of operation. Equipment is presumed to operate over the temperature range −20 to +50 degrees Celsius with an input voltage variation of 85% to 115% of rated input voltage, unless justification is presented to demonstrate otherwise.

(g) Regardless of the power density levels permitted under this section, devices operating under the provisions of this section are subject to the radiofrequency radiation exposure requirements specified in §§ 1.1307(b), 2.1091 and 2.1093 of this chapter, as appropriate. Applications for equipment authorization of devices operating under this section must contain a statement confirming compliance with these requirements for both fundamental emissions and unwanted emissions. Technical information showing the basis for this statement must be submitted to the Commission upon request.

[FR Doc. 2012–19732 Filed 8–10–12; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 79

[CG Docket No. 11–175; FCC 12–83]

Closed Captioning and Video Description of Video Programming

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) determines that the four factors contained in section 713(e) of the Communications Act of 1934, as amended (Act) will continue to apply when evaluating individual requests for closed captioning exemptions under section 713(d)(3) and our corresponding rules, notwithstanding a change in terminology in the statute, enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA), which replaced the term ''undue burden'' in that section with the term ''economically burdensome.'' The Order further amends the Commission's rules to replace all current references to ''undue burden'' with the term ''economically burdensome.'' These rule amendments correspond with the new statutory language in the CVAA requiring petitioners seeking individual closed captioning exemptions under section 713(d)(3) of the Act to show that providing captions on their programming would be economically burdensome.

DATES: Effective September 12, 2012.

FOR FURTHER INFORMATION CONTACT: Karen Peltz Strauss, Deputy Chief, Consumer and Governmental Affairs Bureau; phone: (202) 418–2388; email: *Karen.Strauss@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, document FCC 12–83, adopted on July 19, 2012, and released on July 20, 2012. The full text of document FCC 12–83 is available for inspection and copying during normal business hours in the FCC Reference Information Center, Room CY–A257, 445 12th Street SW., Washington, DC 20554. The complete text may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street SW., Room CY–B402, Washington, DC 20554, (202) 488–5300, facsimile (202) 488–5563, or via email at *fcc@bcpiweb.com.* The complete text is also available on the Commission's Web site at *http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0720/FCC-12-83A1.doc.* To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

Paperwork Reduction Act of 1995 Analysis

Document FCC 12–83 does not contain new or modified information collection(s) 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).

Synopsis

1. In 1996, Congress added section 713 to the Act (47 U.S.C. 613) establishing requirements for closed captioning on video programming to ensure access by persons with hearing disabilities to television programming and directing the Commission to prescribe rules to carry out this mandate. The Commission's closed captioning rules currently require video programming distributors to caption one-hundred percent of all new, non-exempt English and Spanish language programming.

2. Section 713 of the Act authorizes the Commission to grant individual exemptions from the closed captioning requirements. As originally enacted, section 713 of the Act authorized the Commission to grant individual closed captioning exemptions on a case-by-case basis upon a showing that the provision of closed captions would ''result in an undue burden.'' 47 U.S.C. 613(d)(3). Section 713(e) of the Act defined ''undue burden'' to mean ''significant difficulty or expense,'' and directed the Commission to consider four factors in making an undue burden determination. Those factors are: (1) The nature and cost of the closed captions for the programming; (2) the impact on the operation of the provider or program owner; (3) the financial resources of the provider or program owner; and (4) the type of operations of the provider or program owner.

3. In October 2010, Congress adopted the CVAA, in which it amended section 713(d)(3) of the Act by replacing the ''undue burden'' terminology with the term ''economically burdensome.'' Congress did not change the definition of ''undue burden'' contained in section 713(e) of the Act or the four factors to be considered in evaluating individual petitions. As a result, on October 20, 2011, the Commission adopted an *Order,* published at 76 FR 67376, November 1, 2011 and at 76 FR 67377, November 1, 2011, offering provisional guidance on how it would interpret this statutory change and a *Notice of Proposed Rulemaking* (the NPRM), published at 76 FR 67397, November 1, 2011, proposing to amend § 79.1 of its rules to replace the term ''undue burden'' with the term ''economically burdensome.'' In neither the *Order* nor the NPRM did the Commission make or propose to make any substantive change in the standard for evaluating individual exemption petitions or the factors it would consider when deciding these petitions.

4. In response to the NPRM, the Commission received a single comment filed jointly by Telecommunications for the Deaf and Hard of Hearing, Inc., the National Association of the Deaf, the Deaf and Hard of Hearing, the Consumer Advocacy Network, the Association of Late-Deafened Adults, the Hearing Loss Association of America, and the Cerebral Palsy and Deaf Organization (Consumer Groups). Consumer Groups agreed with the Commission's proposed interpretation of the economically burdensome standard and concluded that it was consistent with Congress's expressed and unambiguous intent.

5. In document FCC 12–83, the Commission concludes that, for purposes of evaluating individual exemptions under section 713(d)(3) of the Act, Congress intended the term ''economically burdensome'' to be synonymous with the term ''undue burden'' as defined by section 713(e) of the Act and as interpreted and applied in Commission rules and precedent. This conclusion is supported by the CVAA itself, which preserves, unchanged, the language in section 713(e) defining an ''undue burden'' and enumerating the factors to be considered in an ''undue economic burden'' analysis, and by the CVAA's legislative history, which encouraged the Commission in its determination of ''economically burdensome'' petitions to continue using these factors in assessing individual exemption requests.

6. Accordingly, document FCC 12–83 concludes that in changing the terminology from ''undue burden'' to ''economically burdensome'' in section 713(d)(3) of the Act, Congress did not intend any substantive change to the criteria that the Commission consistently has used for individual closed captioning petitions. It notes that this interpretation is consistent with the manner in which the Commission has interpreted the term ''economically burdensome'' in other recent Commission rules adopted pursuant to the CVAA governing the delivery of closed captioning on video programming delivered using Internet

protocol and rules governing video description, and concludes that the Commission and CGB under delegated authority, will continue to evaluate individual exemption petitions filed under section 713(d)(3) of the Act using the four factors set forth in section 713(e) of the Act.

Final Regulatory Flexibility Act Certification

7. The Regulatory Flexibility Act of 1980, as amended (RFA), (5 U.S.C. 601–612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, Title II, 110 Stat. 857 (1996)), requires that a regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that ''the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities'' (5 U.S.C. 605(b)). 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 U.S.C. 601(6)). In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act (5 U.S.C. 601(3)). 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) (15 U.S.C. 632).

8. In document FCC 12–83, the Commission conforms the terminology used in § 79.1(f) of the Commission's rules to the requirements of section 202 of the CVAA. Under the rule amendments adopted herein, a petitioner seeking an exemption from the closed captioning requirements will have to demonstrate that compliance with such captioning requirements would be ''economically burdensome'' as mandated by the CVAA. Prior to this amendment, the Act and our rules required a petitioner to show that complying with the captioning requirements would constitute an ''undue burden.'' In mandating this change in terminology, the Commission concludes that Congress intended no substantive change to the factors used to evaluate individual petitions for closed captioning exemptions. Because no substantive changes to the Commission's rules or procedures were contemplated by the NPRM, the Commission concluded in the NPRM that the proposed change in our rules to reflect the terminology adopted by Congress in section 202 of the CVAA would have no economic impact on small business entities or consumers and included in the NPRM an Initial Regulatory Flexibility Certification.

9. No comments were received concerning the Certification, and the *Report and Order* finds no reason to change the Commission's conclusions as contained in that Certification. Therefore, the Commission certifies that the rule amendments adopted in document FCC 12–83 will not have a significant economic impact on a substantial number of small entities. The amendments contain no new obligations or prohibitions. Nor do they remove any requirements or have substantive implications of any sort. They simply change the nomenclature utilized by the Commission's rules to describe the showing that must be made by petitioners to warrant exemptions from the closed captioning requirements, as mandated by Congress in section 202 of the CVAA. In addition, document FCC 12–83, including a final certification, will be sent to the Chief Counsel for Advocacy of the SBA.

Congressional Review Act

10. The Commission will send a copy of document FCC 12–83, including a copy of this Final Regulatory Flexibility Certification, in a report to Congress pursuant to the Congressional Review Act (5 U.S.C. 801(a)(1)(A)).

Ordering Clauses

11. Pursuant to sections 4(i), 303(r) and 713 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r) and 613, document FCC 12–83 *is adopted* and the Commission's rules *are hereby amended.*

12. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of document FCC 12–83, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

13. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of document FCC 12–83, in a report to Congress and the Government Accountability Office pursuant to the Congressional Review Act.

List of Subjects in 47 CFR Part 79

Cable television, Closed captioning.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 part 79 as follows:

PART 79—CLOSED CAPTIONING OF VIDEO PROGRAMMING

■ 1. The authority citation for part 79 continues to read as follows:

Authority: 47 U.S.C. 151, 152(a), 154(i), 303, 309, 310, 330, 544a, 613, 617.

■ 2. Amend § 79.1 by revising paragraph (d)(2), the heading of paragraph (f), and paragraphs (f)(1) through (4), (f)(10), and (f)(11) to read as follows:

§ 79.1 Closed captioning of video programming.

* * * * *

(d) * * *

(2) *Video programming or video programming provider for which the captioning requirement has been waived.* Any video programming or video programming provider for which the Commission has determined that a requirement for closed captioning is economically burdensome on the basis of a petition for exemption filed in accordance with the procedures specified in paragraph (f) of this section.

* * * * *

(f) *Procedures for exemptions based on economically burdensome standard.* (1) A video programming provider, video programming producer or video programming owner may petition the Commission for a full or partial exemption from the closed captioning requirements. Exemptions may be granted, in whole or in part, for a channel of video programming, a category or type of video programming, an individual video service, a specific video program or a video programming provider upon a finding that the closed captioning requirements will be economically burdensome.

(2) A petition for an exemption must be supported by sufficient evidence to demonstrate that compliance with the requirements to closed caption video programming would be economically burdensome. The term ''economically burdensome'' means significant difficulty or expense. Factors to be considered when determining whether the requirements for closed captioning are economically burdensome include:

(i) The nature and cost of the closed captions for the programming;

(ii) The impact on the operation of the provider or program owner;

(iii) The financial resources of the provider or program owner; and

(iv) The type of operations of the provider or program owner.

(3) In addition to these factors, the petition shall describe any other factors the petitioner deems relevant to the Commission's final determination and any available alternatives that might

constitute a reasonable substitute for the closed captioning requirements including, but not limited to, text or graphic display of the content of the audio portion of the programming. The extent to which the provision of closed captions is economically burdensome shall be evaluated with regard to the individual outlet.

(4) An original and two (2) copies of a petition requesting an exemption based on the economically burdensome standard, and all subsequent pleadings, shall be filed in accordance with § 0.401(a) of this chapter.

* * * * *

(10) The Commission may deny or approve, in whole or in part, a petition for an economically burdensome exemption from the closed captioning requirements.

(11) During the pendency of an economically burdensome determination, the video programming subject to the request for exemption shall be considered exempt from the closed captioning requirements.

* * * * *

[FR Doc. 2012–18898 Filed 8–10–12; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. NHTSA–2012–0112]

Federal Motor Vehicle Safety Standards; Motorcycle Helmets

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Final rule; grant of petition for reconsideration.

SUMMARY: This document responds to a petition for reconsideration of a final rule issued by this agency on May 13, 2011. The final rule amended the Federal Motor Vehicle Safety Standard for motorcycle helmets. Specifically, the final rule amended the helmet labeling requirements and compliance test procedures in order to make it more difficult to misleadingly label novelty helmets and to aid the agency in enforcing the standard. This document addresses issues raised in a petition for reconsideration relating to early compliance with the amended requirements.

DATES: *Effective date:* The effective date of the final rule amending 49 CFR part 571 published at 76 FR 28132, May 13, 2011, is May 13, 2013.

Compliance date: Voluntary early compliance with the final rule amending 49 CFR part 571 published at 76 FR 28132, May 13, 2011, is permitted as of August 13, 2012 if all of the amended requirements of the final rule are met.

Petitions for reconsideration must be received by September 27, 2012.

ADDRESSES: Petitions for reconsideration must be submitted to: Administrator, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT:

For policy and technical issues: Mr. Check Kam, Office of Rulemaking, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590. Telephone: (202) 366–7002.

For legal issues: Mr. William H. Shakely, Office of the Chief Counsel, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590. Telephone: (202) 366–2992.

SUPPLEMENTARY INFORMATION:

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I. Background
II. Petition for Reconsideration and Agency's Response

I. Background

On May 13, 2011, NHTSA published a final rule amending the helmet labeling requirements and compliance test procedures of FMVSS No. 218, *Motorcycle helmets,* in order to make it more difficult to misleadingly label novelty helmets and to aid the agency in enforcing the standard.[1] Specifically, the final rule required a single, enhanced certification label that the agency believes will discourage the production, sale, and attachment of labels that misleadingly resemble legitimate certification labels. The final rule further required that the size label state the helmet size in discrete, numerical terms in order to facilitate compliance testing. Additionally, the final rule amended the retention and impact attenuation test procedures and adopted helmet conditioning tolerances.

Two petitions for reconsideration, each dated June 23, 2011, were received from the Motorcycle Industry Council (MIC), a not-for-profit national trade association representing manufacturers and distributors of motorcycles and motorcycle parts and accessories, as well as members of allied trades. The first petition requested that the agency include in the preamble a statement permitting voluntary early compliance prior to the effective date of May 13, 2013. This document responds to that petition.

The second petition requested that the definition of ''discrete size'' in FMVSS No. 218 be amended by adding language requiring that this value reflect the actual size of the helmet. MIC also submitted a clarification of its second petition, which noted various issues regarding the measurement of ''discrete size.'' The agency will respond to this petition in a separate, forthcoming document.

II. Petition for Reconsideration and Agency's Response

MIC requested that the agency include in the preamble a statement permitting voluntary early compliance prior to the effective date of May 13, 2013, stating that such a provision is usually included in final rules with safety benefits. MIC asserted that allowing immediate voluntary compliance would serve to accelerate the goals of the rule and would provide needed flexibility to motorcycle helmet manufacturers seeking to introduce helmets complying with the amended requirements on a gradual basis, rather than having to stockpile inventory until the effective date.

Agency Response—NHTSA is granting MIC's petition and is including a provision in the **DATES** section of this document permitting voluntary early compliance with the amended requirements of 49 CFR 571.218 established by the May 13, 2011 final rule. We emphasize that a helmet manufactured to meet the amended requirements of FMVSS No. 218 before the effective date must meet all of the amended labeling and performance requirements.

Issued on: August 6, 2012.

Christopher J. Bonanti,

Associate Administrator for Rulemaking.

[FR Doc. 2012–19763 Filed 8–10–12; 8:45 am]

BILLING CODE 4910–59–P

[1] Final Rule, Federal Motor Vehicle Safety Standards; Motorcycle Helmets, 76 FR 28132 (May 13, 2011).

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 223

[Docket No. 120427423–2423–02]

RIN 0648–AW93

Sea Turtle Conservation; Shrimp and Summer Flounder Trawling Requirements; Correction

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

ACTION: Final rule; correcting amendment.

SUMMARY: On May 21, 2012, we published a final rule to revise the turtle excluder devices (TEDs) requirements to allow new materials and to modify existing approved TED designs. In this notice, we are correcting a technical error in the definition of a brace bar included in the allowable modifications to hard TEDs and special hard TEDs.

DATES: *Effective Date:* August 13, 2012.

ADDRESSES: NMFS, Southeast Regional Office, Protected Resources Division, 263 13th Avenue South, St. Petersburg, FL 33701–5505.

FOR FURTHER INFORMATION CONTACT: Michael Barnette, NMFS, Southeast Regional Office, and the address above, or at (727) 551–5794.

SUPPLEMENTARY INFORMATION:

Background

On May 21, 2012 (77 FR 29905), we published a final rule revising the TED requirements to allow the use of new materials and to modify existing approved TED designs. The definition of a brace bar included as an allowable modification was wrong, however, and must be corrected. Specifically, the previous definition incorrectly required the brace bar to be permanently attached to the frame and rear face of each of the deflector bars within 4 inches (10.2 cm) of the midpoint of the TED frame. This requirement is explicit only for TEDs constructed of steel or aluminum flat bar less than 3/8 inch in thickness, as noted in § 223.207, paragraph (a)(1)(i)(D). For TEDs constructed of steel, fiberglass, or aluminum rod meeting the minimum specified dimensions; steel or aluminum tubing meeting the minimum specified dimensions; or steel or aluminum flat bar 3/8 inch (0.95 cm) or more in thickness, an optional brace bar need only be secured to the rear face of the TED frame. A brace bar on a TED frame constructed of the aforementioned materials may also be secured to the rear face of each of the deflector bars, with or without spacer bars, but this is not a requirement.

Correction

Accordingly, the final rule published on May 21, 2012 (77 FR 29905), is corrected and is effective upon publication. On page 29909, column 3, paragraph (d)(9) is corrected.

List of Subjects in 50 CFR Part 223

Endangered and threatened species, Exports, Imports, Transportation.

Dated: August 7, 2012.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, performing the functions and duties of the Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 223 is amended by making the following corrected amendment:

PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

■ 1. The authority citation for part 223 continues to read as follows:

Authority: 16 U.S.C. 1531–1543; subpart B, § 223.201–202 also issued under 16 U.S.C. 1361 *et seq.;* 16 U.S.C. 5503(d) for § 223.206 (d)(9).

■ 2. In § 223.207, paragraph (d)(9) is revised to read as follows:

§ 223.207 Approved TEDs.

* * * * *

(d) * * *

(9) *Brace bar.* (Figure 14a of this part). A horizontal brace bar may be added to a TED if the brace bar is constructed of aluminum or steel rod or tubing specified in 50 CFR 223.207(a)(1)(i)(A) through (C), or flat bar 3/8-inch (0.95 cm) or more in thickness, and is permanently attached to the rear of the outer frame; for TEDs constructed of flat bar less than 3/8-inch (0.95 cm) in thickness, the regulations specified in 50 CFR 223.207(a)(1)(i)(D) apply. The horizontal brace bar may be permanently secured to the rear face of each of the deflector bars. The horizontal brace bar may be offset behind the deflector bars, using spacer bars attached to the rear face of each of the deflector bars, not to exceed 5 inches (12.7 cm) in length, and must be constructed of the same size or larger material as the deflector bars.

* * * * *

[FR Doc. 2012–19809 Filed 8–10–12; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 77, No. 156
Monday, August 13, 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.

NUCLEAR REGULATORY COMMISSION

10 CFR Part 61

[NRC–2011–0012]

RIN–3150–AI92

Workshop on Performance Assessments of Near-Surface Disposal Facilities: FEPs Analysis, Scenario and Conceptual Model Development, and Code Selection

AGENCY: Nuclear Regulatory Commission.

ACTION: Public meeting.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or the Commission) plans to conduct a workshop on performance assessments of near-surface low-level radioactive waste (LLW) disposal facilities. The workshop has been developed to facilitate communication among Federal and State agencies, industry representatives, contractors, and members of the public on three aspects of a performance assessment: (1) Features, Events, and Processes (FEPs) analysis, (2) the development of scenarios and conceptual models, and (3) the selection of computer codes. Information gathered from invited subject matter experts, stakeholders, and other interested members of the public will be used to improve guidance on performance assessments for near-surface disposal of LLW.

DATES: The workshop will be held on August 29 and August 30, 2012.

ADDRESSES: The public meeting will be held (registration begins at 7:30 a.m.) at the NRC Auditorium, 11545 Rockville Pike, Rockville, Maryland 20852. The NRC welcomes active participation from those attending. Members of the public will be able to participate via telephone and webinar. The telephone and webinar information is provided below.

FOR FURTHER INFORMATION CONTACT: George Alexander, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–6755; email: *George.Alexander@nrc.gov;* or Tarsha Moon, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–6745; email: *Tarsha.Moon@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Accessing Information

Please refer to Docket ID NRC–2011–0012 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 are publicly-available, using any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2011–0012. Address questions about NRC dockets to Carol Gallagher; telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov.*
- *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.*
- *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.
- Information related to the workshop will be made available on the NRC's Web site. Information on the Web site will include any updates to the workshop, the final agenda, workshop presentations, and a video recording of the workshop.

II. Background

The Commission's licensing requirements for the disposal of LLW in near-surface [approximately the uppermost 30 meters (100 feet)] facilities reside in Title 10 of the *Code of Federal Regulations* (10 CFR) Part 61, ''Licensing Requirements for Land Disposal of Radioactive Waste.'' These regulations were published in the **Federal Register** on December 27, 1982 (47 FR 57446). The regulations emphasize an integrated systems approach to the disposal of commercial LLW, including site selection, disposal facility design and operation, minimum waste form requirements, and disposal facility closure. In connection with demonstrating compliance with 10 CFR Part 61, a performance assessment is used to quantitatively evaluate potential releases into the environment and the resultant radiological doses. NRC guidance for developing performance assessments can be found in NUREG–1573. Currently, the NRC is considering a revision to 10 CFR Part 61.[1]

III. NRC Public Meeting

The purpose of this public meeting is to facilitate communication and gather information from Federal and State agencies, industry representatives, contractors, and members of the public concerning performance assessments of near-surface disposal facilities. Stakeholders and other interested members of the public will have an opportunity to pose questions directly to presenters and panelists in each of the sessions. Information gathered in the meeting will be used to improve guidance on performance assessments for near-surface disposal of LLW. The workshop will be organized into four sessions comprising a series of presentations followed by panel discussions of invited subject matter experts. The workshop sessions are as follows:

- Session 1: Performance Assessment Overview: US and International Approaches to Performance Assessment and Experiences with Analyses for LLW
- Session 2: Analysis of FEPs for Near-Surface Disposal Facilities
- Session 3: Scenario and Conceptual Model Development
- Session 4: Code Selection and Implementation, Model Abstraction, and Confidence Building Activities

The public meeting will be held on August 29 and August 30, 2012, from 8:00 a.m. to 5:00 p.m. (registration begins at 7:30 a.m.) in the Auditorium on Level P1 at NRC Headquarters, 11545 Rockville Pike, Rockville, Maryland 20852. Pre-registration for this meeting

[1] See *http://www.nrc.gov/about-nrc/regulatory/rulemaking/potential-rulemaking/potential-part61-revision.html#initiative.*

is not necessary. Members of the public choosing to participate in this meeting remotely can do so in one of two ways—online, or via a telephone (audio) connection. The webinar and call-in information is provided below:

Date and Time: August 29, 2012 8:00 a.m. to 5:00 p.m.

Telephone Number: 1–888–469–3043.

Access Code: 23678.

Webinar Address: *https://www1.gotomeeting.com/register/937057065.*

Date and Time: August 30, 2012 8:00 a.m. to 5:00 p.m.

Telephone Number: 1–888–942–8392.

Access Code: 85687.

Webinar Address: *https://www1.gotomeeting.com/register/156319977.*

Members of the public interested in participating via webinar should follow the registration link above. After registering, instructions for joining the Webinar (including a teleconference number and pass code) will be provided via email. All participants will be in ''listen-only'' mode during the presentation. Participants will have a chance to pose questions either orally after the presentation or in writing during the Webinar.

The agenda for the public meeting will be noticed no fewer than 10 days prior to the meeting on the NRC's Public Meeting Schedule Web site at *http://www.nrc.gov/public-involve/public-meetings/index.cfm.*

Questions about participation in the public meetings should be directed to the points of contact listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

Dated at Rockville, Maryland, this 6th day of August 2012.

For the Nuclear Regulatory Commission.

Kevin Hsueh,

Acting Deputy Director, Environmental Protection and Performance Assessment Directorate, Division of Waste Management and Environmental Protection, Office of Federal and State Materials and Environmental Management Programs.

[FR Doc. 2012–19774 Filed 8–10–12; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF ENERGY

10 CFR Part 430

[Docket No. EERE–2012–STD–0020]

RIN 1904–AC77

Energy Conservation Standards for Commercial Clothes Washers: Public Meeting and Availability of the Framework Document

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of public meeting and availability of the framework document.

SUMMARY: The Department of Energy (DOE) issues a framework document to consider whether to amend the energy and water conservation standards for commercial clothes washers. DOE also announces a public meeting to discuss and receive comments on issues that it will address in this rulemaking proceeding. DOE is initiating data collection for considering amended energy and water conservation standards for commercial clothes washers. DOE also encourages written comments on potential amended standards, including comments on the issues identified in the framework document. The framework document, which is intended to inform stakeholders and facilitate the rulemaking process, is available at *http://www1.eere.energy.gov/buildings/appliance_standards/commercial/clothes_washers.html.*

DATES: DOE will hold a public meeting on September 24, 2012, from 9 a.m. to 12 p.m. in Washington, DC. Any person requesting to speak at the public meeting should submit such request along with a signed original and an electronic copy of the statements to be given at the public meeting before 4:00 p.m., September 10, 2012. Written comments are welcome, especially following the public meeting, and should be submitted by October 12, 2012.

ADDRESSES: The public meeting will be held at the U.S. Department of Energy, Forrestal Building, Room 8E–089, 1000 Independence Avenue SW., Washington, DC 20585–0121. Please note that foreign nationals participating in the public meeting are subject to advance security screening procedures. If a foreign national wishes to participate in the public meeting, please inform DOE of this fact as soon as possible by contacting Ms. Brenda Edwards at (202) 586–2945 so that the necessary procedures can be completed.

Stakeholders may submit comments, identified by docket number EERE–2012–STD– 0020 and/or Regulation Identifier Number (RIN) 1904–AC77, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov* Follow the instructions for submitting comments.
- *Email: CommClothesWashers-2012-STD-0020@ee.doe.gov* Include docket number EERE–2012–STD–0020 and/or RIN 1904–AC77 in the subject line of the message.
- *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue SW., Washington, DC 20585–0121. If possible, please submit all items on a CD. It is not necessary to include printed copies.
- *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza SW., Suite 600, Washington, DC 20024. Phone: (202) 586–2945. Please submit one signed paper original. If possible, please submit all items on a CD. It is not necessary to include printed copies.
- *Docket:* The docket is available for review at *http://www.regulations.gov,* and will include **Federal Register** notices, framework document, notice of proposed rulemaking, public meeting attendee lists and transcripts, comments, and other supporting documents/materials throughout the rulemaking process. The docket can be accessed by searching for Docket No. EERE–2012–BT–STD–0020 at the regulations.gov Web site.

For further information on how to submit or review public comments or view hard copies of the docket in the Resource Room, contact Ms. Brenda Edwards at (202) 586–2945 or email: *Brenda.Edwards@ee.doe.gov.*

FOR FURTHER INFORMATION CONTACT:

Mr. Stephen Witkowski, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies, EE–2J, 1000 Independence Avenue SW., Washington, DC 20585–0121. Phone: (202) 586–7463. Email: *stephen.witkowski@ee.doe.gov.*

Ms. Elizabeth Kohl, U.S. Department of Energy, Office of General Counsel, GC–71, 1000 Independence Avenue SW., Washington, DC 20585–0121. Phone: (202) 586–7796, email: *elizabeth.kohl@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction and Legal Authority
II. Test Procedures
III. Energy Conservation Standards

I. Introduction and Legal Authority

The Energy Policy and Conservation Act of 1975 (EPCA) established an energy conservation program for consumer products. (42 U.S.C. 6291–6309) The National Energy Conservation Policy Act of 1978 amended EPCA to add Part C of Title III, which established an energy conservation program for certain industrial equipment. (42 U.S.C. 6311–6317) (Part C was re-designated Part A–1 on codification in the U.S. Code, for editorial reasons.) The Energy Policy Act of 2005 (EPACT 2005), Public Law 109–58, further amended

EPCA to expand DOE's energy conservation program to include commercial clothes washers and other commercial equipment.

EPACT 2005 established the first energy conservation standards for commercial clothes washers, requiring commercial clothes washers manufactured on or after January 1, 2007 to have a modified energy factor (MEF) of at least 1.26 and a water factor (WF) of no more than 9.5. (42 U.S.C. 6313(e)(1); 10 CFR 431.156) EPACT 2005 further directed DOE to conduct two rulemaking cycles to determine whether to amend these standards. EPCA required completion of the first rulemaking by January 1, 2010, and DOE must complete the second rulemaking by January 1, 2015. (42 U.S.C. 6313(e)).

DOE completed the first rulemaking when it issued a final rule to amend the standards for commercial clothes washers on December 18, 2009. (75 FR 1122, January 8, 2010). Compliance with the amended standards is required as of January 8, 2013. The January 2010 final rule established revised standards for two separate product classes: top-loading and front-loading commercial clothes washers. These standards were based on the MEF and WF metrics.

This current rulemaking will satisfy the requirement to publish the second final rule by January 1, 2015. Compliance with any amended standards would be required three years after the date of publication of the final standards.

II. Test Procedures

EPCA requires that CCWs use the same test procedures as residential clothes washers. (42 U.S.C. 6314(a)(8)) DOE published a final rule amending its clothes washer test procedures on March 7, 2012. (''March 2012 final rule''). (77 FR 13888) The March 2012 final rule amended the test procedure at 10 CFR part 430, subpart B, appendix J1 and established a new test procedure at Appendix J2. Manufacturers of both commercial and residential clothes washers will be required to use the new Appendix J2 on the compliance date of the amended standards for residential clothes washers, March 7, 2015. (The amended standards for residential clothes washers were established by a direct final rule. If DOE withdraws the direct final rule on the basis of adverse comments pursuant to 42 U.S.C. 6295(p)(4), a different compliance date may be established in subsequent rulemaking action for residential clothes washers.)

The new Appendix J2 contains provisions for measuring standby mode and off mode energy use, which is factored into a new efficiency metric, integrated modified energy factor (IMEF). Appendix J2 also establishes a new water efficiency metric, integrated water factor (IWF), which provides a more representative measure of water consumption by incorporating water consumption from all the temperature cycles; in contrast, the WF metric is based on the water consumption of only the cold wash cycle.

Appendix J2 retains provisions for calculating MEF and WF; however, because of certain changes to the active mode provisions of the test procedure, MEF and WF calculated using Appendix J2 will differ from MEF and WF calculated for the same clothes washer using the current test procedure at Appendix J1. The current standard levels for commercial clothes washers are based on MEF and WF as measured using Appendix J1, and products that minimally comply with the standard as measured using Appendix J1 would likely not comply if measured using Appendix J2.

III. Energy Conservation Standards

During this rulemaking, DOE will determine whether to further amend the energy conservation standards for commercial clothes washers. (42 U.S.C. 6313(e)). DOE will also consider developing correction factors that would be used to determine compliance with the MEF/WF standards effective January 8, 2013 when manufacturers are required to measure energy and water consumption using Appendix J2. Such correction factors would be used until compliance with any amended standards developed in this rulemaking was required.

EPCA requires that any new or amended energy conservation standard be designed to achieve the maximum improvement in energy or water efficiency that is technologically feasible and economically justified. To determine whether a standard is economically justified, EPCA requires that DOE determine whether the benefits of the standard exceed its burdens by considering, to the greatest extent practicable, the following:

(1) The economic impact of the standard on the manufacturers and consumers of the affected products;

(2) The savings in operating costs throughout the estimated average life of the product compared to any increases in the initial cost, or maintenance expense;

(3) The total projected amount of energy and water (if applicable) savings likely to result directly from the imposition of the standard;

(4) Any lessening of the utility or the performance of the products likely to result from the imposition of the standard;

(5) The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the imposition of the standard;

(6) The need for national energy and water conservation; and

(7) Other factors the Secretary considers relevant.

(42 U.S.C. 6295 (o)(2)(B)(i) and 42 U.S.C. 6316(a))

To begin the required rulemaking process, DOE has prepared a framework document to explain the issues, analyses, and processes that it is considering for the development of amended energy conservation standards for commercial clothes washers. The framework document is available at *http://www1.eere.energy.gov/buildings/appliance_standards/commercial/clothes_washers.html.*

Additionally, DOE will hold a public meeting to focus on the analyses and issues described in the framework document. DOE encourages anyone who wishes to participate in the public meeting to view the framework document and to be prepared to discuss its contents. Public meeting participants need not limit their comments to the topics identified in the framework document; DOE is also interested in receiving views on other relevant issues that participants believe would affect energy conservation standards for this equipment. DOE welcomes all interested parties, regardless of whether they participate in the public meeting, to submit in writing comments and information on matters addressed in the framework document and on other matters relevant to consideration of standards for commercial clothes washers.

DOE will conduct the public meeting in an informal conference style. A court reporter will record the minutes of the meeting. The discussion will not include proprietary information, costs or prices, market shares, or other commercial matters regulated by U.S. antitrust laws.

After the public meeting and the expiration of the period for submitting written statements, DOE will begin collecting data, conducting the analyses as discussed at the public meeting, and reviewing public comments.

Anyone who wishes to participate in the public meeting, receive meeting materials, or be added to the DOE mailing list to receive future notices and information about the rulemaking process for commercial clothes washers

should contact Ms. Brenda Edwards at (202) 586–2945.

Issued in Washington, DC, on July 31, 2012.

Kathleen B. Hogan,

Deputy Assistant Secretary of Energy, Energy Efficiency and Renewable Energy.

[FR Doc. 2012–19766 Filed 8–10–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0817; Directorate Identifier 99–NE–24–AD]

RIN 2120–AA64

Airworthiness Directives; General Electric Company Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede an existing airworthiness directive (AD) that applies to certain General Electric Company (GE) CF6–80C2 series turbofan engines. The existing AD requires replacement of the fuel tubes connected to the fuel flowmeter. Since we issued that AD, we received several additional reports of fuel leaks and two reports of engine fire due to mis-assembled supporting brackets on the fuel tube connecting the flowmeter to the Integrated Drive Generator (IDG) fuel-oil cooler. This proposed AD would require installing a new simplified one-piece bracket to eliminate mis-assembly. We are proposing this AD to prevent high-pressure fuel leaks caused by improper seating of fuel tube flanges, which could result in an engine fire and damage to the airplane.

DATES: We must receive comments on this proposed AD by October 12, 2012.

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

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

For service information identified in this AD, contact General Electric Company, GE–Aviation, Room 285, 1 Neumann Way, Cincinnati, OH 45215, phone: (513) 552–3272; email: *geae.aoc@ge.com*. You may review copies of the referenced service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Jason Yang, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7747; fax: 781–238–7199; email: *jason.yang@faa.gov*.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2012–0817; Directorate Identifier 99–NE–24–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

On February 17, 2000, we issued AD 2000–04–14, Amendment 39–11597 (65 FR 10698, February 29, 2000), for all GE CF6–80C2 series turbofan engines. That AD requires replacement of the fuel tube connecting the fuel flowmeter to the IDG fuel-oil cooler and the fuel tubes connecting the fuel flowmeter to the Main Engine Control (MEC) or Hydromechanical Unit (HMU) with improved fuel tubes. That AD resulted from reports of fuel leaking in the core cowl cavity under high pressure that can be ignited by contact with hot engine case surfaces. We issued that AD to prevent high-pressure fuel leaks caused by improper seating of fuel tube flanges, which could result in an engine fire and damage to the airplane.

Actions Since Existing AD Was Issued

Since we issued AD 2000–04–14, Amendment 39–11597 (65 FR 10698, February 29, 2000), we received several reports of fuel leaks and two reports of engine fire due to mis-assembled supporting brackets on the fuel tube connecting the fuel flowmeter to the IDG fuel-oil cooler. Investigation of these two fires determined the root cause was due to a design shortfall, which allowed improper installation of the two-piece bracket and subsequent fuel leaks from the fuel tube connection.

FAA's Determination

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

Proposed AD Requirements

This proposed AD would require replacement of the fuel tube connecting the fuel flowmeter to the IDG fuel-oil cooler and the fuel tubes connecting the fuel flowmeter to the MEC or HMU with improved fuel tubes. This proposed AD would also require installing a simplified one-piece bracket to eliminate mis-assembly when the fuel tubes connecting the fuel flowmeter to the IDG fuel-oil cooler are disconnected.

Costs of Compliance

We estimate that this proposed AD would affect 2,300 CF6–80C2 engines installed on airplanes of U.S. registry. We also estimate that one work-hour would be required per engine to accomplish the actions required by this AD. The average labor rate is $85 per work-hour. We also estimate that the required parts will cost about $180 per engine. Based on these figures, we estimate the total cost of the proposed AD to U.S. operators is $609,500.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII,

Aviation Programs, describes in more detail the scope of the Agency's authority.

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by removing airworthiness directive (AD) 2000–04–14, Amendment 39–11597 (65 FR 10698, February 29, 2000), and adding the following new AD:

General Electric Company: Docket No. FAA–2012–0817; Directorate Identifier 99–NE–24–AD.

(a) Comments Due Date

The FAA must receive comments on this AD action by October 12, 2012.

(b) Affected ADs

This AD supersedes AD 2000–04–14, Amendment 39–11597 (65 FR 10698, February 29, 2000).

(c) Applicability

This AD applies to all General Electric Company (GE) CF6–80C2 A1/A2/A3/A5/A8/A5F/B1/B2/B4/B6/B1F/B2F/B4F/B6F/B7F/D1F turbofan engines with fuel tubes, part number (P/N) 1321M42G01, 1334M88G01, 1374M30G01 or 1383M12G01, or supporting bracket, P/N 1321M88P001A, installed.

(d) Unsafe Condition

This AD was prompted by several reports of fuel leaks and two reports of fire due to mis-assembled supporting brackets on the fuel tube connecting the fuel flowmeter to the Integrated Drive Generator (IDG) fuel-oil cooler. We are issuing this AD to prevent high-pressure fuel leaks caused by improper seating of fuel tube flanges, which could result in an engine fire and damage to the airplane.

(e) Compliance

Unless already done, do the following.

(f) Replacement

After the effective date of this AD, if the fuel tubes are disconnected for any reason, or at the next engine shop visit, whichever occurs first, replace the fuel tubes and brackets with improved tubes and brackets eligible for installation. Do the following:

(1) Replace the fuel flowmeter to IDG fuel-oil cooler fuel tube, P/N 1321M42G01, with a part eligible for installation.

(2) For engines with Power Management Controls, replace the Main Engine Control (MEC) to fuel flowmeter fuel tube, P/N 1334M88G01, and bolts, P/N MS9557–12, with a part eligible for installation.

(3) For engines with Full Authority Digital Electronic Controls, replace the Hydromechanical Unit (HMU) to fuel flowmeter fuel tubes, P/Ns 1383M12G01 and 1374M30G01, with a part eligible for installation.

(4) Replace supporting bracket, P/N 1321M88P001A, and spray shields, P/Ns 1606M57G01 and 1775M61G01, with one-piece supporting bracket, P/N 2021M83G01.

(5) Perform an idle leak check after accomplishing paragraphs (f)(1), (f)(2), (f)(3) or (f)(4), or any combination thereof.

(g) Definition

For the purpose of this AD, an engine shop visit is defined as the induction of an engine into the shop for any reason.

(h) Prohibition

After the effective date of this AD, do not install any of the following parts into any GE CF6–80C2 series turbofan engines: P/Ns 1321M42G01, 1321M88P001A, 1334M88G01, 1374M30G01, 1383M12G01, 1606M57G01, 1775M61G01, and MS9557–12.

(i) 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.

(j) Related Information

For more information about this AD, contact Jason Yang, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7747; fax: 781–238–7199; email: *jason.yang@faa.gov*.

Issued in Burlington, Massachusetts, on July 31, 2012.

Diane Cook,

Acting Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2012–19824 Filed 8–10–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 51

[REG–112805–10]

RIN 1545–BJ39

Branded Prescription Drug Fee; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of public hearing on notice of proposed rulemaking by cross-reference to temporary regulations; correction.

SUMMARY: This document corrects a notice of public hearing on proposed rulemaking by cross-reference to temporary regulations (REG–112805–10) that was published in the **Federal Register** on Monday, August 6, 2012 (77 FR 46653) relating to the branded prescription drug fee imposed by the Affordable Care Act.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Celia Gabrysh (202) 622–3130, and regarding the submission of public comments and the public hearing, Ms. Oluwafunmilayo (Funmi) Taylor, at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

The notice of public hearing on a notice of proposed rulemaking by cross-reference to temporary regulations (REG–112805–10) that is the subject of this correction is under section 9008 of the Patient Protection and Affordable Care Act (ACA), Public Law 111–148 (124 Stat. 119 (2010)), as amended by

section 1404 of the Health Care and Education Reconciliation Act of 2010 (HCERA), Public Law 111–152 (124 Stat. 1029 (2010)).

Need for Correction

As published, REG–112805–10, contains an error that may prove to be misleading and is in need of clarification.

Correction of Publication

Accordingly, the publication of the notice of public hearing on notice of proposed rulemaking by cross-reference to temporary regulations (REG–112805–10) which was the subject of FR Doc. 2012–19074, is corrected as follows:

On page 46653, column 2, in the preamble, under the caption **ADDRESSES**, line five, the language ''DC 20224. Send Submissions to'' is corrected to read ''DC 20224. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Send submissions to''.

LaNita Van Dyke,

Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel, Procedure and Administration.

[FR Doc. 2012–19730 Filed 8–10–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 190, 192, 193, 195, and 199

[Docket No. PHMSA–2012–0102]

RIN 2137–AE29

Pipeline Safety: Administrative Procedures; Updates and Technical Corrections

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This Notice of Proposed Rulemaking updates the administrative civil penalty maximums for violation of the pipeline safety regulations to conform to current law, updates the informal hearing and adjudication process for pipeline enforcement matters to conform to current law, amends other administrative procedures used by PHMSA personnel, and makes other technical corrections and updates to certain administrative procedures. The proposed amendments do not impose any new operating, maintenance, or other substantive requirements on pipeline owners or operators.

DATES: Persons interested in submitting written comments on the rule amendments proposed in this document must do so by September 12, 2012. PHMSA will consider comments filed after this date so far as practicable.

ADDRESSES: Comments should reference Docket No. PHMSA–2012–0102 and may be submitted in the following ways:

- *Web Site: http://www.regulations.gov.* This site allows the public to enter comments on any **Federal Register** notice issued by any agency. Follow the online instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* U.S. Department of Transportation (DOT) Docket Operations Facility (M–30), West Building, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* DOT Docket Operations Facility, West Building, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, 20590 between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays

Instructions: Identify the docket number, PHMSA–2012–0102, at the beginning of your comments. If you mail your comments, submit two copies. In order to confirm receipt of your comments, include a self-addressed, stamped postcard.

Note: All comments are posted electronically in their original form, without changes or edits, including any personal information.

Privacy Act Statement

Anyone can search the electronic comments associated with any docket by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). DOT's complete Privacy Act Statement was published in the **Federal Register** on April 11, 2000, (65 FR 19477).

FOR FURTHER INFORMATION CONTACT: James Pates, PHMSA, Office of Chief Counsel, 202–366–0331, *james.pates@dot.gov;* Kristin T.L. Baldwin, Office of Chief Counsel, 202–366–6139, *kristin.baldwin@dot.gov;* or Larry White, PHMSA, Office of Chief Counsel, 202–366–9093, *lawrence.white@dot.gov.*

SUPPLEMENTARY INFORMATION:

I. Purpose and Scope

Effective January 3, 2012, the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011 (Pub. L. 112–90) (the Act) increased the maximum administrative civil penalties for violation of the pipeline safety laws and regulations to $200,000 per violation per day of violation, with a maximum of $2,000,000 for a related series of violations. The Act also imposed certain requirements for the conduct of informal administrative enforcement hearings including, among other things: convening hearings before a presiding official, an attorney on the staff of the Deputy Chief Counsel; providing an opportunity for a respondent to arrange for a hearing transcript; ensuring a separation of functions between agency employees involved with the investigation or prosecution of an enforcement case and those involved in deciding the case; and prohibiting ex parte communications. The Act also provided PHMSA with new enforcement authority for oil spill response plan compliance under section 4202 of the Oil Pollution Act of 1990 (33 U.S.C. 1321(j)).

In accordance with the Act, PHMSA proposes to: update the administrative civil penalty maximums and the informal hearing process for pipeline enforcement matters to conform to current law and to amend other administrative procedures used by PHMSA personnel; amend the criminal enforcement provisions to conform to current law and practice; make corrections to the special permit provisions in the procedures for adoption of rules; implement the new enforcement authority for Part 194 oil spill response plans; and make certain technical amendments and corrections. The proposed amendments do not impose any new operating, maintenance, or other substantive requirements on pipeline owners or operators.

II. Proposed Amendments to Part 190

A. Administrative Civil Penalties and the Informal Hearing and Enforcement Process

Maximum administrative civil penalties. Section 2 of the Pipeline Safety Act of 2011 increased the maximum administrative civil penalties for violation of the pipeline safety laws and regulations to $200,000 per violation per day, with a maximum of $2,000,000 for a related series of violations. PHMSA proposes to amend 49 CFR 190.223 to reflect this increase. PHMSA proposes to apply the new administrative civil penalty maximums in cases involving violations that occur or are discovered after January 3, 2012. The proposed amendment also removes

outdated penalty provisions for violations involving offshore gathering lines and liquefied natural gas facilities and clarifies the applicability of penalties for violations of the terms of an enforcement order.

Presiding Official. Section 20(a)(1)(A) of the Act requires PHMSA to issue regulations requiring hearings conducted under 49 U.S.C. chapter 601 for the issuance of corrective action orders (CAOs), safety orders, compliance orders, and civil penalties to be convened before a presiding official. The pipeline enforcement process found in 49 CFR part 190, used successfully by PHMSA for many years, already includes the use of such a presiding official for informal hearings. The amendment proposes to codify existing practice. This process provides pipeline operators with the right to receive notice of any alleged violations identified during an inspection or investigation; to respond to the notice, including the opportunity to request an informal hearing or otherwise contest any alleged violations; to examine the evidence; to be represented by counsel; to provide any relevant information to the proposed penalty amount; and to petition for reconsideration of the agency's decision.

Although current regulations already provide that hearings are held before a presiding official, section 20(a)(2) of the Act requires that PHMSA issue regulations both defining the term ''presiding official'' and requiring the presiding official to be an attorney on the staff of the Deputy Chief Counsel who is not engaged in investigative or prosecutorial functions. PHMSA proposes to conform to this requirement by amending the existing definition of ''presiding official'' in § 190.3 and by adding a new § 190.212 concerning the presiding official's powers and duties.

The proposed regulations will specify the powers and duties of the presiding official and provide that, if the dedicated presiding official is unavailable, the Deputy Chief Counsel may delegate the duties of the presiding official to another attorney in the Office of Chief Counsel who has no prior involvement in the case and who will be supervised by the Deputy Chief Counsel. PHMSA also proposes to amend § 190.211(a) to clarify that this section applies to any hearing relating to civil penalty assessments, compliance orders, safety orders, or CAOs.

Hearing transcript. Section 20(a)(1)(B) of the Act requires PHMSA to issue regulations providing the opportunity for any party requesting a hearing to arrange for a transcript of the hearing, at the party's expense. Although it is currently PHMSA's practice to permit a respondent to make arrangements for a transcript at the respondent's cost, this is not explicitly stated in Part 190. PHMSA proposes to amend § 190.211 to provide that a respondent may arrange for a hearing to be recorded or transcribed at its own cost. PHMSA further proposes that an accurate copy of the recording or transcript must be submitted for the official record.

Separation of functions and prohibition on ex parte communications. Section 20(a)(1)(D) of the Act requires PHMSA to issue regulations implementing a separation of functions between agency employees involved with the investigation and prosecution of an enforcement case and those involved in deciding the case. PHMSA's current practice is to ensure that personnel involved in deciding an enforcement case are not involved in determining the allegations to be made in that case or preparing the Notice of Probable Violation or other type of enforcement action. On July 12, 2011, PHMSA explained its separation of functions policy in a statement published in the **Federal Register** (76 FR 40820). In order to conform Part 190 to the current law and existing agency practice, PHMSA proposes to add a new § 190.210, titled: ''Separation of functions.'' Paragraph (a) of the new section proposes that an agency employee involved in the investigation or prosecution of an enforcement case may not participate in the decision of that case or a factually related case, but may participate as a witness or counsel at a hearing, as set forth in subpart B. Likewise, paragraph (a) proposes to require that an agency employee who prepares the decision in an enforcement case may not have served in an investigative or prosecutorial capacity in that case or a factually related case.

Section 20(a)(1)(E) of the Act requires PHMSA to issue regulations prohibiting ex parte communications that are relevant to the question to be decided in an enforcement case. An ex parte communication is a communication between a party to a pending case and the decision maker regarding an issue in that case occurring outside the presence of the other parties and without prior notice and opportunity for all parties to provide comment or rebuttal. In the aforementioned July 12, 2011, PHMSA policy statement discussed earlier in this preamble, the agency explained that ex parte communications with the presiding official are not permitted by the operator, its counsel, or agency staff involved in the investigation and prosecution of the case. This prohibition applies to all communication regarding information, facts, or arguments involving an issue in the case, but not to routine administrative matters, such as scheduling the hearing or clarification of the enforcement process.

To incorporate this prohibition into Part 190, PHMSA proposes to add paragraph (b) to the newly created § 190.210 enjoining any party to an enforcement proceeding (e.g., respondent, agency employees serving in an investigative or prosecutorial capacity, representatives of either party, etc.) from communicating privately with the decision maker concerning information that is material to the question to be decided. Notwithstanding this addition, parties would be allowed to communicate freely with the presiding official regarding procedural or administrative issues, such as scheduling a hearing.

Expedited review of corrective action orders. Section 20(a)(1)(C) of the Act requires PHMSA to issue regulations ensuring ''expedited review'' of any CAO issued without prior notice pursuant to 49 U.S.C. 60112(e). Section 20(a)(3) also requires the agency to define the term ''expedited review'' for purposes of this regulation. The procedural regulations for issuance of a CAO after notice and opportunity for hearing are outlined in § 190.233. Under paragraph (b) of that regulation, PHMSA may waive the requirement for prior notice and opportunity for hearing if a failure to do so would result in the likelihood of serious harm to life, property, or the environment. In cases where an order is issued without prior notice, paragraph (b) already requires that an opportunity for a hearing be provided to the respondent as soon as is practicable after issuance of the order. PHMSA typically schedules hearings within 10 calendar days, except where the respondent requests postponement for good cause.

The current process works well both to ensure that an operator has a timely opportunity for a post-order hearing and that PHMSA acts expeditiously to render a final determination on the CAO. Therefore, PHMSA proposes to conform paragraph § 190.233(b) to current law by defining the term ''expedited review'' for purposes of a CAO issued without prior notice. In this proposed ''expedited review,'' the respondent must either request such review by answering the order in writing or by requesting a hearing. The Associate Administrator, as soon as practicable following issuance of the order, will decide whether the order should remain in effect or be terminated. Once the determination is issued, the expedited review process is

complete. Issuance of the decision will occur as soon as is practicable.

Other amendments to enforcement process. PHMSA also proposes other technical amendments and updates to improve the clarity and efficiency of the enforcement regulations and to otherwise conform to current practice. These proposed amendments include:

1. Amending § 190.7(a), relating to subpoenas and witness fees, to clarify that PHMSA has the authority to issue subpoenas for any reason to carry out its duties at any time, both during the investigative phase of an enforcement action and pursuant to a hearing.

2. Amending § 190.11(a)(1), relating to the availability of informal guidance on the pipeline safety regulations, to remove the requirement that ''All messages will receive a response by the following business day,'' since the Office of Pipeline Safety (OPS) is not always able to provide telephonic guidance or interpretive assistance on pipeline regulations by the following business day.

3. Amending § 190.11(a) to revise paragraph (a)(1) and remove paragraph (a)(2) to reflect the current practice on obtaining telephonic and internet assistance from OPS.

4. Amending § 190.11(b) to remove paragraph (b)(2) to reflect the current practice on obtaining written interpretations from OPS.

5. Amending § 190.201, relating to the purpose and scope of subpart B, to clarify that these enforcement procedures encompass the enforcement of 49 U.S.C. 60101 *et seq.,* section 4202 of the Oil Pollution Act of 1990 (33 U.S.C. 1321(j)), and any PHMSA regulation or order issued thereunder.

6. Amending § 190.203(c), relating to inspections and investigations, to clarify that an OPS request for specific information to an owner or operator may be issued at any time and is not limited to a request following an inspection.

7. Amending § 190.203(e) to provide that if a representative of DOT investigates an accident or incident involving a pipeline facility, the owner or operator of the facility must provide all records and information pertaining to the accident or incident to a representative of DOT, including integrity management plans and test results. Pursuant to this proposed change, the owner or operator of the facility would be required to provide all reasonable assistance in the investigation of the accident or incident. Civil penalties may be assessed for obstructing an OPS inspection or investigation, in accordance with section 2 of the Act.

8. Amending §§ 190.205, 190.207, 190.217, 190.219, 190.221, and 190.223, relating to enforcement actions, to provide that OPS may take varied actions under section 4202 of the Oil Pollution Act of 1990 (33 U.S.C. 1321(j)).

9. Amending § 190.211, relating to hearings, to clarify the manner in which informal hearings are conducted, including: A respondent may withdraw a hearing request in writing and, if permitted by the presiding official, supplement the record with a written submission in lieu of a hearing; a respondent must submit the material it intends to use to rebut the allegation of violation at least 10 calendar days prior to the date of the hearing; the hearing is conducted informally; OPS, as well as the respondent, may present evidence and call witnesses at a hearing; and both parties may request permission to submit additional documents after the hearing.

10. Amending § 190.211(c) to provide that all hearings in civil penalty cases under $25,000 (currently $10,000) will be held by telephone conference, unless either party requests an in-person hearing. This proposed change recognizes the increase in the size of civil penalty assessments generally and minimizes travel expense for both parties. The presiding official will also have the flexibility to order a video conference in addition to a telephonic hearing.

11. Amending § 190.211(d) to clarify that all evidentiary material on which OPS intends to rely at a hearing, to the extent possible, must be provided at respondent's request prior to a hearing in order to ensure the respondent's full access to the evidentiary record upon which final orders are based.

12. Amending § 190.213(b), relating to final orders, to clarify that the presiding official in a § 190.211 hearing case or an attorney from the Office of Chief Counsel in a non-hearing case provides a recommended decision to the Associate Administrator proposing findings on all material issues.

13. Amending § 190.213(d) and (e) to remove the provision that an operator may file a judicial appeal of a final order without first filing a petition for reconsideration. This proposed change will ensure that the parties have an administrative opportunity to correct errors prior to the filing of a judicial appeal.

14. Amending § 190.215, relating to petitions for reconsideration, by moving the language in this section to § 190.249 at the end of subpart B and expanding its scope to cover all final orders, corrective action orders, notices of amendment, and safety orders. This proposed change clarifies that a respondent must file a petition to exhaust its administrative remedies. Additionally, a proposed provision on the filing period and the standard of judicial review has been included in order to conform to 49 U.S.C. 60119.

15. Amending the existing language in § 190.215(a) that is moved to § 190.249 to remove the requirement that a respondent file multiple copies of a petition; to allow 30, rather than 20, calendar days from receipt of service of a final order to file a petition for reconsideration; and to indicate that all petitions must be filed with the Associate Administrator, with a copy to the Office of Chief Counsel.

16. Amending § 190.219, relating to consent orders, to expand this section to provide that consent orders may also be used to resolve CAOs and safety orders.

17. Amend §§ 190.223(b) and 190.229(b), relating to civil and criminal penalties, to remove obsolete civil and criminal penalty provisions for violations involving offshore gathering lines.

18. Amending § 190.225(a), relating to civil penalty assessment considerations, to remove paragraph (a)(4) relating to ''ability to pay'' as a penalty assessment factor, to conform to the Act.

19. Amending § 190.233(b) and (c), relating to CAOs, to provide an expedited process for setting hearings and issuing decisions on CAOs and notices of proposed CAOs. This proposal also includes an expedited process for handling petitions for reconsideration to challenge CAOs, to conform to the Act.

B. Criminal Enforcement

PHMSA proposes to amend the criminal enforcement provisions as follows:

1. Relocating the criminal enforcement sections to a new ''Subpart C—Criminal Enforcement.''

2. Amending the language in existing § 190.229 that is moved to § 190.291, relating to criminal penalties, to remove outdated maximum criminal penalty amounts for each criminal offense and insert ''fined under Title 18'' to conform to current 49 U.S.C. 60123.

C. Procedures for Adoption of Rules

PHMSA proposes to amend the procedures for the adoption of rules provisions as follows:

1. Redesignating current Subpart C, *Procedures for Adoption of Rules,* as Subpart D.

2. Amending § 190.207(a), relating to Notices of Probable Violation (NOPV), to clarify that a NOPV may be issued for

violation of a special permit, as a special permit is an agency order that is enforceable through a NOPV.

3. Amending § 190.239 to include a process for filing petitions for reconsideration on safety orders.

4. Amending § 190.337 to remove paragraph (b), relating to the reconsideration of petitions for rulemaking, to remove the target times for the Associate Administrator to act on petitions for reconsideration, to conform to actual practice.

5. Amending § 190.341, relating to special permits, to clarify that PHMSA may issue a NOPV for violations of a special permit.

D. Technical Amendments and Corrections

PHMSA proposes to make the following technical amendments and corrections to Part 190:

1. Amending Part 190 to remove all references to 49 U.S.C. 5101, to update Web sites addresses, telephone numbers, and postal addresses, and to eliminate other incorrect references.

2. Amending Part 190 to remove the term ''PHMSA'' from the phrases ''Administrator, PHMSA'' and ''Chief Counsel, PHMSA'' throughout Part 190 and remove the term ''OPS'' from the phrase ''Associate Administrator, OPS.''

3. Amending § 190.3 to define the terms ''Associate Administrator,'' ''Chief Counsel,'' ''Day,'' and ''Operator.''

4. Amending § 190.7(d) to harmonize the service of subpoenas with the service of other documents under § 190.5 to reflect that service by hand, certified mail, or registered mail is complete upon mailing.

5. Amending § 190.203(b)(6) and other sections to eliminate the exclusive use of the masculine pronouns ''him'' and ''his'' or to define the term to include both masculine and feminine.

6. Amending § 190.205 to clarify that the Associate Administrator or his or her designee(s) issue warning letters and that an operator may respond to a warning letter.

7. Amending § 190.207(a) to clarify that a NOPV may contain a combination of warning items, allegations of violation, proposed civil penalties, and proposed compliance orders for a probable violation of section 4202 of the Oil Pollution Act of 1990 (33 U.S.C. 1321(j)).

8. Amending § 190.207(c) to clarify that the Associate Administrator or his or her designee(s) may amend a NOPV but must provide an additional opportunity for response.

9. Amending § 190.209(a)(1), relating to response options to NOPVs, to clarify that if an operator responds by paying a proposed civil penalty, such action serves to close only that particular allegation of violation and not the entire case.

10. Amending § 190.209(a) to clarify that in responding to a NOPV, an operator may contest it in writing without requesting an in-person hearing.

11. Amending § 190.209(c) to correct a typographical error by changing the reference from paragraph (c) to paragraph (b).

12. Amending language in existing § 190.215(a), which is moved to § 190.249, to clarify that a petition for reconsideration must include an explanation as to why the final order should be reconsidered, rather than an explanation of why the ''effectiveness'' of the final order should be stayed.

13. Amending § 190.223(a) to clarify that the term ''civil penalty'' refers to ''administrative'' civil penalties.

14. Amending § 190.227(a), relating to the payment of penalties, to allow payment of penalties under $10,000 to be made via ''www.pay.gov'' and to provide the correct address.

15. Amending §§ 190.233 to clarify that CAOs are based upon a determination that a particular facility ''is or would be hazardous,'' which tracks the statutory language in 49 U.S.C. 60112, and to clarify that the closure of a CAO ''terminates'' it, as opposed to ''rescinding'' it.

16. Amending §§ 190.239 and 190.341 to italicize the questions at the beginning of each lettered paragraph.

17. Amending § 190.319, relating to extensions of time for rulemaking comment periods, to clarify that petitions for extensions of time to file comments must be addressed to PHMSA, as provided in § 190.309.

18. Amending § 190.321, relating to the contents of written comments, to remove the requirement to submit multiple copies of a rulemaking comment.

19. Amending § 190.327(b), relating to hearings on proposed rulemakings, to clarify that procedures for rulemaking hearings do not apply to other types of hearings by deleting the phrase ''under this part'' and inserting ''under this subpart.''

20. Amending § 190.335(a) and removing § 190.338(c), relating to the reconsideration of petitions for rulemaking and appeals, to remove the requirement to submit multiple copies of each.

21. For administrative purposes, §§ 190.241, 190.243, 190.245, and 190.247 are added and reserved.

22. Amending §§ 192.603(c), 193.2017(b), 195.402(b), and 199.101(b) to change the reference to § 190.237 to § 190.206.

III. Rulemaking Analyses and Notices

A. Statutory/Legal Authority for This Rulemaking

This notice of proposed rulemaking is published under the authority of the Federal Pipeline Safety Law (49 U.S.C. 60101 *et seq.*). Section 60102 authorizes the Secretary of Transportation to issue regulations governing design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities. Section 60102(l) of the Federal Pipeline Safety Law states that the Secretary shall, to the extent appropriate and practicable, update incorporated industry standards that have been adopted as part of the Federal pipeline safety regulations.

B. Executive Order 12866, Executive Order 13563, and DOT Regulatory Policies and Procedures

This proposed rule is not considered a significant regulatory action under Section 3(f) of Executive Order 12866 and, therefore, is not subject to review by the Office of Management and Budget. This proposed rule is not significant under DOT Regulatory Policies and Procedures (44 FR 11034; Feb. 26, 1979). Executive Orders 12866 and 13563 require agencies to regulate in the most cost effective manner, to make a reasoned determination that the benefits of the intended regulation justify its costs, and to develop regulations that impose the least burden on society. As this proposed rule involves agency practice and procedure, proposes to conform agency procedural requirements to current public law, and does not recommend imposing any new substantive requirements on operators or the public, it has no significant economic impact on regulated entities.

C. Executive Order 13132

This proposed rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (''Federalism''). This proposed rule does not introduce any regulation that: (1) Has substantial direct effects on the states, the relationship between the national government and the states, or the distribution of power and responsibilities among the various levels of government; (2) imposes substantial direct compliance costs on state and local governments; or (3) preempts state law. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

Further, this proposed rule does not have an impact on federalism that warrants preparation of a federalism assessment.

D. Executive Order 13175

This proposed rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175 (''Consultation and Coordination with Indian Tribal Governments''). This proposed rule does not significantly or uniquely affect the communities of the Indian tribal governments; therefore, the funding and consultation requirements of Executive Order 13175 do not apply.

E. Executive Order 13211

This proposed rule is not a significant energy action under Executive Order 13211. 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. Furthermore, this proposed rule has not been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action.

F. Regulatory Flexibility Act

As this proposed rule updates the Part 190 procedures in accordance with current public law and will have no direct or indirect economic impacts for government units, businesses, or other organizations, I certify that this proposed rule will not have a significant economic impact on a substantial number of small entities.

G. Paperwork Reduction Act

This proposed rule contains no new information collection requirements or additional paperwork burdens. Therefore, submitting an analysis of the burdens to OMB pursuant to the Paperwork Reduction Act is unnecessary.

H. Unfunded Mandates Reform Act

This proposed rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It does not result in costs of $100 million or more, as adjusted for inflation, to either state, local or tribal governments, in the aggregate, or to the private sector, and is the least burdensome alternative that achieves the objective of the rule.

I. Environmental Assessment

As this proposed rule amends agency administrative practice and procedure and does not impose any new substantive environmental requirements on operators or the public or change the environmental status quo in any way, there are no significant environmental impacts associated with this rule.

List of Subjects

49 CFR Part 190

Administrative Practice and procedure; Penalties.

49 CFR Part 192

Pipeline safety, Fire Prevention, Security measures.

49 CFR Part 193

Pipeline safety, Fire prevention, Security measures.

49 CFR Part 195

Ammonia, Carbon dioxide, Incorporation by reference, Petroleum, Pipeline safety, Reporting and recordkeeping requirements.

49 CFR Part 199

Drug testing, alcohol misuse.

For the reasons discussed in the preamble, PHMSA proposes to amend 49 CFR Subchapter C as follows:

PART 190—PIPELINE SAFETY PROGRAMS AND RULEMAKING PROCEDURES

1. The authority citation for part 190 is revised to read as follows:

Authority: 33 U.S.C. 1321(b); 49 U.S.C. 60101 *et seq.;* 49 CFR 1.53.

PART 190—[AMENDED]

2. Part 190 is amended by revising the title to read:

PART 190—PIPELINE SAFETY ENFORCEMENT AND REGULATORY PROCEDURES.

PART 190—[AMENDED]

3. In part 190, revise all references to ''Associate Administrator, PHMSA'' to read ''Associate Administrator''.

4. In part 190, revise all references to ''Chief Counsel, PHMSA'' to read ''Chief Counsel''.

5. In part 190, revise all references to ''Associate Administrator, OPS'' to read ''Associate Administrator''.

§ 190.1 [Amended]

6. In § 190.1, paragraph (a) is amended by removing the phrase ''and 49 U.S.C. 5101 *et seq.* (the hazardous material transportation laws)''.

7. In § 190.3, the definition of ''Presiding Official'' is revised and the new definitions for ''Associate Administrator,'' ''Chief Counsel,'' ''Day,'' and ''Operator'' are added in alphabetical order to read as follows:

§ 190.3 Definitions.

* * * * *

Associate Administrator means the Associate Administrator for Pipeline Safety.

Chief Counsel means the Chief Counsel of the PHMSA.

Day means a 24-hour period ending at 11:59 p.m.

* * * * *

Operator means any or all of the owners or operators.

* * * * *

Presiding official means the person who conducts any hearing relating to civil penalty assessments, compliance orders, safety orders, or corrective action orders and who has the duties and powers set forth in § 190.212.

* * * * *

8. In § 190.7, paragraphs (a) and (d) are revised to read as follows:

§ 190.7 Subpoenas; witness fees.

(a) The Administrator, the Chief Counsel, or an official designated by the Administrator may sign and issue subpoenas individually on his or her own initiative at any time. Such times may include during an inspection or investigation or, upon request and adequate showing by a participant to an enforcement proceeding, that the information sought will materially advance the proceeding.

* * * * *

(d) Service of a subpoena upon the person named in the subpoena is achieved by delivering a copy of the subpoena to the person and by paying the fees for one day's attendance and mileage as specified by paragraph (g) of this section. Service of a subpoena can also be made by certified or registered mail to the person at the last known address. Service is complete upon mailing. When a subpoena is issued at the instance of any officer or agency of the United States, fees and mileage need not be tendered at the time of service. Delivery of a copy of a subpoena and tender of the fees to a natural person may be made by handing them to the person, leaving them at the person's office with a person in charge, leaving them at the person's residence with a person of suitable age and discretion residing there, or by any method whereby actual notice is given to the person and the fees are made available prior to the return date.

* * * * *

9. In § 190.11, paragraphs (a) and (b) are revised to read as follows:

§ 190.11 Availability of informal guidance and interpretive assistance.

(a) *Availability of telephonic and Internet assistance.* PHMSA has

established a Web site and a telephone line to OPS headquarters where information on and advice about compliance with the pipeline safety regulations specified in 49 CFR parts 190–199 is available. The Web site and telephone line are staffed by personnel from PHMSA's OPS from 9:00 a.m. through 5:00 p.m., Eastern Time, Monday through Friday, with the exception of Federal holidays. When the lines are not staffed, individuals may leave a recorded voicemail message or post a message on the OPS Web site. The telephone number for the OPS information line is (202) 366–4595 and the OPS Web site can be accessed via the Internet at *http://phmsa.dot.gov/pipeline*

(b) *Availability of written interpretations.* A written regulatory interpretation, response to a question, or an opinion concerning a pipeline safety issue may be obtained by submitting a written request to the Office of Pipeline Safety (PHP–30), PHMSA, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590–0001. The requestor must include his or her return address and should also include a daytime telephone number. Written requests should be submitted at least 120 days before the time the requestor needs a response.

* * * * *

10. In § 190.201, paragraph (a) is revised to read as follows:

§ 190.201 Purpose and scope.

(a) This subpart describes the enforcement authority and sanctions exercised by the Associate Administrator for achieving and maintaining pipeline safety and compliance under 49 U.S.C. 60101 *et seq.,* section 4202 of the Oil Pollution Act of 1990 (33 U.S.C. 1321(j)), and any PHMSA regulation or order issued thereunder. It also prescribes the procedures governing the exercise of that authority and the imposition of those sanctions.

* * * * *

11. In § 190.203, paragraph (b)(6) and paragraphs (c), (e), and (f) are revised to read as follows:

§ 190.203 Inspections and investigations.

* * * * *

(b) * * *

(6) Whenever deemed appropriate by the Associate Administrator, or his or her designee.

(c) If the Associate Administrator believes that further information is needed to determine appropriate action, the Associate Administrator may notify the pipeline operator in writing that the operator is required to provide specific information within a period specified by the Associate Administrator, but no later than 30 days from the time the notification is received by the operator. The notification must provide a reasonable description of the specific information required.

* * * * *

(e) If a representative of the U.S. Department of Transportation inspects or investigates an incident involving a pipeline facility, the operator must make available to the representative all records and information that pertain to the incident in any way, including integrity management plans and test results. The operator must provide all reasonable assistance in the investigation. Any person who obstructs an inspection or investigation by taking actions that were known or reasonably should have been known to prevent, hinder, or impede an investigation without good cause will be subject to administrative civil penalties under this subpart.

(f) When OPS determines that the information obtained from an inspection or from other appropriate sources warrants further action, OPS may initiate one or more of the enforcement proceedings prescribed in this subpart.

12. Section 190.205 is revised to read as follows:

§ 190.205 Warning letters.

Upon determining that a probable violation of 49 U.S.C. 60101 *et seq.,* section 4202 of the Oil Pollution Act of 1990 (33 U.S.C. 1321(j)), or any regulation or order issued thereunder has occurred, the Associate Administrator or his or her designee(s) may issue a Warning Letter notifying the owner or operator of the probable violation and advising the owner or operator to correct it or be subject to potential enforcement action under this subpart. The owner or operator may submit a response to the Warning Letter but is not required to.

13. Add § 190.206 to subpart B to read as follows:

§ 190.206 Amendment of plans or procedures.

(a) A Regional Director begins a proceeding to determine whether an operator's plans or procedures required under parts 192, 193, 194, 195, and 199 of this subchapter are inadequate to assure safe operation of a pipeline facility by issuing a notice of amendment. The notice will specify the alleged inadequacies and the proposed action for revision of the plans or procedures and provide an opportunity for a hearing under § 190.211 of this Part. The notice will allow the operator 30 days after receipt of the notice to submit written comments, revised procedures, or request a hearing. After considering all material presented in writing or at the hearing if applicable, the Associate Administrator determines whether the plans or procedures are inadequate as alleged and orders the required amendment if they are inadequate, or withdraws the notice if they are not. In determining the adequacy of an operator's plans or procedures, the Associate Administrator may consider:

(1) Relevant available pipeline safety data;

(2) Whether the plans or procedures are appropriate for the particular type of pipeline transportation or facility, and for the location of the facility;

(3) The reasonableness of the plans or procedures; and

(4) The extent to which the plans or procedures contribute to public safety.

(b) The amendment of an operator's plans or procedures prescribed in paragraph (a) of this section is in addition to, and may be used in conjunction with, the appropriate enforcement actions prescribed in this subpart.

14. In § 190.207, paragraphs (a) and (c) are revised to read as follows:

§ 190.207 Notice of probable violation.

(a) Except as otherwise provided by this subpart, a Regional Director begins an enforcement proceeding by serving a notice of probable violation on a person and charging that person with a probable violation of 49 U.S.C. 60101 *et seq.,* section 4202 of the Oil Pollution Act of 1990 (33 U.S.C. 1321(j)), or any regulation or order issued thereunder.

* * * * *

(c) The Regional Director may amend a notice of probable violation at any time prior to issuance of a final order under § 190.213. If an amendment includes any new material allegations of fact, proposes an increased civil penalty amount, or proposes new or additional remedial action under § 190.217, the respondent will have the opportunity to respond under § 190.209.

15. In § 190.209, paragraphs (a) and (c) are revised to read as follows:

§ 190.209 Response options.

(a) When the notice contains a proposed civil penalty—

(1) If respondent is not contesting an allegation of probable violation, pay the proposed civil penalty as provided in § 190.227 and advise the Regional Director of the payment. The payment authorizes PHMSA to make a finding of violation as to the uncontested item(s), with prejudice to the respondent;

(2) If respondent is not contesting an allegation of probable violation but wishes to submit a written explanation, information or other materials respondent believes may warrant mitigation or elimination of the proposed civil penalty, respondent may submit such materials. This authorizes PHMSA to make a finding of violation and to issue a final order under § 190.213;

(3) If respondent is contesting one or more allegations of probable violation but is not requesting a hearing under § 190.211, respondent may submit a written response in answer to the allegations; or

(4) The respondent may request a hearing under § 190.211.

* * * * *

(c) Failure of the respondent to respond in accordance with paragraph (a) of this section or, when applicable, paragraph (b) of this section, constitutes a waiver of the right to contest the allegations in the notice of probable violation and authorizes the Associate Administrator, without further notice to the respondent, to find the facts as alleged in the notice of probable violation and to issue a final order under § 190.213.

* * * * *

16. Add § 190.210 to subpart B to read as follows:

§ 190.210 Separation of functions.

(a) *General* An agency employee who assists in the investigation or prosecution of an enforcement case may not participate in the decision of that case or a factually related one, but may participate as a witness or counsel at a hearing, as set forth in this subpart. Likewise, an agency employee who prepares a decision in an enforcement case may not have served in an investigative or prosecutorial capacity in that case or a factually related one.

(b) *Prohibition on ex parte communications.* A party to an enforcement proceeding, including a respondent, its representative, or an agency employee having served in an investigative or prosecutorial capacity in the proceeding, may not communicate privately with the Associate Administrator or presiding official concerning information that is material to the question to be decided in the proceeding. A party may communicate, however, with the presiding official regarding certain administrative or procedural issues, such as for scheduling a hearing.

17. Section 190.211 is revised to read as follows:

§ 190.211 Hearings.

(a) *General.* This section applies to hearings conducted under this part relating to civil penalty assessments, compliance orders, safety orders, and corrective action orders. A presiding official will convene all hearings conducted under this section.

(b) *Hearing request and statement of issues.* A request for a hearing provided for in this part must be accompanied by a statement of the issues that the respondent intends to raise at the hearing. The issues may relate to the allegations in the notice, the proposed corrective action, or the proposed civil penalty amount. A respondent's failure to specify an issue may result in waiver of the respondent's right to raise that issue at the hearing. The respondent's request must also indicate whether or not the respondent will be represented by counsel at the hearing. A respondent may withdraw a hearing request in writing and, if permitted by the presiding official, supplement the record with a written submission in lieu of a hearing.

(c) *Telephonic and in-person hearings.* A telephone hearing will be held if the amount of the proposed civil penalty or the cost of the proposed corrective action is less than $25,000, unless the respondent or OPS submits a written request for an in-person hearing. In-person hearings will normally be held at the office of the appropriate PHMSA Region. Hearings may be held by video teleconference if the necessary equipment is available to all parties.

(d) *Request for evidentiary material.* Upon request, to the extent practicable, OPS will provide to the respondent in advance of the hearing all evidentiary material upon which OPS intends to rely or to introduce at the hearing that is pertinent to the issues to be determined. The respondent may respond to or rebut this material at the hearing as set forth in this section.

(e) *Pre-hearing submission.* Respondent must submit all records, documentation, and other written evidence it intends to use to rebut an allegation of violation at least 10 calendar days prior to the date of the hearing, unless another deadline is ordered by the presiding official. Failure to submit the material in advance of the hearing in accordance with this paragraph will waive the respondent's right to introduce the material at the hearing, unless the presiding official finds there is good cause for not timely submitting the materials.

(f) *Conduct of the hearing.* The hearing is conducted informally without strict adherence to rules of evidence. The presiding official regulates the course of the hearing and gives each party an opportunity to offer facts, statements, explanation, documents, testimony or other items that are relevant and material to the issues under consideration. The parties may call witnesses on their own behalf and examine the evidence and witnesses presented by the other party. After the evidence in the case has been presented, the presiding official may permit discussion on the issues under consideration.

(g) *Transcript.* PHMSA does not prepare a detailed record of the hearing. The respondent may arrange for the hearing to be recorded or transcribed at cost to the respondent, provided the respondent submits an accurate copy of the recording or transcript for the official record.

(h) *Post-hearing submission.* The respondent and OPS may request an opportunity to submit further written material after the hearing for inclusion in the record. The presiding official will allow a reasonable time for the submission of the material and will specify the submission date. If the material is not submitted within the time prescribed, the case will proceed to final action without the material.

(i) *Preparation of decision.* After submission of all materials during and after the hearing, the presiding official prepares a recommended decision in the case. This recommended decision, along with any material submitted during and after the hearing, will be included in the record which is forwarded to the Associate Administrator for issuance of a decision and order.

18. Add § 190.212 to subpart B to read as follows:

§ 190.212 Presiding official, powers, and duties.

(a) *General.* The presiding official for a hearing conducted under § 190.211 is an attorney on the staff of the Deputy Chief Counsel who is not engaged in any investigative or prosecutorial functions, such as the issuance of a notice under this subpart. If the designated presiding official is unavailable, the Deputy Chief Counsel may delegate the powers and duties specified in this section to another attorney in the Office of Chief Counsel with no prior involvement in the matter to be heard who will serve as the presiding official.

(b) *Time and place of the hearing.* The presiding official will set the date, time and location of the hearing. To the extent practicable, the presiding official will accommodate the parties' schedules when setting the hearing. Reasonable

notice of the hearing will be provided to all parties.

(c) *Powers and duties of presiding official.* The presiding official will conduct a fair and impartial hearing and take all action necessary to avoid delay in the disposition of the proceeding and maintain order. The presiding official has all powers necessary to achieve those ends, including, but not limited to the power to:

(1) Regulate the course of the hearing and conduct of the parties and their counsel;

(2) Receive evidence and inquire into the relevant and material facts concerning the matters that are subject of the hearing;

(3) Require the submission of documents and other information;

(4) Direct that documents or briefs relate to issues raised during the course of the hearing;

(5) Fix the time for filing documents, briefs, and other items;

(6) Prepare a recommended decision; and

(7) Exercise such other authority as is necessary to carry out the responsibilities of the presiding official under this subpart.

19. Section 190.213 is amended by revising paragraph (b)(5), adding paragraph (b)(6) and removing paragraphs (d) and (e) to read as follows:

§ 190.213 Final order.

* * * * *

(b) * * *

(5) In cases involving a § 190.211 hearing, any material submitted during and after the hearing; and

(6) The recommended decision prepared by the presiding official in cases involving a § 190.211 hearing, or prepared by an attorney from the Office of Chief Counsel in cases not involving a hearing, containing proposed findings and determinations on all material issues.

(c) * * *

§ 190.215 [Removed and Reserved]

20. Remove and reserve § 190.215.

21. Section 190.217 is revised to read as follows:

§ 190.217 Compliance orders generally.

When the Associate Administrator has reason to believe that a person is engaging in conduct that violates 49 U.S.C. 60101 *et seq.,* section 4202 of the Oil Pollution Act of 1990 (33 U.S.C. 1321(j)), or any regulation or order issued thereunder, and if the nature of the violation and the public interest warrant, the Associate Administrator may conduct proceedings under §§ 190.207 through 190.213 of this part to determine the nature and extent of the violations and to issue an order directing compliance.

22. In § 190.219, paragraph (a) is revised and paragraph (c) is added to read as follows:

§ 190.219 Consent order.

(a) At any time prior to the issuance of a compliance order under § 190.217, a corrective action order under § 190.233, or a safety order under § 190.239, the Associate Administrator and the respondent may agree to dispose of the case by execution of a consent agreement and order which may be jointly executed. Upon execution, the consent order is considered a final order under § 190.213.

* * * * *

(c) The proposed execution of a consent agreement and order arising out of a corrective action order under § 190.233 will comply with the notification procedures set forth in 49 U.S.C. 60112(c).

23. Section 190.221 is revised to read as follows:

§ 190.221 Civil penalties generally.

When the Associate Administrator has reason to believe that a person has committed an act violating 49 U.S.C. 60101 *et seq.,* section 4202 of the Oil Pollution Act of 1990 (33 U.S.C. 1321(j)), or any regulation or order issued thereunder, proceedings under §§ 190.207 through 190.213 may be conducted to determine the nature and extent of the violations and to assess and, if appropriate, compromise a civil penalty.

24. Section 190.223 is revised to read as follows:

§ 190.223 Maximum penalties.

(a) Any person who is determined to have violated a provision of 49 U.S.C. 60101 *et seq.* section 4202 of the Oil Pollution Act of 1990 (33 U.S.C. 1321(j)), or any regulation or order issued thereunder after January 3, 2012, is subject to an administrative civil penalty not to exceed $200,000 for each violation for each day the violation continues, except that the maximum administrative civil penalty may not exceed $2,000,000 for any related series of violations.

(b) Any person who is determined to have violated any standard or order under 49 U.S.C. 60129 shall be subject to a civil penalty not to exceed $1,000, which shall be in addition to any other penalties to which such person may be subject under paragraph (a) of this section.

(c) No person will be subject to a civil penalty under this section for the violation of any provision of 49 U.S.C. 60101 *et seq.* or any regulation issued thereunder resulting in an order being issued under §§ 190.217, 190.219 or 190.233 and a violation of the requirements of such an order if both violations are based on the same act, except that failure to comply with the terms of such orders constitutes a different act.

25. In § 190.225, paragraphs (a)(1), (a)(2), (a)(3), (a)(4) and (a)(5) are revised to read as follows:

§ 190.225 Assessment considerations.

* * * * *

(a) The Associate Administrator shall consider:

(1) The nature, circumstances and gravity of the violation, including adverse impact on the environment;

(2) The degree of the respondent's culpability;

(3) The respondent's history of prior offenses;

(4) Any good faith by the respondent in attempting to achieve compliance;

(5) The effect on the respondent's ability to continue in business; and

* * * * *

26. In § 190.227, paragraph (a) is revised to read as follows:

§ 190.227 Payment of penalty.

(a) Except for payments exceeding $10,000, payment of a civil penalty proposed or assessed under this subpart may be made by certified check or money order (containing the CPF Number for the case), payable to ''U.S. Department of Transportation,'' to the Federal Aviation Administration, Mike Monroney Aeronautical Center, Financial Operations Division (AMZ–341), P.O. Box 25770, Oklahoma City, OK 73125, by wire transfer through the Federal Reserve Communications System (Fedwire) to the account of the U.S. Treasury, or via ''*www.pay.gov.*'' Payments exceeding $10,000 must be made by wire transfer.

* * * * *

§ 190.229 [Removed and Reserved]

27. Remove and reserve § 190.229.

§ 190.231 [Removed and Reserved]

28. Remove and reserve § 190.231.

29. In § 190.233, paragraphs (a), (b), (c)(3), (c)(4), (f)(1), and (g) are revised to read as follows:

§ 190.233 Corrective action orders.

(a) Except as provided by paragraph (b) of this section, if the Associate Administrator finds, after reasonable notice and opportunity for hearing in accord with paragraph (c) of this section and § 190.211, a particular pipeline

facility is or would be hazardous to life, property, or the environment, the Associate Administrator may issue an order pursuant to this section requiring the owner or operator of the facility to take corrective action. Corrective action may include suspended or restricted use of the facility, physical inspection, testing, repair, replacement, or other appropriate action.

(b) The Associate Administrator may waive the requirement for notice and opportunity for hearing under paragraph (a) of this section before issuing an order whenever the Associate Administrator determines that the failure to do so would result in the likelihood of serious harm to life, property, or the environment. When an order is issued under this paragraph, a respondent that elects to contest the order may obtain expedited review of the order either by answering in writing to the order or requesting a § 190.211 hearing to be held as soon as practicable in accordance with paragraph (c)(2) of this section. For purposes of this section, the term ''expedited review'' is defined as the process for making a prompt determination of whether the order should remain in effect or be terminated, in accordance with paragraph (g) of this section. The expedited review of an order issued under this paragraph will be complete upon issuance of such determination.

(c) * * *

(3) A hearing under this section will be conducted pursuant to § 190.211.

(4) After conclusion of a hearing under this section, the presiding official will submit a recommendation to the Associate Administrator as to whether or not a hazardous condition that exists or may exist requiring corrective action expeditiously. Upon receipt of the recommendation, the Associate Administrator will proceed in accordance with paragraphs (d) through (h) of this section. If the Associate Administrator finds the facility is or would be hazardous to life, property, or the environment, the Associate Administrator, OPS issues a corrective action order in accordance with this section or continues a corrective action order already issued under paragraph (b) of this section. If the Associate Administrator does not find the facility is or would be hazardous to life, property, or the environment, the Associate Administrator will withdraw the allegation of the existence of a hazardous facility contained in the notice or will terminate a corrective action order issued under paragraph (b), and promptly notify the owner or operator in writing by service as prescribed in § 190.5.

* * * * *

(f) * * *

(1) A finding that the pipeline facility is or would be hazardous to life, property, or the environment.

* * * * *

(g) The Associate Administrator will terminate a corrective action order whenever the Associate Administrator determines that the facility is no longer hazardous to life, property, or the environment. If appropriate, however, a notice of probable violation may be issued under § 190.207.

* * * * *

§ 190.237 [Removed and Reserved]

30. Remove and reserve § 190.237.

31. Section 190.239 is amended by revising the heading of paragraphs (a), (b), (c), (d), (e), and (f), and adding paragraph (g) to read as follows:

§ 190.239 Safety orders.

(a) *When may PHMSA issue a safety order?* * * *

(b) *How is an operator notified of the proposed issuance of a safety order and what are its responses options?* * * *

(c) *How is the determination made that a pipeline facility has a condition that poses an integrity risk?* * * *

(d) *What factors must PHMSA consider in making a determination that a risk condition is present?* * * *

(e) *What information will be included in a safety order?* * * *

(f) *Can PHMSA take other enforcement actions on the affected facilities?* * * *

(g) *May I petition for reconsideration of a safety order?* Yes, a petition for reconsideration may be submitted in accordance with § 190.249.

§ 190.241 [Reserved]

32. Add and reserve § 190.241.

§ 190.243 [Reserved]

33. Add and reserve § 190.243.

§ 190.245 [Reserved]

34. Add and reserve § 190.245.

§ 190.247 [Reserved]

35. Add and reserve § 190.247.

36. Add § 190.249 to subpart B to read as follows:

§ 190.249 Petitions for reconsideration.

(a) A respondent may petition the Associate Administrator for reconsideration of a final order issued under § 190.213, a compliance order issued under § 190.217, a corrective action order issued under § 190.233, an order directing amendment of plans or procedures under § 190.206, or a safety order under § 190.239. The petition must be received no later than 30 days after service of the order upon the respondent and a copy must be provided to the Office of Chief Counsel. Petitions received after that time will not be considered. The petition must contain a brief statement of the complaint and an explanation as to why the order should be reconsidered.

(b) If the respondent requests the consideration of additional facts or arguments, the respondent must submit the reasons they were not presented prior to issuance of the final order.

(c) The Associate Administrator does not consider repetitious information, arguments, or petitions.

(d) The filing of a petition under this section stays the payment of any civil penalty assessed. However, unless the Associate Administrator, OPS otherwise provides, the order, including any required corrective action, is not stayed.

(e) The Associate Administrator may grant or deny, in whole or in part, any petition for reconsideration without further proceedings. In the event the Associate Administrator reconsider a final order, a final decision on reconsideration may be issued without further proceedings, or, in the alternative, additional information, data, and comment may be requested by the Associate Administrator as deemed appropriate.

(f) It is the policy of the Associate Administrator to issue notice of the action taken on a petition for reconsideration expeditiously. In cases where a substantial delay is expected, notice of that fact and the date by which it is expected that action will be taken is provided to the respondent upon request and whenever practicable.

(g) The Associate Administrator's decision on reconsideration is the final agency action. Any application for judicial review must be filed no later than 89 days after the issuance of the decision in accordance with 49 U.S.C. 60119(a). Failure to raise an issue in a petition for reconsideration waives the availability of judicial review of that issue.

(h) Judicial review of agency action under 49 U.S.C. 60119(a) will apply the standards of review established in section 706 of title 5.

Subpart C—[Redesignated as Subpart D]

37. Redesignate existing subpart C as new subpart D.

38. Add new subpart C to read as follows:

Subpart C—Criminal Enforcement

§ 190.291 Criminal penalties generally.

(a) Any person who willfully and knowingly violates a provision of 49 U.S.C. 60101 *et seq.* or any regulation or order issued thereunder will upon conviction be subject to a fine under title 18 and imprisonment for not more than five years, or both, for each offense.

(b) Any person who willfully and knowingly injures or destroys, or attempts to injure or destroy, any interstate transmission facility, any interstate pipeline facility, or any intrastate pipeline facility used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce (as those terms are defined in 49 U.S.C. 60101 *et seq.*) will, upon conviction, be subject to a fine under title 18, imprisonment for a term not to exceed 20 years, or both, for each offense.

(c) Any person who willfully and knowingly defaces, damages, removes, or destroys any pipeline sign, right-of-way marker, or marine buoy required by 49 U.S.C. 60101 *et seq.* or any regulation or order issued thereunder will, upon conviction, be subject to a fine under title 18, imprisonment for a term not to exceed 1 year, or both, for each offense.

(d) Any person who willfully and knowingly engages in excavation activity without first using an available one-call notification system to establish the location of underground facilities in the excavation area; or without considering location information or markings established by a pipeline facility operator; and

(1) Subsequently damages a pipeline facility resulting in death, serious bodily harm, or property damage exceeding $50,000;

(2) Subsequently damages a pipeline facility and knows or has reason to know of the damage but fails to promptly report the damage to the operator and to the appropriate authorities; or

(3) Subsequently damages a hazardous liquid pipeline facility that results in the release of more than 50 barrels of product; will, upon conviction, be subject to a fine under title 18, imprisonment for a term not to exceed 5 years, or both, for each offense.

(e) No person shall be subject to criminal penalties under paragraph (a) of this section for violation of any regulation and the violation of any order issued under §§ 190.217, 190.219 or 190.291 if both violations are based on the same act.

§ 190.293 Referral for prosecution.

If an employee of the Pipeline and Hazardous Materials Safety Administration becomes aware of any actual or possible activity subject to criminal penalties under § 190.291, the employee reports it to the Office of the Chief Counsel, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, Washington, DC 20590. The Chief Counsel refers the report to OPS for investigation. Upon completion of the investigation and if appropriate, the Chief Counsel refers the report to the Department of Justice for criminal prosecution of the offender.

39. Section 190.319 is revised to read as follows:

§ 190.319 Petitions for extension of time to comment.

A petition for extension of the time to submit comments must be submitted to PHMSA in accordance with § 190.309 and received by PHMSA not later than 10 days before expiration of the time stated in the notice. The filing of the petition does not automatically extend the time for petitioner's comments. A petition is granted only if the petitioner shows good cause for the extension, and if the extension is consistent with the public interest. If an extension is granted, it is granted to all persons, and it is published in the **Federal Register**.

40. Section 190.321 is revised to read as follows:

§ 190.321 Contents of written comments.

All written comments must be in English. Any interested person should submit as part of written comments all material considered relevant to any statement of fact. Incorporation of material by reference should be avoided; however, where necessary, such incorporated material shall be identified by document title and page.

41. In § 190.327, paragraph (b) is revised to read as follows:

§ 190.327 Hearings.

* * * * *

(b) Sections 556 and 557 of title 5, United States Code, do not apply to hearings held under this subpart. Unless otherwise specified, hearings held under this part are informal, non-adversarial fact-finding proceedings, at which there are no formal pleadings or adverse parties. Any regulation issued in a case in which an informal hearing is held is not necessarily based exclusively on the record of the hearing.

* * * * *

42. In § 190.335, paragraph (a) is revised to read as follows:

§ 190.335 Petitions for Reconsideration.

(a) Except as provided in § 190.339(d), any interested person may petition the Associate Administrator for reconsideration of any regulation issued under this subpart, or may petition the Chief Counsel for reconsideration of any procedural regulation issued under this subpart and contained in this subpart. The petition must be received not later than 30 days after publication of the rule in the **Federal Register**. Petitions filed after that time will be considered as petitions filed under § 190.331. The petition must contain a brief statement of the complaint and an explanation as to why compliance with the rule is not practicable, is unreasonable, or is not in the public interest.

* * * * *

43. Section 190.337 is revised to read as follows:

§ 190.337 Proceedings on petitions for reconsideration.

The Associate Administrator or the Chief Counsel may grant or deny, in whole or in part, any petition for reconsideration without further proceedings, except where a grant of the petition would result in issuance of a new final rule. In the event that the Associate Administrator or the Chief Counsel determines to reconsider any regulation, a final decision on reconsideration may be issued without further proceedings, or an opportunity to submit comment or information and data as deemed appropriate, may be provided. Whenever the Associate Administrator or the Chief Counsel determines that a petition should be granted or denied, the Office of the Chief Counsel prepares a notice of the grant or denial of a petition for reconsideration, for issuance to the petitioner, and the Associate Administrator or the Chief Counsel issues it to the petitioner. The Associate Administrator or the Chief Counsel may consolidate petitions relating to the same rules.

§ 190.338 [Amended]

44. In § 190.338, paragraph (c) is removed and reserved.

45. Section 190.341 is amended by revising the heading of paragraphs (a), (b), (c), (d), (e), (f), (g), (h), (i), and (j), and adding paragraph (k) to read as follows:

§ 190.341 Special permits.

(a) *What is a special permit?* * * *

(b) *How do I apply for a special permit?* * * *

(c) *What information must be contained in the application?* * * *

(d) *How does PHMSA handle special permit applications?* * * *

(e) *Can a special permit be requested on an emergency basis?* * * *

(f) *How do I apply for an emergency special permit?* * * *

(g) *What must be contained in an application for an emergency special permit?* * * *

(h) *In what circumstances will PHMSA revoke, suspend, or modify a special permit?* * * *

(i) *Can a denial of a request for a special permit or a revocation of an existing special permit be appealed?* * * *

(j) *Are documents related to an application for a special permit available for public inspection?* * * *

(k) *Am I subject to enforcement action for non-compliance with the terms and conditions of a special permit?* Yes. PHMSA inspects for compliance with the terms and conditions of special permits and if a violation is identified, PHMSA will initiate one or more of the enforcement actions under subpart B of this part.

PART 192—TRANSPORTATION OF NATURAL AND OTHER GAS BY PIPELINE: MINIMUM FEDERAL SAFETY STANDARDS

46. The authority citation for Part 192 continues to read as follows: 49 U.S.C. 5103, 60102, 60104, 60108, 60109, 60110, 60113, 60116, 60118, and 60137; and 49 CFR 1.53.

47. In § 192.603, paragraph (c) is revised read as follows:

§ 192.603 General provisions.

* * * * *

(c) The *Administrator or the State Agency* that has submitted a current certification under the pipeline safety laws, (49 U.S.C. 60101 *et seq.*) with respect to the pipeline facility governed by an operator's plans and procedures may, after notice and opportunity for hearing as provided in 49 CFR 190.206 or the relevant State procedures, require the operator to amend its plans and procedures as necessary to provide a reasonable level of safety.

PART 193—LIQUEFIED NATURAL GAS FACILITIES: FEDERAL SAFETY STANDARDS

48. The authority citation for Part 193 continues to read as follows: 49 U.S.C. 5103, 60102, 60103, 60104, 60108, 60109, 60110, 60113, 60118; and 49 CFR 1.53.

49. In § 193.2017, paragraph (b) is revised read as follows:

§ 192.2017 Plans and procedures.

* * * * *

(b) The *Administrator or the State Agency* that has submitted a current certification under section 5(a) of the Natural Gas Pipeline Safety Act with respect to the pipeline facility governed by an operator's plans and procedures may, after notice and opportunity for hearing as provided in 49 CFR 190.206 or the relevant State procedures, require the operator to amend its plans and procedures as necessary to provide a reasonable level of safety.

* * * * *

PART 195—TRANSPORTATION OF HAZARDOUS LIQUIDS BY PIPELINE

50. The authority citation for Part 195 continues to read as follows: 49 U.S.C. 5103, 60102, 60104, 60108, 60109, 60116, 60118, and 60137; and 49 CFR 1.53.

51. In § 195.402, paragraph (b) is revised read as follows:

§ 195.402 Procedural manual for operations, maintenance, and emergencies.

* * * * *

(b) The *Administrator or the State Agency* that has submitted a current certification under the pipeline safety laws (49 U.S.C. 60101 *et seq.*) with respect to the pipeline facility governed by an operator's plans and procedures may, after notice and opportunity for hearing as provided in 49 CFR 190.206 or the relevant State procedures, require the operator to amend its plans and procedures as necessary to provide a reasonable level of safety.

* * * * *

PART 199—TRANSPORTATION OF HAZARDOUS LIQUIDS BY PIPELINE

52. The authority citation for Part 199 continues to read as follows: 49 U.S.C. 5103, 60102, 60104, 60108, 60117, and 60118; 49 CFR 1.53.

53. In § 199.101, paragraph (b) is revised read as follows:

§ 199.101 Anti-drug plan.

* * * * *

(b) The *Administrator or the State Agency* that has submitted a current certification under the pipeline safety laws (49 U.S.C. 60101 *et seq.*) with respect to the pipeline facility governed by an operator's plans and procedures may, after notice and opportunity for hearing as provided in 49 CFR 190.206 or the relevant State procedures, require the operator to amend its plans and procedures as necessary to provide a reasonable level of safety.

Issued in Washington, DC, on August 6, 2012.

Jeffrey D. Wiese,

Associate Administrator for Pipeline Safety.

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Notices

Federal Register
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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

August 7, 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.

Food and Nutrition Service

Title: Status of Claims Against Households.

OMB Control Number: 0584–0069.

Summary of Collection: Section 11, 13, and 16 of the Food Stamp Act of 1977, as amended (the Act) and appropriate Supplemental Nutrition Assistance Program regulation are the bases for the information collected on FNS–209. Regulations at 7 CFR 273.18(m)(5) requires State agencies to submit at the end of every quarter the completed FNS–209, Status of Claims Against Households. The information required for the FNS–209 report is obtained from a State accountable system responsible for establishing claims, sending demand letters, collecting claims, and managing other claim activity.

Need and Use of the Information: The Food and Nutrition Service (FNS) will collect information on the outstanding aggregate claim balance; claims established; collections; any balance and collection adjustments; and the amount to be retained for collecting non-agency error claims. The information will be used by State agencies to ascertain aggregate claim balance and collections for determining overall performance, the collection amounts to return to FNS, and claim retention amounts. FNS will receive collections and report collection activity to Treasury. If this data is collected less often than quarterly, it would delay the Federal collection of the Federal share of the State agency's collections. FNS would not be able to effectively monitor the collection and recovery of program funds or protect the integrity of the program.

Description of Respondents: State, Local or Tribal Government.

Number of Respondents: 53.

Frequency of Responses: Reporting: Quarterly.

Total Burden Hours: 636.

Food and Nutrition Service

Title: Request for Administrative Review.

OMB Control Number: 0584–0520.

Summary of Collection: The Food and Nutrition Service (FNS) of the U.S. Department of Agriculture is the Federal agency responsible for the Supplemental Nutrition Assistance Program (SNAP). The Food and Nutrition Act of 2008 (7 U.S.C. 2011–2036), as codified under 7 CFR Parts 278 and 279, requires that the FNS determine the eligibility of retail food stores and certain food service organizations to participate in the SNAP. If a retail or wholesale firm is found to be ineligible by FNS, or is otherwise aggrieved by certain FNS action(s), that firm has the right to file a written request for review of the administrative action with FNS.

Need and Use of the Information: The request for administrative review is a formal letter, provided by the requester, with an original signature. FNS receives the letter requesting an administrative review and maintains it as part of the official review record. The designated reviewer will adjudicate the appeals process and make a final determination regarding the aggrieved action.

Description of Respondents: Business or other for profit.

Number of Respondents: 897.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 183.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2012–19731 Filed 8–10–12; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

August 8, 2012.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including

through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

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.

Food Safety and Inspection Service

Title: Food Safety Education Campaign Post-Wave Tracking Survey.

OMB Control Number: 0583–New.

Summary of Collection: The Food Safety and Inspection Service (FSIS) has been delegated the authority to exercise the functions of the Secretary as provided in the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601 *et. seq.*), the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451, *et. seq.*), and the Egg Products Inspection Act (EPIA) (21 U.S.C. 1031). These statues mandate that FSIS protect the public by verifying that meat and poultry products are safe, wholesome, unadulterated, and properly labeled and package. FSIS, in partnership with the AD Council, the Food and Drug Administration, and the Center for Disease Control, has developed a national public service advertising campaign to educate the public about the importance of safe food handling and how to reduce the risks associated with foodborne illness.

Need and Use of the Information: FSIS will collect information using a survey to help measure the impact of the campaign. The collected information will also help gauge awareness of the advertising, attitudes regarding safe food preparation, and self-reported prevention behaviors.

Description of Respondents: Individuals or households.

Number of Respondents: 7,200.

Frequency of Responses: Reporting: Other (once).

Total Burden Hours: 500.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2012–19776 Filed 8–10–12; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

August 8, 2012.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

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 Pork-Filled Pasta.

OMB Control Number: 0579–0214.

Summary of Collection: The Animal Health Protection Act (AHPA) of 2002 is the primary Federal law governing the protection of animal health. The law gives the Secretary of Agriculture broad authority to detect, control, and eradicate pests or diseases of livestock or poultry. The Animal and Plant Health Inspection Service (APHIS) is responsible for protecting the health of our Nation's livestock and poultry populations by preventing the introduction and interstate spread of serious diseases and pests of livestock and for eradicating such diseases from the United States when feasible.

Need and use of the Information: A certificate must be completed and signed by the issuing official, and contains such information as the origin of the meat used in the product, the name and location of the facility that processed the product, and the product's intended destination. Without the information, it would significantly cripple APHIS' ability to ensure that pork-filled pasta from certain regions pose a minimal risk of introducing swine vesicular disease into the United States.

Description of Respondents: Business or other for-profit; Federal Government.

Number of Respondents: 2.

Frequency of Responses: Recordkeeping; Reporting: On occasion.

Total Burden Hours: 3.

Animal and Plant Health Inspection Service

Title: Standards for Privately Owned Quarantine Facilities for Ruminants.

OMB Control Number: 0579–0232.

Summary of Collection: The Animal Health Protection Act (AHPA) of 2002 is the primary Federal law governing the protection of animal health. The law gives the Secretary of Agriculture broad authority to detect, control, or eradicate pests or diseases of livestock or poultry. The Secretary may also prohibit or restrict import or export of any animal or related material to prevent the spread of any livestock or poultry pest or disease. The Animal and Plant Health Inspection Service (APHIS) provides standards for the approval, operation, and oversight of privately owned quarantine facilities for imported ruminants prior to their release into the United States.

Need and use of the Information: APHIS uses the following information activities with its efforts to maintain a system whereby private individuals can operate (with APHIS oversight) their own facilities for the quarantine of imported ruminants: (1) Application Letter; (2) Compliance Agreement; (3) Daily Log; and (4) Request for Variance.

Without the information, APHIS would be forced to discontinue its program of allowing the operation of privately owned quarantine facilities for ruminants, a development that would hamper U.S. animal import activities.

Description of Respondents: Business or other for-profit.

Number of Respondents: 3.

Frequency of Responses: *Recordkeeping;* Reporting: On occasion.

Total Burden Hours: 76.

Animal and Plant Health Inspection Service

Title: Importation of Swine and Swine Products from the European Union.

OMB Control Number: 0579–0265.

Summary of Collection: The Animal Health Protection Act (AHPA) of 2002 is the primary Federal law governing the protection of animal health. The law gives the Secretary of Agriculture broad authority to detect, control, or eradicate pests or diseases of livestock or poultry. In connection with the disease prevention mission, the Animal and Plant Health Inspection Service (APHIS) regulates the importation of animals and animal products into the United States to guard against the introduction of animal diseases not currently present or prevalent in the United States.

Need and Use of the Information: To help APHIS ensure that classical Swine fever (CSF) is not introduced into the United States, the regulations allow, under specified conditions, the importation of pork, pork products, and swine from the APHIS-defined European Union (EU) CSF region. These requirements necessitate the use of several information collection activities, including certification statements from the importation of pork, pork products, and swine. Failing to collect this information would increase the chances of CSF being introduced into the United States.

Description of Respondents: Federal Government.

Number of Respondents: 15.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 6,846.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2012–19785 Filed 8–10–12; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Forest Service

Glenn/Colusa County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Glenn/Colusa County Resource Advisory Committee (RAC) will meet in Willows, California. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110–343) (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with the title II of the Act. The meeting is open to the public. The purpose of the meeting is to review and discuss new project proposals.

DATES: The meeting will be held on August 20, 2012 from 1:00 p.m. and end at approximately 4:00 p.m.

ADDRESSES: The meeting will be held at the Mendocino National Forest Supervisor's Office, Snow Mountain Conference Room, 825 North Humboldt Ave., Willows, CA. Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION**.

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at 825 N. Humboldt Ave., Willows, CA 95988. Please call ahead to (530) 934–3316 to facilitate entry into the building to view comments.

FOR FURTHER INFORMATION CONTACT: Randy Jero, Committee Coordinator, USDA, Mendocino National Forest, Grindstone Ranger District. Phone voice (530) 934–3316; phone TTY (530) 934–7724; Email *rjero@fs.fed.us.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday. Please make requests in advance for sign language interpreting, assistive listening devices or other reasonable accomodation for access to the facility or procedings by contacting the person listed **FOR FURTHER INFORMATION**.

SUPPLEMENTARY INFORMATION: The following business will be conducted: (1) Introductions, (2) Approval of Minutes, (3) Public Comment, (4) RAC Administrative Updates, (5) Project Presentations & Discussion, (6) Next Agenda. The full agenda may be previewed at: *https://fsplaces.fs.fed.us/fsfiles/unit/wo/secure_rural_schools.nsf/Web_Agendas?OpenView&Count=1000&RestrictToCategory=Glenn+and+Colusa+Counties.*

Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing by August 13, 2012 to be scheduled on the agenda. Written comments and requests for time for oral comments must be sent to Randy Jero, Committee Coordinator, USDA, Mendocino National Forest, Grindstone Ranger District, 825 N. Humboldt Ave., Willows, CA 95988 or by email to *derogfSfedus* or via facsimile to 530–934–1212.

A summary of the meeting will be posted at: *https://fsplaces.fs.fed.us/fsfiles/unit/wo/secure_rural_schools.nsf/RAC/Glen+and+Colusa+Counties?OpenDocument,* within 21 days of the meeting.

Dated: August 2, 2012.

Eduardo Olmedo,

District Ranger.

[FR Doc. 2012–19500 Filed 8–10–12; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of Idaho Panhandle Resource Advisory Committee Meeting; Correction

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting; correction.

SUMMARY: The Forest Service published a document in the **Federal Register** of July 30, 2012, concerning the Idaho Panhandle Resource Advisory Committee meeting on Friday, August 24, 2012, at 9:00 a.m. in Coeur d'Alene, Idaho for a business meeting open to the public. The date of the meeting has since changed and needs to be amended.

FOR FURTHER INFORMATION CONTACT: Mary Farnsworth, Forest Supervisor and Designated Federal Official, at (208) 765–7369.

Correction

In the **Federal Register** of July 30, 2012, in FR Doc. 2012–18458, on page 44579, in the first column, correct the **DATES** and the **SUMMARY** caption to read:

DATES: September 7, 2012.

SUMMARY: Pursuant to the authorities in the Federal Advisory Committee Act (Pub. L. 112–141) and under the Secure Rural Schools and Community Self-

Determination Act of 2000 (Pub. L. 110–343) the Idaho Panhandle Resource Advisory Committee will meet Friday, September 7, 2012, at 9:00 a.m. in Coeur d'Alene, Idaho for a business meeting. The business meeting is open to the public.

Dated: August 3, 2012.

Mary Farnsworth,

Forest Supervisor.

[FR Doc. 2012–19544 Filed 8–10–12; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Flathead Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meetings.

SUMMARY: The Flathead Resource Advisory Committee will meet in Kalispell, Montana. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 112–141) (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with the title II of the Act. The meeting is open to the public. The purpose of the meeting is to hear project proposal presentations for 2013.

DATES: The meetings will be held September 4, 11, 18, and 25, 2012. Meetings will begin at 4:30 p.m. and end at 6:00 p.m.

ADDRESSES: The meetings will be held at 650 Wolfpack Way, Flathead National Forest Office, Kalispell, MT. Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION**. Written comments should be sent to Flathead National Forest, Attn: RAC, 650 Wolfpack Way, Kalispell, MT 59901. Comments may also be sent via email to *ckendall@fs.fed.us* or via facsimile to 406.758.5351.

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at 650 Wolfpack Way, Kalispell, MT. Visitors are encouraged to call ahead to 406–758–6485 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Craig Kendall, Flathead National Forest, 406.758.6485.

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. The following business will be conducted: presentation of project proposals and approval of projects. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing by September 1, 2012 to be scheduled on the agenda. Written comments and requests for time for oral comments must be sent to Flathead National Forest, Attn: RAC, 650 Wolfpack Way, Kalispell, MT 59901, or by email to *ckendall@fs.fed.us,* or via facsimile to 406.758.5351. A summary of the meeting will be posted at *https://fsplaces.fs.fed.us/fsfiles/unit/wo/secure_rural_schools.nsf* within 21 days of the meeting.

Meeting Accommodations: If you are a person requiring resonable accomodation, please make requests in advance for sign language interpreting, assistive listening devices or other reasonable accomodation for access to the facility or procedings by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All reasonable accommodation requests are managed on a case by case basis.

Dated: August 6, 2012.

Chip Weber,

Forest Supervisor, Flathead National Forest.

[FR Doc. 2012–19826 Filed 8–10–12; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Missouri River Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Missouri River Resource Advisory Committee will meet in Helena, Montana. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L 110–343) (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with the title II of the Act. The meeting is open to the public. The purpose of the meeting is to approve previous meeting notes; review, vote and recommend projects for title II funding; and address any questions or comments from the public.

DATES: The meeting will be held Monday, September 17, 2012 at 6 p.m.

ADDRESSES: The meeting will be held in the Elkhorn/Tizer meeting room at the Helena National Forest Supervisor's Office at 2880 Skyway Drive, Helena, MT 59602. VTC will be available; members of the public can attend the meeting via VTC at their local Forest Service office.

Written comments may be submitted as described under Supplementary Information. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at the Helena National Forest office. Please call ahead to 406–495–3747 to facilitate entry into the building to view comments.

FOR FURTHER INFORMATION CONTACT: Kathy Bushnell, Forest Public Affairs Officer/DFO, Helena National Forest, 406–495–3747, *kbushnell@fs.fed.us.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday. Requests for reasonable accomodation for access to the facility or procedings may be made by contacting the person listed For Further Information.

SUPPLEMENTARY INFORMATION: The following business will be conducted: approve previous meeting notes; review, vote and recommend projects for Title II funding; and address any questions or comments from the public. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. The agenda will include time for people to make oral statements of three minutes or less. A summary of the meeting will be posted at *www.fs.fed.us/r1/helena/* within 21 days of the meeting.

Dated: August 2, 2012.

Kathy Bushnell,

Forest Public Affairs Officer/DFO.

[FR Doc. 2012–19384 Filed 8–10–12; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF COMMERCE

Economic Development Administration

Notice of Petitions by Firms for Determination of Eligibility to Apply for Trade Adjustment Assistance

AGENCY: Economic Development Administration, Department of Commerce.

ACTION: Notice and Opportunity for Public Comment.

Pursuant to Section 251 of the Trade Act 1974, as amended (19 U.S.C. 2341 et seq.), the Economic Development Administration (EDA) has received petitions for certification of eligibility to apply for Trade Adjustment Assistance (TAA) from the firms listed below. Accordingly, EDA has initiated investigations to determine whether increased imports into the United States of articles like or directly competitive with those produced by each of these firms contributed importantly to the total or partial separation of the firm's workers, or threat thereof, and to a decrease in sales or production of each petitioning firm.

LIST OF PETITIONS RECEIVED BY EDA FOR CERTIFICATION ELIGIBILITY TO APPLY FOR TRADE ADJUSTMENT ASSISTANCE

07/06/12 to 08/06/12

Firm name	Firm address	Date accepted for investigation	Product(s)
Dohm-Icebox, Inc.	1111 Delaware Avenue, Longmont, CO 80501.	07/10/12	The firm manufactures hats and other apparel.
HEB Manufacturing Co., Inc.	67 VT Rte. 110, Chelsea, VT 05038.	07/10/12	The firm performs wire forming, metal fabricating, and metal stamping functions.
J.L. Souser & Associates d/b/a JLS Automation.	3495 Industrial Avenue, York, PA 17402.	07/12/12	The firm manufactures industrial packaging machinery used in the food industry.
Finishing Professionals, LLC	7777 E. 4th Avenue, Denver, CO 80207.	07/16/12	The firm manufactures plated fabricated metal parts.
Gorman Machine Corp	7 Burke Drive, Brockton, MA 02301.	08/06/12	The firm designs and manufactures coil winding machinery.
New World Millworks, Inc. ...	1211 Atchison Court, Castle Rock, CO 80109.	08/06/12	The firm manufactures architectural millwork products including but not limited to wood cabinetry and interior millwork.

Any party having a substantial interest in these proceedings may request a public hearing on the matter. A written request for a hearing must be submitted to the Trade Adjustment Assistance for Firms Division, Room 7106, Economic Development Administration, U.S. Department of Commerce, Washington, DC 20230, no later than ten (10) calendar days following publication of this notice.

Please follow the requirements set forth in EDA's regulations at 13 CFR 315.9 for procedures to request a public hearing. The Catalog of Federal Domestic Assistance official number and title for the program under which these petitions are submitted is 11.313, Trade Adjustment Assistance for Firms.

Dated: August 6, 2012.

Miriam Kearse,

Eligibility Certifier, TAA for Firms.

[FR Doc. 2012–19764 Filed 8–10–12; 8:45 am]

BILLING CODE 3510–WH–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[S–52–2012]

Approval of Subzone Status; Shimadzu USA Manufacturing, Inc., Canby, OR

On May 8, 2012, the Executive Secretary of the Foreign-Trade Zones (FTZ) Board docketed an application submitted by the Port of Portland, grantee of FTZ 45, requesting subzone status subject to the existing activation limit of FTZ 45, on behalf of Shimadzu USA Manufacturing, Inc., in Canby, Oregon.

The application was processed in accordance with the FTZ Act and Regulations, including notice in the **Federal Register** inviting public comment (77 FR 28568, 05/15/2012). The FTZ staff examiner reviewed the application and determined that it meets the criteria for approval. Pursuant to the authority delegated to the FTZ Board Executive Secretary (15 CFR Sec. 400.36(f)), the application to establish Subzone 45G is approved, subject to the FTZ Act and the Board's regulations, including Section 400.13 and further subject to FTZ 45's pre-existing activation limit.

Dated: August 8, 2012.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2012–19807 Filed 8–10–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–53–2012]

Foreign-Trade Zone 20—Suffolk, VA; Notification of Proposed Production Activity, Usui International Corporation, (Diesel Engine Fuel Lines), Chesapeake, VA

The Virginia Port Authority, grantee of FTZ 20, submitted a notification of proposed production activity on behalf of Usui International Corporation (Usui), located in Chesapeake, Virginia. The notification conforming to the requirements of the regulations of the Board (15 CFR 400.22) was received on June 28, 2012.

The Usui facility is located within Site 9 of FTZ 20. The facility is used for the production of diesel engine fuel lines. Production under FTZ procedures could exempt Usui from customs duty payments on foreign status components

used in export production. On its domestic sales, Usui would be able to choose the duty rate during customs entry procedures that applies to diesel engine fuel lines (duty rate—2.5%) for the foreign status inputs noted below. Customs duties also could possibly be deferred or reduced on foreign status production equipment.

Components and materials sourced from abroad include: Plastic caps and clips, rubber o-rings, paper labels, adhesive tape, tubes/pipes/profiles, fasteners, springs, tags, brackets, engine parts, plates, fixtures, alarm tanks, and caps (duty rate ranges from free to 8.5%).

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is September 24, 2012.

A copy of the notification will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230–0002, and in the ''Reading Room'' section of the Board's Web site, which is accessible via *www.trade.gov/ftz.*

For further information, contact Pierre Duy at *Pierre.Duy@trade.gov* or (202) 482–1378.

Dated: July 26, 2012.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2012–19806 Filed 8–10–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket Number: 120706222–2222–01]

Alternative Personnel Management System (APMS) at the National Institute of Standards and Technology

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice of modifications.

SUMMARY: This notice announces changes to the existing provisions of the National Institute of Standards and Technology's (NIST) Alternative Personnel Management System (APMS) published October 21, 1997. NIST is implementing direct-hire authority on a permanent basis for all Nuclear Reactor Operator positions in NIST's Scientific and Engineering Technician (ZT) career path at the Pay Band III and above, and for all positions in NIST's Scientific and Engineering (ZP) career path at the Pay Band III and above except for the Information Technology Management, 2210 series; the General Engineering, 801 series; and the General Physical Science, 1301 series.

DATES: The changes to the APMS announced in this notice are effective on August 13, 2012.

FOR FURTHER INFORMATION CONTACT: Susanne Porch at the National Institute of Standards and Technology, (301) 975–3000; or Valerie Smith at the U.S. Department of Commerce, (202) 482–0272.

SUPPLEMENTARY INFORMATION:

Background

In accordance with Public Law 99–574, the National Bureau of Standards Authorization Act for Fiscal Year 1987, the Office of Personnel Management (OPM) approved a demonstration project plan, ''Alternative Personnel Management System (APMS) at the National Institute of Standards and Technology (NIST),'' and published the plan in the **Federal Register** on October 2, 1987 (52 FR 37082). The project plan has been modified twice to clarify certain NIST authorities (54 FR 21331 of May 17, 1989, and 55 FR 39220 of Sept. 25, 1990). The project plan and subsequent amendments were consolidated in the final APMS plan, which became permanent on October 21, 1997, 62 FR 54604. NIST first amended the plan on May 6, 2005 (70 FR 23996), to strengthen the link between pay and performance, to simplify the pay-for-performance system, and to broaden the link between performance and retention service credit for reduction in force, which became permanent upon publication. NIST amended the plan again on July 15, 2008 (73 FR 40500), to improve flexibility in rewarding new and mid-level employees and to broaden the ability to make performance distinctions and that amendment became permanent on October 1, 2008.

On December 3, 2010, the Department of Commerce approved NIST's request to pilot direct-hire under 5 U.S.C. 3304(a)(3) for a period of one year for all positions within the Scientific and Engineering (ZP) career path at the Pay Band III and above, for Nuclear Reactor Operator positions in the Scientific and Engineering Technician (ZT) career path at Pay Band III and above, and for all occupations for which there is a special rate under the General Schedule (GS) pay system. On January 5, 2011, a **Federal Register** notice was published (76 FR 539) implementing the direct-hire pilot for a period of one year. During the pilot, information was gathered on the impact of direct-hire authority on preference eligibles, as well as information supporting the finding of a severe shortage of candidates for the positions covered under the direct-hire authority.

On December 20, 2011, NIST published a **Federal Register** notice (76 FR 78889) extending the direct-hire pilot for an additional six (6) months. During this extended pilot period, NIST submitted a request to the Department of Commerce to implement direct-hire authority under 5 U.S.C. 3304(a)(3) on a permanent basis for Nuclear Reactor Operator positions in NIST's Scientific and Engineering Technician (ZT) career path at the Pay Band III and above, and for all positions in NIST's Scientific and Engineering (ZP) career path at the Pay Band III and above except for the Information Technology Management, 2210 series; the General Engineering, 801 series; and the General Physical Science, 1301 series. The request included a statistical analysis determining the impact of direct-hire authority on preference eligibles as well as a justification supporting the finding of a severe shortage of candidates in the covered positions. On April 20, 2012, the Department of Commerce, in consultation with OPM, approved NIST's request to implement direct-hire authority on a permanent basis for the above occupations. The Department of Commerce also granted NIST approval to continue piloting direct-hire authority for all positions in the General Engineering, 801 series and the General Physical Science, 1301 series for an additional period of twelve (12) months.

The APMS plan provides for modifications to be made as experience is gained, results are analyzed, and conclusions are reached on how the system is working. This notice formally announces the modification to the APMS and implements direct-hire authority under 5 U.S.C. 3304(a)(3) on a permanent basis.

Dated: August 8, 2012.

David Robinson,

Associate Director for Management Resources.

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I. Executive Summary

The National Institute of Standards and Technology's (NIST) Alternative Personnel Management System (APMS) is designed to (1) improve hiring and

allow NIST to compete more effectively for high-quality researchers through direct hiring, selective use of higher entry salaries, and selective use of recruiting allowances; (2) motivate and retain staff through higher pay potential, pay-for-performance, more responsive personnel systems, and selective use of retention allowances; (3) strengthen the manager's role in personnel management through delegation of personnel authorities; and (4) increase the efficiency of personnel systems through installation of a simpler and more flexible classification system based on pay banding through reduction of guidelines, steps, and paperwork in classification, hiring, and other personnel systems, and through automation.

Since implementing the APMS in 1987, according to findings in the Office of Personnel Management's (OPM's) ''Summative Evaluation Report National Institute of Standards and Technology Demonstration Project: 1988–1995,'' NIST has accomplished the following: NIST is more competitive for talent; NIST retained more top performers than a comparison group; and NIST managers reported significantly more authority to make decisions concerning employee pay. This modification builds on this success by implementing direct-hire authority under 5 U.S.C. 3304(a)(3) on a permanent basis.

This amendment modifies the October 21, 1997 **Federal Register** notice. Specifically, it enables NIST to hire, after public notice is given, any qualified applicant without regard to 5 U.S.C. 3309–3318, 5 CFR part 211, or 5 CFR part 337, subpart A on a permanent basis.

NIST will continually monitor the effectiveness of this amendment.

II. Basis for APMS Plan Modification

Section 3304(a)(3) of title 5, United States Code, provides agencies with the authority to appoint candidates directly to jobs for which OPM determines that there is a severe shortage of candidates or a critical hiring need.

OPM's direct-hire authority enables agencies to hire, after public notice is given, any qualified application without regard to 5 U.S.C. 3309–3318, 5 CFR part 211, or 5 CFR part 337, subpart A. NIST's APMS allows the NIST Director to modify procedures if no new waiver from law or regulation is added. Given this modification is in accordance with existing law and regulation, the NIST Director is authorized to make the changes described in this notice. The modification to our final **Federal Register** notice, dated October 21, 1997, with respect to our Staffing authorities is provided below.

In 1987, with the approval of the NIST APMS (52 FR 37082), and in 1997, when the APMS plan was modified (62 FR 54604), OPM concurred that all occupations in the ZP career path at the Pay Band III and above constitute a shortage category; Nuclear Reactor Operator positions in the ZT Career Path at the Pay Band III and above constitute a shortage category; and all occupations for which there is a special rate under the General Schedule pay system constitute a shortage category.

III. Changes in the APMS Plan

The APMS at NIST, published in the **Federal Register** on October 21, 1997 (62 FR 54604) is amended as follows:

1. *The subsection titled:* ''Direct Examination and Hiring'' is deleted.

2. *The subsection titled:* ''Direct Hire: Critical Shortage Highly Qualified Candidates'' is deleted.

3. *The information under the subsection titled:* ''Direct Hire: Critical Shortage Occupations'' is replaced with:

NIST uses direct-hire procedures for categories of occupations which require skills that are in short supply. All Nuclear Reactor Operator positions at the Pay Band III and above in the ZT Career Path constitute a shortage category, and all occupations at the Pay Band III and above in the ZP Career Path constitute a shortage category except for the Information Technology Management, 2210 series; the General Engineering, 801 series; and the General Physical Science, 1301 series. Any positions in these categories may be filled through direct-hire procedures in accordance with 5 U.S.C. 3304(a)(3). NIST advertises the availability of job opportunities in direct-hire occupations by posting on the OPM USAJOBS Web site. NIST will follow internal direct-hire procedures for accepting applications.

4. *The subsection titled:* ''NIST Applicant Supply File'' is deleted.

5. *The subsection titled:* ''Referral Procedures for Direct Examination and Hiring and Agency Based Staffing Authorities'' is deleted. The information under this subsection titled: ''1. Direct Referral'' and ''2. Rating and Ranking'' is also deleted.

6. *A new subsection titled:* ''Referral Procedures for Direct-Hire'' is added and the information under this subsection is as follows: After public notice is given, a qualified candidate may be referred without regard to 5 U.S.C. 3309–3318, 5 CFR part 211, or 5 CFR part 337, subpart A.

NIST intends to publish a consolidated plan that reflects all amendments to the APMS in FY13.

[FR Doc. 2012–19812 Filed 8–10–12; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

National Institute of Standards and Technology Performance Review Board Membership

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice.

SUMMARY: This notice lists the membership of the National Institute of Standards and Technology Performance Review Board (NIST PRB) and supersedes the list published on September 9, 2011.

DATES: The changes to the NIST PRB membership list announced in this notice are effective on August 13, 2012.

FOR FURTHER INFORMATION CONTACT: Didi Hanlein at the National Institute of Standards and Technology, (301) 975–3000 or by email at *desiree.hanlein@nist.gov*.

SUPPLEMENTARY INFORMATION: The National Institute of Standards and Technology Performance Review Board (NIST PRB or Board) reviews performance appraisals, agreements, and recommended actions pertaining to employees in the Senior Executive Service and ST–3104 employees. The Board makes recommendations to the appropriate appointing authority concerning such matters so as to ensure the fair and equitable treatment of these individuals.

This notice lists the membership of the NIST PRB and supersedes the list published in the **Federal Register** on September 9, 2011 (76 FR 55880).

NIST PRB Members

Delwin Brockett (C), Chief Information Officer, National Institute of Standards & Technology, Gaithersburg, MD 20899, Appointment Expires: 12/31/13.

Robert Dimeo (C), Director, NIST Center for Neutron Research, National Institute of Standards & Technology, Gaithersburg, MD 20899, Appointment Expires: 12/31/12.

Stella Fiotes (C) (alternate), Chief Facilities Management Officer, National Institute of Standards & Technology, Gaithersburg, MD 20899, Appointment Expires: 12/31/12.

Ellen Herbst (C), Senior Advisor for Policy and Program Integration, Office of the Deputy Secretary, Department of Commerce, Washington, DC 20230, Appointment Expires: 12/31/2012.

Anna M. Gomez (NC), Deputy Assistant Secretary for Communication and Information, National Telecommunications & Information Administration, Department of Commerce, Washington, DC 20230, Appointment Expires: 12/31/2014.

Sivaraj Shyam-Sunder (C) (alternate), Director, Engineering Laboratory, National Institute of Standards & Technology, Gaithersburg, MD 20899, Appointment Expires: 12/31/12.

Dated: August 8, 2012.

David Robinson,

Associate Director for Management Resources.

[FR Doc. 2012–19803 Filed 8–10–12; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Prospective Grant of Exclusive Patent License

AGENCY: National Institute of Standards and Technology, Commerce.

ACTION: Notice of prospective grant of exclusive patent license.

SUMMARY: This is a notice in accordance with 35 U.S.C. 209(e) and 37 CFR 404.7(a)(1)(i) that the National Institute of Standards and Technology (''NIST''), U.S. Department of Commerce, is contemplating the grant of an exclusive license in the United States of America, its territories, possessions and commonwealths, to NIST's interest in the invention embodied in Provisional Application for Patent Application No. 61,638,362 titled ''Flow Cytometer Systems and Associated Methods,'' NIST Docket No. 11–010 to the Regents of the University of Colorado, having a place of business at 1800 Grant Street, 8th Floor, Denver, CO 80203. The grant of the license would be for all fields of use.

FOR FURTHER INFORMATION CONTACT: Cathy Cohn, National Institute of Standards and Technology, Technology Partnerships Office, 100 Bureau Drive, Stop 2200, Gaithersburg, MD 20899, (301) 975–6691, fax: (301) 975–3482, or email: *ccohn@nist.gov*.

SUPPLEMENTARY INFORMATION: The prospective exclusive license will be royalty bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive license may be granted unless, within fifteen days from the date of this published Notice, NIST receives written evidence and argument which establish that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Provisional Application for Patent Application No. 61,638,362 is co-owned by the U.S. government, as represented by the Secretary of Commerce and the Regents of the University of Colorado. The invention is a flow cytometer system for algal cells which includes a flow cell having an interrogation region, a long wavelength illuminator for illuminating algal cells entering the interrogation region, and a short wavelength illuminator for exciting fluorescence within the algal cells. The system also includes one or more photodetectors for measuring the fluorescence, and a data acquisition system that detects the illuminated algal cells in the interrogation region. The data acquisition system controls the illuminators to provide specific conditions for stimulating the fluorescence, and acquires data from the one or more photodetectors to provide information of the algal cells.

Dated: August 8, 2012.

Willie E. May,

Associate Director for Laboratory Programs.

[FR Doc. 2012–19805 Filed 8–10–12; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC136

Marine Mammals; File No. 17152

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

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that PRBO Conservation Science, 3820 Cypress Drive, #11, Petaluma, California 94954 (Responsible Party: Russ Bradley), has applied in due form for a permit to conduct research on pinnipeds in California.

DATES: Written, telefaxed, or email comments must be received on or before September 12, 2012.

ADDRESSES: The application and related documents are available upon written request or by appointment in the following offices:

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; and

Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213; phone (562) 980–4001; fax (562) 980–4018.

Written comments on this application should be submitted to the Chief, Permits and Conservation Division, at the address listed above. Comments may also be submitted by facsimile to (301) 713–0376, or by email to *NMFS.Pr1Comments@noaa.gov.* Please include the File No. in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits and Conservation Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Amy Sloan or Tammy Adams, (301) 427–8401.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), and the regulations governing the taking and importing of marine mammals (50 CFR part 216).

The applicant requests a five-year permit to study and monitor population trends, health, and ecology of pinnipeds in California, specifically at the Farallon Islands, Point Reyes Peninsula, Año Nuevo, San Francisco Bay, and in Sonoma County near the Russian River. Up to 325 harbor seals (*Phoca vitulina richardii*) will be captured, sedated, sampled, marked, and instrumented annually; up to 5,500 harbor seals will be incidentally harassed annually during captures and ground surveys/photo-identification. Ten unintentional mortalities of harbor seals are requested over the duration of the permit. Each year, up to 2,500 northern elephant seals (*Mirounga angustirostris*) will be handled for marking without capture; up to 100 elephant seals will be handled for swab sampling without capture; up to 150 elephant seals will be captured, marked, weighed, and sampled (swabs and blood); and up to 1,000 elephant seals may be incidentally harassed during captures and ground monitoring/photo-identification. Researchers will also conduct ground surveys and photo-identification of and may harass 2,000 California sea lions (*Zalophus californianus*) and 75 northern fur seals (*Callorhinus ursinus*) annually. Steller sea lions (*Eumetopias jubatus*) will be monitored but will not be harassed.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of the application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: August 3, 2012.

P. Michael Payne,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2012–19795 Filed 8–10–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC158

New England Fishery Management Council; Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Scientific and Statistical Committee to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This meeting will be held on Tuesday, September 4, 2012 at 9 a.m.

ADDRESSES: The meeting will be held at the Seaport Hotel, One Seaport Lane, Boston, MA 02210; telephone: (617) 385–4000; fax: (617) 385–4001.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION: The Scientific and Statistical Committee (SSC) will meet to review the stock assessment for Atlantic sea herring completed by the 54th Northeast Regional Stock Assessment Workshop and to develop ABC recommendations for fishing years 2013 through 2015. The Committee may not develop all the recommendations for this stock at this meeting. Other business may be discussed.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

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

Dated: August 8, 2012.

Tracey L. Thompson,

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

[FR Doc. 2012–19797 Filed 8–10–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Department of the Army

Draft Finding of No Significant Impact and Programmatic Environmental Assessment for the Implementation of the Net Zero Program at Army Installations

AGENCY: Department of the Army, DoD.

ACTION: Notice of availability.

SUMMARY: The Department of the Army announces the availability of the Draft Finding of No Significant Impact and the Final Programmatic Environmental Assessment (PEA) for Implementation of the Net Zero program at Army Installations. This PEA evaluates potential direct, indirect, and cumulative effects of the Net Zero Installation program at a programmatic (Army-wide) level; installation- or project-specific analysis will be performed and documented for proposed installation-level action.

The Net Zero program is comprised of changes in management practices and behavior as well as multiple possible projects and technologies to enhance resource efficiency with a broad focus on increased sustainability. It is based on the following concepts: (1) Producing at least as much energy on the installation from renewable sources as it uses annually; (2) Limiting the consumption of freshwater resources and returning water back to the same watershed so as not to deplete the groundwater and surface water resources of that region in quantity or quality; and (3) Reducing, reusing, and recovering waste streams, converting them to resource value with zero solid waste disposed in landfills. The Army does not consider Net Zero as a stand-alone program and intends to leverage existing resources and collaborate with the private sector to strive toward the Net Zero program's energy, water, and waste reduction goals.

The PEA assesses the potential environmental impacts from the range of energy, water, and waste projects that could be implemented in support of Net Zero. The Army evaluated three alternatives: (1) No action; (2) Implement Net Zero Army-wide; and (3) Strategically Implement Net Zero based on mission needs, consumption, and resource constraints (the preferred alternative). The Army identified no significant environmental effects associated with implementation of Net Zero that cannot be mitigated to a level of insignificance with site-specific best management practices or other mitigation measures.

Native Americans, federal, state, and local agencies, organizations, and the public are invited to submit written comments. The document can be accessed at: *http://www.army.mil/asaiee.*

DATES: Submit comments on or before September 12, 2012.

ADDRESSES: Written comments should be forwarded to: Office of the Deputy Assistant Secretary of the Army (Energy and Sustainability), OASA(IE&E), 110 Army Pentagon, Room 3D453, Washington, DC 20310–0110.

FOR FURTHER INFORMATION CONTACT: Please call (703) 697–5433.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 2012–19727 Filed 8–10–12; 8:45 am]

BILLING CODE 3710–08–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Hanford

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental

Management Site-Specific Advisory Board (EM SSAB), Hanford. The Federal Advisory Committee Act requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Thursday, September 6, 2012, 8:30 a.m.–5:00 p.m. Friday, September 7, 2012, 8:30 a.m.–3:00 p.m.

ADDRESSES: Red Lion Hotel, 1101 North Columbia Center Boulevard, Kennewick, WA 99336.

FOR FURTHER INFORMATION CONTACT: Tifany Nguyen, Federal Coordinator, Department of Energy Richland Operations Office, 825 Jadwin Avenue, P.O. Box 550, A7–75, Richland, WA, 99352; Phone: (509) 376–3361; or Email: *tifany.nguyen@rl.doe.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda:

- Tri-Party Agreement Agencies—Annual Updates
  - U.S. Department of Energy (DOE), Richland Operations Office
  - U.S. DOE, Office of River Protection
  - State of Washington Department of Ecology
  - U.S. Environmental Protection Agency
- Draft Advice
  - State of the Site Meetings
  - Resource Conservation and Recovery Act (RCRA) Site-Wide Permit
  - Integrated Safety Management System
- Draft Letter
  - 200–UP–1 Operable Unit Proposed Plan
  - Comments on DOE's Response to Preservation of Historical Properties and Artifacts Advice
- Update on Draft Hanford Advisory Board (HAB) Values White Paper
- Fiscal Year 2012 Board Accomplishments
- 2013 Tri-Party Agreement Priorities and HAB Work Plan Priorities
- 2013 HAB Meeting Calendar
- Board Business
  - HAB Budget
  - Potential November Board Meeting Topics
  - Update on the Board Chair Nominating Process
- Committee Reports

Public Participation: The meeting is open to the public. The EM SSAB, Hanford, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Tifany Nguyen at least seven days in advance of the meeting at the phone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Tifany Nguyen at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Tifany Nguyen's office at the address or phone number listed above. Minutes will also be available at the following Web site: *http://www.hanford.gov/page.cfm/hab.*

Issued at Washington, DC, on August 7, 2012.

LaTanya R. Butler,

Acting Deputy Committee Management Officer.

[FR Doc. 2012–19767 Filed 8–10–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP12–494–000; PF11–5–000]

Gas Transmission Northwest, LLC; Notice of Application

Take notice that on July 31, 2012, Gas Transmission Northwest, LLC (GTN), filed in Docket No. CP12–494–000, an application pursuant to section 7(c) of the Natural Gas Act (NGA) and Part 157 of the Commission's regulations, requesting authorization to construct, own, and operate a new lateral pipeline consisting of approximately 24.3 miles of 20-inch diameter pipeline, along with measurement and other associated facilities, located between GTN's Ione Compressor Station and Portland General Electric Company's (PGE) proposed Carty Generating Station in Morrow County, Oregon (Carty Lateral Project), all as more fully set forth in the application which is on file with the Commission and open to public inspection. 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. For assistance, call (866) 208–3676 or TTY, (202) 502–8659.

Any questions regarding this application should be directed to Mr. Richard Parke, Manager, Certificates, Gas Transmission Northwest, LLC, 717 Texas Street, Suite 2400, Houston, Texas 77002–2761, or by calling (832) 320–5516 (telephone), email: *richard_parke@transcanada.com.*

On March 31, 2011, the Commission staff granted GTN's request to use the pre-filing process and assigned Docket No. PF11–5–000 to staff activities involving the Carty Lateral Project. Now, as of the filing of this application on July 31, 2012, the NEPA Pre-Filing Process for this project has ended. From this time forward, this proceeding will be conducted in Docket No. CP12–494–000, as noted in the caption of this Notice.

Pursuant to Section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding, or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of

all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

Motions to intervene, protests and comments may be filed electronically via the internet in lieu of paper; see, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

Comment Date: August 28, 2012.

Dated: August 7, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–19782 Filed 8–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER12–1726–001.
Applicants: Michigan Electric Transmission Company, LLC.
Description: Michigan Electric Transmission Company, LLC submits tariff filing per 35: METC Certificate of Concurrence Compliance Filing to be effective 7/1/2012.
Filed Date: 7/31/12.
Accession Number: 20120731–5139.
Comments Due: 5 p.m. ET 8/21/12.

Docket Numbers: ER12–2355–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: MidAmerican-Geneseo SA 2459 WDS to be effective 9/1/2012.
Filed Date: 7/31/12.
Accession Number: 20120731–5036.
Comments Due: 5 p.m. ET 8/21/12.

Docket Numbers: ER12–2356–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: MidAmerican-MEAN-Buffalo SA 2460 to be effective 9/1/2012.
Filed Date: 7/31/12.
Accession Number: 20120731–5037.
Comments Due: 5 p.m. ET 8/21/12.

Docket Numbers: ER12–2357–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: MidAmerican-MEAN-Carlisle SA 2461 to be effective 9/1/2012.
Filed Date: 7/31/12.
Accession Number: 20120731–5038.
Comments Due: 5 p.m. ET 8/21/12.

Docket Numbers: ER12–2358–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: MidAmerican-MEAN Indianola WDS SA 2462 to be effective 9/1/2012.
Filed Date: 7/31/12.
Accession Number: 20120731–5045.
Comments Due: 5 p.m. ET 8/21/12.

Docket Numbers: ER12–2359–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: MidAm-MEAN Rockford WDS SA 2463 to be effective 9/1/2012.
Filed Date: 7/31/12.
Accession Number: 20120731–5046.
Comments Due: 5 p.m. ET 8/21/12.

Docket Numbers: ER12–2360–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: MidAmerican-MEAN Wall Lake SA 2464 WDS to be effective 9/1/2012.
Filed Date: 7/31/12.
Accession Number: 20120731–5048.
Comments Due: 5 p.m. ET 8/21/12.

Docket Numbers: ER12–2361–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: MidAmerican-MEAN Fonda SA 2203 WDS to be effective 9/1/2012.
Filed Date: 7/31/12.
Accession Number: 20120731–5049.
Comments Due: 5 p.m. ET 8/21/12.

Docket Numbers: ER12–2362–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: MidAmerican-Cornbelt-Auburn WDS SA2331 to be effective 9/1/2012.
Filed Date: 7/31/12.
Accession Number: 20120731–5050.
Comments Due: 5 p.m. ET 8/21/12.

Docket Numbers: ER12–2363–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: MidAmerican-MEAN–Breda 1st Rev SA 2340 to be effective 9/1/2012.
Filed Date: 7/31/12.
Accession Number: 20120731–5051.
Comments Due: 5 p.m. ET 8/21/12.

Docket Numbers: ER12–2364–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: MidAmerican-MEAN–Waverly WDS 2nd Rev. SA2164 to be effective 9/1/2012.
Filed Date: 7/31/12.
Accession Number: 20120731–5052.
Comments Due: 5 p.m. ET 8/21/12.

Docket Numbers: ER12–2365–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: SA 2338 MidAm-MEAN WDS Denver to be effective 9/1/2012.
Filed Date: 7/31/12.
Accession Number: 20120731–5053.
Comments Due: 5 p.m. ET 8/21/12.

Docket Numbers: ER12–2366–000.
Applicants: Southwest Power Pool, Inc.
Description: Compliance Filing Docket Nos. ER09–659–002 and EL12–2 Attachment O Section VII to be effective 7/31/2012.
Filed Date: 7/31/12.
Accession Number: 20120731–5087.
Comments Due: 5 p.m. ET 8/21/12.

Docket Numbers: ER12–2367–000.
Applicants: Southern California Edison Company.
Description: Amendment to LGIA with North Sky River Energy, LLC., North Sky River Wind Proj. to be effective 8/1/2012.
Filed Date: 7/31/12.
Accession Number: 20120731–5099.
Comments Due: 5 p.m. ET 8/21/12.

Docket Numbers: ER12–2368–000.
Applicants: Denver City Energy Associates, LP.
Description: Denver City Energy Associates, LP submits tariff filing per 35.15: Tariff Cancelation to be effective 7/31/2012.
Filed Date: 7/31/12.
Accession Number: 20120731–5126.
Comments Due: 5 p.m. ET 8/21/12
Docket Numbers: ER12–2369–000.
Applicants: The Detroit Edison Company.
Description: The Detroit Edison Company submits tariff filing per 35.13(a)(2)(iii: Refile of Wyandotte Interconnection Agreement RS 44 to be effective 8/1/2012.
Filed Date: 7/31/12.
Accession Number: 20120731–5128.
Comments Due: 5 p.m. ET 8/21/12.
Docket Numbers: ER12–2370–000.
Applicants: FPL Energy Oliver Wind, LLC.
Description: FPL Energy Oliver Wind, LLC Notice of Cancellation of Market-Based Rate Tariff.
Filed Date: 7/31/12.
Accession Number: 20120731–5154.
Comments Due: 5 p.m. ET 8/21/12.

Take notice that the Commission received the following land acquisition reports:

Docket Numbers: LA12–2–000.
Applicants: Rockland Wind Farm LLC, Goshen Phase II LLC, Grays Ferry Cogeneration Partnership, MATEP, LP, MATEP, LLC, Trigen-St. Louis Energy Corp.
Description: Quarterly Land Acquisition Report of Ridgeline Energy LLC *et al.*
Filed Date: 7/31/12.
Accession Number: 20120731–5074.
Comments Due: 5 p.m. ET 8/21/12.
Docket Numbers: LA12–2–000.
Applicants: Spring Canyon Energy LLC, Judith Gap Energy LLC, Invenergy TN LLC, Wolverine Creek Energy LLC, Grays Harbor Energy LLC, Forward Energy LLC, Willow Creek Energy LLC, Sheldon Energy LLC, Hardee Power Partners Limited, Spindle Hill Energy LLC, Invenergy Cannon Falls LLC, Beech Ridge Energy LLC, Grand Ridge Energy LLC, Grand Ridge Energy II LLC, Grand Ridge Energy III LLC, Grand Ridge Energy IV LLC, Grand Ridge Energy V LLC, Vantage Wind Energy LLC, Stony Creek Energy LLC, Gratiot County Wind LLC, Gratiot County Wind II LLC, Bishop Hill Energy LLC, Bishop Hill Energy III LLC, California Ridge Wind Energy LLC.
Description: Generation Site Report Second Quarter 2012 of Spring Canyon Energy LLC, et al.
Filed Date: 7/31/12.
Accession Number: 20120731–5092.
Comments Due: 5 p.m. ET 8/21/12.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 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: July 31, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–19751 Filed 8–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC12–129–000
Applicants: Baja California Power, Inc, Uluru Finance Limited, China Huaneng Group HK Ltd., Upper Horm Investments Ltd., Overseas International Inc. Limited
Description: Application for authorization under Section 203 of the Federal Power Act and request for expedited action re Baja California Power, Inc *et al.*
Filed Date: 8/2/12
Accession Number: 20120802–0200
Comments Due: 5 p.m. ET 8/23/12
Docket Numbers: EC12–130–000
Applicants: Viridity Energy Inc.
Description: Application of Viridity Energy, Inc., for transaction approval under FPA Section 203, request for waivers, and request for expedited consideration.
Filed Date: 8/3/12
Accession Number: 20120803–5056
Comments Due: 5 p.m. ET 8/24/12

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1910–001; *ER10–1911–001; ER10–1909–001; ER10–1908–001*
Applicants: Duquesne Light Company, Duquesne Power, LLC, Duquesne Keystone, LLC, Duquesne Conemaugh LLC
Description: Amended Notice of Change in Status of Duquesne Light Company, *et al.*
Filed Date: 8/2/12
Accession Number: 20120802–5138
Comments Due: 5 p.m. ET 8/23/12
Docket Numbers: ER11–3643–003
Applicants: PacifiCorp
Description: PacifiCorp submits tariff filing per 35: OATT Revised Section 1 and 3 to be effective 12/25/2011.
Filed Date: 8/3/12
Accession Number: 20120803–5048
Comments Due: 5 p.m. ET 8/24/12
Docket Numbers: ER12–2125–000
Applicants: GWF Energy LLC
Description: Clarification to Notice of Change in Market-Based Rate Status of GWF Energy LLC.
Filed Date: 8/3/12
Accession Number: 20120803–5076
Comments Due: 5 p.m. ET 8/17/12
Docket Numbers: ER12–2297–001
Applicants: BFES Inc.
Description: Initial Tariff Baseline to be effective 9/24/2012.
Filed Date: 8/3/12
Accession Number: 20120803–5001
Comments Due: 5 p.m. ET 8/24/12
Docket Numbers: ER12–2393–000
Applicants: ISO New England Inc., New England Power Pool Participants Committee
Description: Rev. to FCM Rules Related to Non-Price Retirement Requests to be effective 10/2/2012.
Filed Date: 8/3/12
Accession Number: 20120803–5036
Comments Due: 5 p.m. ET 8/24/12
Docket Numbers: ER12–2394–000
Applicants: PacifiCorp
Description: PacifiCorp submits tariff filing per 35.13(a)(2)(iii: Powerex Settlement of CAISO Scheduling Charges/Revenues to be effective 7/31/2012.
Filed Date: 8/3/12
Accession Number: 20120803–5047
Comments Due: 5 p.m. ET 8/24/12
Docket Numbers: ER12–2395–000
Applicants: NaturEner Power Watch, LLC, NorthWestern Corporation
Description: NaturEner Power Watch, LLC submits tariff filing per 35.13(a)(2)(iii: Revised COA No. 260 NaturEner Power Watch to be effective 8/3/2012.
Filed Date: 8/3/12
Accession Number: 20120803–5061
Comments Due: 5 p.m. ET 8/24/12

Docket Numbers: ER12–2396–000

Applicants: Pacific Gas and Electric Company

Description: Pacific Gas and Electric Company submits tariff filing per 35.13(a)(2)(iii: Amendment to WD Tariff: Online Generator Interconnection Request to be effective 10/3/2012.

Filed Date: 8/3/12

Accession Number: 20120803–5075

Comments Due: 5 p.m. ET 8/24/12

Docket Numbers: ER12–2397–000

Applicants: Southern California Edison Company

Description: Southern California Edison submits Application for PPA Approval of Affiliate Transaction Pursuant to Section 205 of the Federal Power Act.

Filed Date: 8/3/12

Accession Number: 20120803–5078

Comments Due: 5 p.m. ET 8/24/12

Docket Numbers: ER12–2398–000

Applicants: NRG Solar Borrego I LLC

Description: NRG Solar Borrego I LLC submits tariff filing per 35.12: Application for Market-Based Rate Authority and Baseline Tariff to be effective 10/2/2012.

Filed Date: 8/3/12

Accession Number: 20120803–5079

Comments Due: 5 p.m. ET 8/24/12

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 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: August 3, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–19756 Filed 8–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2331–008; ER10–2343–008; ER10–2319–007; ER10–2320–007; ER10–2317–006; ER10–2322–008; ER10–2324–007; ER10–2325–006; ER10–2332–007; ER10–2326–008; ER10–2327–009; ER10–2328–007; ER11–4609–006; ER10–2898–007.

Applicants: J.P. Morgan Ventures Energy Corporation, Triton Power Michigan LLC, BE Allegheny LLC, BE CA LLC, BE Ironwood LLC, BE KJ LLC, BE Rayle LLC, BE Alabama LLC, BE Louisiana LLC, Cedar Brakes I, L.L.C., Utility Contract Funding, L.L.C., Central Power & Lime LLC, Cedar Brakes II, L.L.C., J.P. Morgan Commodities Canada Corporation.

Description: Notice of Non-Material Change in Status of J.P. Morgan Ventures Energy Corporation, et al.

Filed Date: 7/30/12.

Accession Number: 20120730–5219.

Comments Due: 5 p.m. ET 8/20/12.

Docket Numbers: ER10–2331–009; ER10–2343–009; ER10–2319–008; ER10–2320–008; ER10–2317–007; ER10–2322–009; ER10–2324–008; ER10–2325–007; ER10–2332–008; ER10–2326–009; ER10–2327–010; ER10–2328–008; ER11–4609–007; ER10–2898–008.

Applicants: J.P. Morgan Ventures Energy Corporation, Triton Power Michigan LLC, BE Ironwood LLC, BE KJ LLC, BE Alabama LLC, BE Louisiana LLC, Cedar Brakes I, L.L.C., Utility Contract Funding, L.L.C., Central Power & Lime LLC, Cedar Brakes II, L.L.C., J.P. Morgan Commodities Canada Corporation, BE CA LLC, BE Rayle LLC, BE Allegheny LLC.

Description: Notice of Non-Material Change in Status of J.P. Morgan Ventures Energy Corporation, et al.

Filed Date: 7/30/12.

Accession Number: 20120730–5220.

Comments Due: 5 p.m. ET 8/20/12.

Docket Numbers: ER10–2331–010; ER10–2343–010; ER10–2319–009; ER10–2320–009; ER10–2317–008; ER10–2322–010; ER10–2324–009; ER10–2325–008; ER10–2332–009; ER10–2326–010; ER10–2327–011 ER10–2328–009 ER11–4609–008 ER10–2898–009.

Applicants: J.P. Morgan Ventures Energy Corporation, BE Allegheny LLC, BE CA LLC, BE Ironwood LLC, BE KJ LLC, BE Rayle LLC, BE Alabama LLC, BE Louisiana LLC, Cedar Brakes I, L.L.C., Utility Contract Funding, L.L.C., Central Power & Lime LLC, Cedar Brakes II, L.L.C., Triton Power Company, J.P. Morgan Commodities Canada Corporation, BE Allegheny LLC.

Description: Notice of Non-Material Change in Status of J.P. Morgan Ventures Energy Corporation, et al.

Filed Date: 7/30/12.

Accession Number: 20120730–5221.

Comments Due: 5 p.m. ET 8/20/12.

Docket Numbers: ER10–2776–004.

Applicants: Wells Fargo Commodities, LLC.

Description: Notice of Non-Material Change in Status, Wells Fargo Commodities LLC.

Filed Date: 7/30/12.

Accession Number: 20120730–5214.

Comments Due: 5 p.m. ET 8/20/12.

Docket Numbers: ER11–113–002.

Applicants: Sandy Ridge Wind, LLC.

Description: Notice of Non-Material Change in Status of Sandy Ridge Wind, LLC.

Filed Date: 7/30/12.

Accession Number: 20120730–5213.

Comments Due: 5 p.m. ET 8/20/12.

Docket Numbers: ER11–3589–002.

Applicants: Long Island Solar Farm, LLC.

Description: Notification of non-material change in status of Long Island Solar Farm, LLC.

Filed Date: 7/30/12.

Accession Number: 20120730–5218.

Comments Due: 5 p.m. ET 8/20/12.

Docket Numbers: ER11–3781–001.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: 07–30–12 RAR Compliance to be effective 7/28/2010.

Filed Date: 7/30/12.

Accession Number: 20120730–5115.

Comments Due: 5 p.m. ET 8/20/12.

Docket Numbers: ER12–1577–001.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: 07–30–12 MEP Compliance to be effective 7/1/2012.

Filed Date: 7/30/12.

Accession Number: 20120730–5124.

Comments Due: 5 p.m. ET 8/20/12.

Docket Numbers: ER12–1708–000.

Applicants: Midwest Independent Transmission System Operator, Inc., ITC Midwest LLC.

Description: Response to Deficiency Letter of ITC Midwest LLC.

Filed Date: 7/30/12.

Accession Number: 20120730–5210.

Comments Due: 5 p.m. ET 8/20/12.

Docket Numbers: ER12–1809–001.

Applicants: ISO New England Inc.

Description: Compliance Filing—Posturing Rule Changes 1 of 2 to be effective 5/18/2012.

Filed Date: 7/30/12.
Accession Number: 20120730–5075.
Comments Due: 5 p.m. ET 8/20/12.
Docket Numbers: ER12–1809–002.
Applicants: ISO New England Inc.
Description: Compliance Filing Concerning Posturing Rule Changes 2 of 2 to be effective 10/1/2012.
Filed Date: 7/30/12.
Accession Number: 20120730–5082.
Comments Due: 5 p.m. ET 8/20/12.
Docket Numbers: ER12–2349–000.
Applicants: Kit Carson Windpower, LLC.
Description: Merger-Related MBR Tariff Filing to be effective 7/2/2012.
Filed Date: 7/27/12.
Accession Number: 20120727–5193.
Comments Due: 5 p.m. ET 8/17/12.
Docket Numbers: ER12–2350–000.
Applicants: Northern States Power Company, a Wisconsin corporation.
Description: 2012_7_30_NSPW CDTT Const Intercon Fac Agrmt–116 to be effective 7/2/2012.
Filed Date: 7/30/12.
Accession Number: 20120730–5136.
Comments Due: 5 p.m. ET 8/20/12.
Docket Numbers: ER12–2351–000.
Applicants: Northern States Power Company, a Wisconsin corporation.
Description: 2012_7_30_NSPW HH Meter Data Access Agrmt–134 to be effective 5/31/2012.
Filed Date: 7/30/12.
Accession Number: 20120730–5137.
Comments Due: 5 p.m. ET 8/20/12.
Docket Numbers: ER12–2352–000.
Applicants: Massachusetts Electric Company.
Description: 2012 Rate Update Filing for Massachusetts Electric Borderline Sales Agreement to be effective 11/1/2011.
Filed Date: 7/30/12.
Accession Number: 20120730–5163.
Comments Due: 5 p.m. ET 8/20/12.
Docket Numbers: ER12–2353–000.
Applicants: Lively Grove Energy Partners, LLC.
Description: Lively Grove Energy Partners, LLC Reactive Power Rate Schedule for PSEC to be effective 10/1/2012.
Filed Date: 7/30/12.
Accession Number: 20120730–5187.
Comments Due: 5 p.m. ET 8/20/12.
Docket Numbers: ER12–2354–000.
Applicants: Pacific Gas and Electric Company.
Description: CCSF IA—38th Quarterly Filing of Facilities Agreements to be effective 6/30/2012.
Filed Date: 7/30/12.
Accession Number: 20120730–5193.
Comments Due: 5 p.m. ET 8/20/12.

Take notice that the Commission received the following land acquisition reports:

Docket Numbers: LA12–2–000.
Applicants: Bishop Hill Energy II LLC, Cordova Energy Company LLC, MidAmerican Energy Company, and Saranac Power Partners, L.P.
Description: Quarterly Land Acquisition Report of Bishop Hill Energy II LLC, *et al.*
Filed Date: 7/30/12.
Accession Number: 20120730–5113.
Comments Due: 5 p.m. ET 8/20/12.
Docket Numbers: LA12–2–000.
Applicants: Cedar Creek II, LLC, Copper Mountain Solar 1, LLC, Copper Mountain Solar 2, LLC, Energia Sierra Juarez U.S., LLC, Flat Ridge 2 Wind Energy LLC, Fowler Ridge II Wind Farm LLC, Mesquite Power, LLC, Mesquite Solar 1, LLC, San Diego Gas & Electric Company, Sempra Energy Trading LLC, Sempra Generation, Termoelectrica U.S., LLC.
Description: Quarterly Land Acquisition Report of Sempra Generation, *et al.* under LA12–2.
Filed Date: 7/30/12.
Accession Number: 20120730–5116.
Comments Due: 5 p.m. ET 8/20/12.
Docket Numbers: LA12–2–000.
Applicants: Alabama Electric Marketing, LLC, Big Sandy Peaker Plant, LLC, California Electric Marketing, LLC, Crete Energy Venture, LLC, CSOLAR IV South, LLC, High Desert Power Project, LLC, Kiowa Power Partners, LLC, Lincoln Generating Facility, LLC, New Covert Generating Company, LLC, New Mexico Electric Marketing, LLC, Rolling Hills Generating, L.L.C., Tenaska Alabama Partners, L.P., Tenaska Alabama II Partners, L.P., Tenaska Frontier Partners, Ltd., Tenaska Gateway Partners, Ltd., Tenaska Georgia Partners, L.P., Tenaska Power Management, LLC, Tenaska Power Services Co., Tenaska Virginia Partners, L.P., Tenaska Washington Partners, L.P., Texas Electric Marketing, LLC, TPF Generation Holdings, LLC, and Wolf Hills Energy, LLC.
Description: Quarterly Land Acquisition Report of Alabama Electric Marketing, LLC, *et al.*
Filed Date: 7/30/12.
Accession Number: 20120730–5133.
Comments Due: 5 p.m. ET 8/20/12.
Docket Numbers: LA12–2–000.
Applicants: Astoria Generating Company, L.P.
Description: Quarterly Land Acquisition Report of Astoria Generating Company, L.P.
Filed Date: 7/30/12.
Accession Number: 20120730–5205.
Comments Due: 5 p.m. ET 8/20/12.
Docket Numbers: LA12–2–000.
Applicants: Bluegrass Generation Company, L.L.C., Blythe Energy, LLC, Calhoun Power Company, LLC, Cherokee County Cogeneration Partners, LLC, DeSoto County Generating Company, LLC, Doswell Limited Partnership, Las Vegas Power Company, LLC, LS Power Marketing, LLC, LSP Safe Harbor Holdings, LLC, LSP University Park, LLC, Renaissance Power, L.L.C., Riverside Generating Company, L.L.C., Rocky Road Power, LLC, Tilton Energy LLC, University Park Energy, LLC, Wallingford Energy LLC, and Wyoming Colorado Intertie, LLC.

Description: Quarterly Land Acquisition Report of Blythe Energy, LLC, et al.

Filed Date: 7/30/12.

Accession Number: 20120730–5206.

Comments Due: 5 p.m. ET 8/20/12.

Take notice that the Commission received the following electric reliability filings:

Docket Numbers: RR12–12–000.

Applicants: North American Electric Reliability Corporation.

Description: Petition of the North American Electric Reliability Corporation for Approval of Amendments to Delegation Agreement with ReliabilityFirst Corporation—Amendments to ReliabilityFirst's Bylaws and Reliability Standards Development Procedure.

Filed Date: 7/30/12.

Accession Number: 20120730–5188.

Comment Date: 5 p.m. ET 8/20/12.

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.

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Dated: July 31, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–19758 Filed 8–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC06–129–004
Applicants: Capital Research and Management Company.
Description: Request for Amended Order Under Section 203 of the Federal Power Act of Capital Research and Management Company.
Filed Date: 8/2/12
Accession Number: 20120802–5085
Comments Due: 5 p.m. ET 8/23/12

Docket Numbers: EC12–128–000
Applicants: Public Service Company of Colorado, BIV Generation Company, L.L.C., Colorado Power Partners, Centennial Power, LLC, Brush Power, LLC
Description: Joint Application for Authorization Under Section 203 of the Federal Power Act for Disposition of Jurisdictional Facilities and Request for Confidential Treatment of Public Service Company of Colorado, et al.
Filed Date: 8/2/12
Accession Number: 20120802–5090
Comments Due: 5 p.m. ET 8/23/12

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2719–008; ER10–2718–008; ER10–2578–010; ER10–2633–008; ER10–2570–008; ER10–2717–008; ER10–3140–007
Applicants: Fox Energy Company LLC, Birchwood Power Partners, L.P., Shady Hills Power Company, L.L.C., EFS Parlin Holdings, LLC, Inland Empire Energy Center, LLC, East Coast Power Linden Holding, L.L.C., Cogen Technologies Linden Venture, L.P.
Description: Notice of Non-Material Change in Status of East Coast Power Linden Holding, L.L.C., et al.
Filed Date: 8/2/12
Accession Number: 20120802–5147
Comments Due: 5 p.m. ET 8/23/12

Docket Numbers: ER12–2382–000
Applicants: Duke Energy Carolinas, LLC
Description: Duke Energy Carolinas, LLC submits tariff filing per 35.13(a)(2)(iii: Amendment to NCEMC PPA to be effective 7/2/2012.
Filed Date: 8/2/12
Accession Number: 20120802–5061
Comments Due: 5 p.m. ET 8/23/12

Docket Numbers: ER12–2383–000
Applicants: Duke Energy Carolinas, LLC
Description: Amendment to NCEMC IA to be effective 7/2/2012.
Filed Date: 8/2/12
Accession Number: 20120802–5063
Comments Due: 5 p.m. ET 8/23/12

Docket Numbers: ER12–2384–000
Applicants: BFES Inc.
Description: Initial Tariff Baseline to be effective 9/24/2012.
Filed Date: 8/2/12
Accession Number: 20120802–5095
Comments Due: 5 p.m. ET 8/23/12

Docket Numbers: ER12–2385–000
Applicants: PJM Interconnection, L.L.C.
Description: Revisions to Sec 3.2.3–OATT Att K Appx & OA Sch 1–Shortage Pricing Sharing Agmts to be effective 10/1/2012.
Filed Date: 8/2/12
Accession Number: 20120802–5097
Comments Due: 5 p.m. ET 8/23/12

Docket Numbers: ER12–2386–000
Applicants: New England Power Company
Description: Notice of Cancellation of Service Agreement and Request for Waiver of Commission Notice Requirements of New England Power Company.
Filed Date: 8/2/12
Accession Number: 20120802–5101
Comments Due: 5 p.m. ET 8/23/12

Docket Numbers: ER12–2387–000
Applicants: Southwest Power Pool, Inc.
Description: Revisions to Implement Reallocation of Revenue Pursuant to Attachment J & O to be effective 10/1/2012.
Filed Date: 8/2/12
Accession Number: 20120802–5121
Comments Due: 5 p.m. ET 8/23/12

Docket Numbers: ER12–2388–000
Applicants: BFES Inc.
Description: Initial Tariff Baseline to be effective 9/24/2012.
Filed Date: 8/2/12
Accession Number: 20120802–5128
Comments Due: 5 p.m. ET 8/23/12

Docket Numbers: ER12–2389–000
Applicants: NaturEner Power Watch, LLC
Description: Revised Amended and Restated COA with NorthWestern Corporation to be effective 8/3/2012.
Filed Date: 8/2/12
Accession Number: 20120802–5129
Comments Due: 5 p.m. ET 8/23/12

Docket Numbers: ER12–2390–000
Applicants: Entergy Arkansas, Inc.
Description: Attachment S Independent Coordinator of Transmission to be effective 12/1/2012.
Filed Date: 8/2/12
Accession Number: 20120802–5130
Comments Due: 5 p.m. ET 8/23/12

Docket Numbers: ER12–2391–000
Applicants: PJM Interconnection, L.L.C.
Description: Revisions to OATT Att K Apx & OA Sch 1–Marg. Benefits Factor & Make-Whole Pymts to be effective 10/1/2012.
Filed Date: 8/2/12
Accession Number: 20120802–5133
Comments Due: 5 p.m. ET 8/23/12

Docket Numbers: ER12–2392–000
Applicants: Northern States Power Company, a Wisconsin corporation
Description: 20120802_Wholesale_Rate to be effective 7/1/2012.
Filed Date: 8/2/12
Accession Number: 20120802–5134
Comments Due: 5 p.m. ET 8/23/12

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: August 3, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–19755 Filed 8–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[EL11–22–000, QF11–115–001, QF11–116–001, et al.]

Notice of Compliance Filing

OREG 1, Inc.; OREG 2, Inc.; OREG 3, Inc.; OREG 4, Inc..	Docket Nos. EL11–22–000, QF11–115–001, QF11–116–001, QF11–117–001, QF11–118–001, QF11–119–001, QF11–120–001, QF11–121–001, QF11–122–001, QF11–123–001, QF11–124–001.

Take notice that on August 6, 2012, OREG 1, Inc., OREG 2, Inc., OREG 3, Inc., and OREG 4, Inc. submitted a supplement to the compliance refund reports filed on March 19, 2012, pursuant to the Federal Energy Regulatory Commission's (Commission) Orders issued in this proceeding on May 19, 2011, 135 FERC ¶ 61,150 (2011), and February 16, 2012, 138 FERC ¶ 61,110 (2012).

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on August 27, 2012.

Dated: August 7, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–19757 Filed 8–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. EG12–63–000; EG12–64–000; EG12–65–000; EG12–66–000; EG12–67–000; EG12–68–000; EG12–69–000]

Topaz Solar Farms LLC; High Plains Ranch II, LLC; Bethel Wind Energy LLC; Rippey Wind Energy LLC; Pacific Wind, LLC; Colorado Highlands Wind, LLC; Shooting Star Wind Project, LLC; Notice of Effectiveness of Exempt Wholesale Generator or Foreign Utility Company Status

Take notice that during the month of May 2012, the status of the above-captioned entities as Exempt Wholesale Generators became effective by operation of the Commission's regulations. 18 CFR 366.7(a).

Dated: August 6, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–19780 Filed 8–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Jordan Cove Energy Project LP—Docket No. PF12–7–000: Pacific Connector Gas Pipeline LP—Docket No. PF12–17–000]

Notice of Intent To Prepare an Environmental Impact Statement for the Planned Jordan Cove Liquefaction and Pacific Connector Pipeline Projects, Request for Comments on Environmental Issues, and Notice of Public Scoping Meetings

The staff of the Federal Energy Regulatory Commission (FERC or Commission), in cooperation with other federal agencies, will prepare an environmental impact statement (EIS) that will discuss the environmental impacts of Jordan Cove Energy Project LP's (Jordan Cove) proposed liquefaction project in Coos County, Oregon, and Pacific Connector Gas Pipeline LP's (Pacific Connector) proposed pipeline project crossing portions of Klamath, Jackson, Douglas, and Coos Counties, Oregon. The FERC is the lead federal agency in the preparation of an EIS to satisfy the requirements of the National Environmental Policy Act (NEPA). The United States (U.S.) Army Corps of Engineers (COE), U.S. Department of Energy Office of Fossil Energy (DOE), U.S. Department of Agriculture Forest Service (Forest Service), and the U.S. Department of the Interior Bureau of Land Management (BLM), Bureau of Reclamation (Reclamation), and Fish and Wildlife Service are cooperating agencies assisting the FERC in preparation of the EIS.

The Commission will use this EIS in its decision-making process, to determine whether the Jordan Cove liquefied natural gas (LNG) terminal is in the public interest, and whether the Pacific Connector pipeline is in the public convenience and necessity, in accordance with the Natural Gas Act (NGA). The BLM and Forest Service propose to adopt the FERC EIS in accordance with Title 40 Code of Federal Regulations (CFR) 1506.3 to support decisions and findings that must be made by each agency with respect to the Pacific Connector pipeline project.

This notice announces the opening of the scoping process the Commission, Forest Service, BLM, and Reclamation will use to gather input from the public and interested agencies on the planned projects. Your input will help the Commission staff determine what issues should be evaluated in the EIS. Please note that the scoping period will close on September 4, 2012.

You may submit comments in written form or verbally. Further details on how to submit written comments are in the Public Participation section of this notice. In lieu of or in addition to sending in written comments, the Commission invites you to make verbal comments [1] at the public scoping meetings scheduled as follows:

Monday, August 27, 2012, 6:30 p.m.	Tuesday, August 28, 2012, 6:30 p.m.
Southwestern Oregon Community College, Hales Performing Arts Center, 1988 Newmark Ave., Coos Bay, OR 97420, 541–888–2525	Umpqua Community College, Campus Center Dining Room, 1140 Umpqua College Rd., Roseburg, OR 97470, 541–440–4600

[1] Verbal comments at the public scoping meetings will be transcribed by a court reporter and placed into the public record for these proceedings.

Wednesday, August 29, 2012, 6:30 p.m. Oregon Institute of Technology, College Union Auditorium, 3201 Campus Dr., Klamath Falls, OR 97601, 541–885–1030	Thursday, August 30, 2012, 6:30 p.m. Medford School District, Education Center Auditorium, 815 S. Oakdale Ave., Medford, OR 97501, 541–842–3636.

This notice is being sent to the Commission's current environmental mailing list for these projects. State and local government representatives should notify their constituents about these projects and this scoping effort, and encourage interested members of the public to comment on their areas of concern.

If you are a landowner receiving this notice, a Pacific Connector representative may contact you about the acquisition of an easement to construct, operate, and maintain the planned facilities. The company would seek to negotiate a mutually acceptable agreement. However, if the Commission approves the Pacific Connector pipeline project, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail to produce an agreement, the pipeline company could initiate condemnation proceedings where compensation would be determined in accordance with state law.

A fact sheet prepared by the FERC entitled ''An Interstate Natural Gas Facility On My Land? What Do I Need To Know?'' is available for viewing on the FERC Web site (*www.ferc.gov*). This fact sheet addresses a number of typically-asked questions, including the use of eminent domain and how to participate in the Commission's proceedings.

Background

On December 17, 2009, the Commission issued an Order authorizing the Jordan Cove LNG import terminal in Docket No. CP07–444–000 and Pacific Connector pipeline in Docket No. CP07–441–000. The Commission vacated those authorizations in an Order issued April 16, 2012, after Jordan Cove submitted its request to begin the pre-filing process to change the facility's purpose from an LNG import terminal to an export terminal.

The FERC staff and cooperating agencies produced an EIS for the previous projects in May 2009. The new EIS for the currently proposed projects will make use of the previous analyses, update information, as needed, and evaluate the impacts associated with the new or modified facilities and routes.

Summary of the Planned Projects

Jordan Cove proposes to construct and operate an LNG export terminal on the North Spit of Coos Bay. The terminal would have the capacity to produce about six million metric tons per annum (MMTPA) of LNG (equivalent to 0.9 billion cubic feet per day [Bcf/d] of natural gas). Facilities would include:

- 7.3-mile-long waterway in Coos Bay for about 80 LNG carriers per year;
- 0.3-mile-long access channel and marine berth;
- A cryogenic transfer pipeline;
- Two 160,000 cubic meter LNG storage tanks;
- Four liquefaction trains (each with a capacity of 1.5 MMTPA);
- two feed gas and dehydration trains with a combined throughput of 1 Bcf/d of natural gas; and
- a 350 megawatt South Dunes power plant.

The Pacific Connector pipeline would be 36-inches-in-diameter and about 230-miles-long, extending from interconnections with other interstate pipelines near Malin, Oregon to the Jordan Cove LNG terminal at Coos Bay. The pipeline would have a design capacity of 0.9 Bcf/d of natural gas. Related facilities include:

- Two meter stations at the interconnections with the existing Gas Transmission Northwest (GTN) and Ruby pipelines near Malin, in Klamath County, Oregon;
- A 23,000-horsepower compressor station adjacent to the GTN and Ruby meter stations;
- A meter station at the interconnection with the existing Williams Northwest Pipeline system near Myrtle Creek, in Douglas County, Oregon; and
- A meter station at the Jordan Cove terminal, in Coos County, Oregon.

The general location of the project facilities is shown in Appendix 1.[2]

Land Requirements for Construction

The newly proposed Jordan Cove LNG export terminal in PF12–7–000 occupies the same footprint that was analyzed in our [3] May 2009 EIS, with the addition of the South Dunes power plant at the location of the previously proposed dredged material placement area. Likewise, the Pacific Connector pipeline as proposed in Docket PF12–17–000 basically follows the route that was previously analyzed, with a few minor adjustments, and the relocation of the compressor station to the east end of the project.

As presented in our May 2009 EIS, construction of the Jordan Cove's LNG terminal would affect about 390 acres onshore, with an additional 72 acres needed to construct the marine berth and access channel for the LNG ships in Coos Bay. Construction of the Pacific Connector pipeline would affect a total of about 6,217 acres. The permanent operational easement for the pipeline right-of-way (ROW) and aboveground facilities would occupy about 1,439 acres.

The EIS Scoping Process

The NEPA requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity, or makes a public interest determination. The NEPA also requires us to discover and address concerns the public may have about proposals. This process is referred to as scoping. The main goal of the scoping process is to focus the analysis in the EIS on the important environmental issues. By this notice, the Commission requests public comments on the scope of the issues to be addressed in the EIS. We will consider all filed comments during the preparation of the EIS.

In the EIS we will discuss impacts that could occur as a result of the construction and operation of the planned projects under these general headings:

- Land use;
- Geology and soils;
- Water resources and wetlands;
- Vegetation and wildlife;
- Cultural resources;
- Recreation and visual resources;
- Air quality and noise; and
- Public safety.

We will also evaluate possible alternatives to the planned projects or portions of the projects, and make recommendations on how to lessen or avoid impacts on the various environmental resources. The EIS will present our independent analysis of the issues.

Although no formal applications have been filed yet, we have already initiated

[2] The appendices referenced in this notice will not appear in the **Federal Register**. Copies of the appendices were sent to all those receiving this notice in the mail and are available at *www.ferc.gov* using the link called ''eLibrary'' or from the Commission's Public Reference Room, 888 First Street NE., Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to eLibrary, refer to the last page of this notice.

[3] ''We,'' ''us,'' and ''our'' refer to the environmental staff of the Commission's Office of Energy Projects.

our NEPA review under the Commission's pre-filing process. The purpose of the pre-filing process is to encourage early involvement of interested stakeholders, and to identify and resolve issues before the FERC receives an application. As part of our pre-filing review, we have begun to contact some federal and state agencies to discuss their involvement in the scoping process and the preparation of the EIS.

The COE, DOE, Forest Service, BLM, and Reclamation also have responsibilities under the NEPA, and can adopt the EIS for their own agencies purposes. The BLM, Reclamation, and Forest Service will use this EIS to evaluate the effects of the Pacific Connector pipeline project on lands and facilities managed by these agencies. The BLM and Forest Service will also use the EIS to address proposed amendments of their respective land management plans [4] that may be necessary to make provision for the project.

With this notice, we are asking other agencies with jurisdiction by law and/or special expertise with respect to the environmental issues related to the projects to formally cooperate with us in the preparation of the EIS.[5] Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the Public Participation section of this notice.

We will publish and distribute a draft EIS for public comment. After the comment period, we will consider all timely comments and revise the document, as necessary, before issuing a final EIS. To ensure we have the opportunity to consider and address your comments, please carefully follow the instructions in the Public Participation section of this notice.

Consultations Under Section 106 of the National Historic Preservation Act

In accordance with the Advisory Council on Historic Preservation's implementing regulations for section 106 of the National Historic Preservation Act (NHPA), we are using this notice to initiate consultations with the Oregon State Historic Preservation Office (SHPO), and to solicit its views, and those of other government agencies, interested Indian tribes, and the public on the projects' potential effects on historic properties.[6] The EIS will define the project-specific area of potential effects (APE), determined in consultation with the SHPO. On natural gas projects, the APE at a minimum encompasses all areas subject to ground disturbance (including the construction ROW, temporary extra workspaces, contractor/pipe storage yards, compressor stations and other aboveground facilities, and access roads). The EIS will document our findings on the projects' potential impacts on historic properties and summarize the status of consultations under section 106. The cooperating agencies will also participate in the section 106 consultation process to ensure that their requirements under the NHPA are met.[7]

Currently Identified Environmental Issues

The purpose of the public scoping process is to determine relevant issues that will influence the scope of the environmental analysis, including alternatives. Scoping also allows the public to comment on the BLM and Forest Service plan amendment process, and the consideration of a ROW Grant.

Based in part on our previous environmental analysis, information provided by Jordan Cove and Pacific Connector for their new proposals, and input from other federal and state resource agencies, and other stakeholders, we have already identified several issues that we think deserve attention during our current review. This preliminary list of environmental issues may change based on your comments and our further analysis. The FERC staff identified the following preliminary list of issues:

- Reliability and safety for LNG carrier traffic in Coos Bay, the LNG terminal, and the pipeline;
- Impacts on aquatic resources from dredging the LNG terminal access channel and berth, and pipeline trenching in Coos Bay;
- Geological hazards to the LNG terminal from seismic activity;
- Geological hazards, including landslides at steep slopes, along the pipeline route;
- Impacts of pipeline construction on federally listed threatened and endangered species, including salmon, marbled murrelet, and northern spotted owl;
- Impacts of pipeline construction on private landowners; and
- Visual impacts resulting from construction and operation of the projects.

Preliminary issues for the plan amendments have been identified by BLM and Forest Service staff. The issues include:

- Effects of proposed amendments on Survey and Manage species and their habitat;
- Effects of proposed amendments on contiguous existing or recruitment habitat for marbled murrelets within 0.5 mile of occupied marbled murrelet sites;
- Effects of proposed amendments on habitat in Known Owl Activity Centers (KOAC); and
- Effects of the proposed amendments on Late Successional Reserves (LSR).

Preliminary BLM and Forest Service planning criteria include:

- Evaluation of significance of proposed amendments of Forest Service Land and Resource Management Plans (LRMP) in the context of goals and objectives of the affected LRMPs. Whether a plan amendment is significant is guided by several factors, including the timing and duration of the proposed change, the location and size of the project, and how the proposed change could alter multiple-use goals and objectives for long-term land and resource management;
- Likelihood of persistence of affected Survey and Manage species within the range of the northern spotted owl;
- Amount and quality of marbled murrelet habitat affected by construction and operation of the Pacific Connector pipeline project;
- Amount and quality of habitat in KOAC affected by construction and operation of the Pacific Connector pipeline project;
- Functionality of LSR; and
- Impacts on Connectivity and Diversity Blocks on BLM lands.

The BLM and Forest Service seek public input on issues and planning criteria related to amendment of their District and Forest land management plans related to the Pacific Connector pipeline project. The BLM, Reclamation, and Forest Service also seek public input on issues and planning criteria related to issuance of the ROW Grant, as discussed below (under Proposed Actions of the BLM and Forest Service).

[4] BLM land management plans are called ''Resource Management Plans'' or RMPs. Forest Service land management plans are called ''Land and Resource Management Plans'' or LRMPs. The term ''land management plan'' is generic and may apply to either an RMP or LRMP.

[5] The Council on Environmental Quality regulations addressing cooperating agency responsibilities are at 40 CFR 1501.6.

[6] The Advisory Council on Historic Preservation regulations are at 36 CFR part 800. Those regulations define historic properties as any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register for Historic Places.

[7] We and the federal land managing agencies previously executed a Memorandum of Agreement (MOA) to resolve adverse effects at historic properties for the Jordan Cove LNG terminal and Pacific Connector pipeline in Docket Nos. CP07–441–000 and CP07–444–000. The MOA will be amended for the new proposals under Docket Nos. PF12–7–000 and PF12–17–000.

Proposed Actions of the DOE

The DOE must meet its obligation under section 3 of the NGA, to authorize the import and export of natural gas, including LNG, unless it finds that the proposed import or export will not be consistent with the public interest. The purpose and need for DOE actions is to respond to the application filed by Jordan Cove with the DOE on March 23, 2012 (FE Docket No. 12–32–LNG), seeking authorization to export up to 6 MMTPA of LNG, an export volume equivalent to about 292 Bcf per year of natural gas, for a 25-year period, commencing the earlier of the date of first export or seven years from the date of issuance of the requested authorization. The LNG proposed for export would be from Jordan Cove's proposed Coos Bay terminal to any country: (1) With which the U.S. does not have a free trade agreement requiring the national treatment for trade in natural gas; (2) that has, or in the future develops, the capacity to import LNG; and (3) with which trade is not prohibited by U.S. law or policy.

Because the proposed projects may involve actions in floodplains, in accordance with 10 CFR part 1022, *Compliance with Floodplain and Wetland Environmental Review Requirements,* the EIS will include a floodplain assessment, as appropriate. A floodplain statement of findings will be included in any DOE determinations.

Proposed Actions of the BLM and Forest Service

The purpose of and need for the proposed action by the BLM is to respond to a ROW Grant application originally submitted by Pacific Connector on April 17, 2006 to construct, operate, maintain, and eventually decommission a natural gas pipeline that crosses lands and facilities administered by the BLM, Reclamation, and Forest Service. In addition, there is a need for the BLM and the Forest Service to consider amending affected District and Forest land management plans to make provision for the Pacific Connector ROW.

The proposed action of the BLM and Forest Service has two components. First, the BLM would amend its Resource Management Plans (RMP) for the Coos Bay, Roseburg, and Medford Districts, and Klamath Falls Resource Area of the Lakeview District; while the Forest Service would amend its LRMPs for the Umpqua, Rogue River, and Winema National Forests to make provisions for the Pacific Connector pipeline project. Reclamation has no land use plan amendments associated with this action. Second, in accordance with 43 CFR 2882.3(i), the BLM would issue a ROW Grant in response to Pacific Connector's application for the project to occupy federal lands, with the written concurrence of the Forest Service and Reclamation. Each agency may submit specific stipulations, including mitigation measures, for inclusion in the ROW Grant related to lands, facilities, and easements within their respective jurisdictions.

The Secretary of the Interior has delegated authority to the BLM to grant a ROW in response to Pacific Connector's application for natural gas transmission on federal lands under the Mineral Leasing Act of 1920. The Responsible Official for amendments of BLM RMPs and issuance of the ROW Grant is the BLM Oregon/Washington State Director. The Responsible Official for amendment of Forest Service LRMPs is the Forest Supervisor of the Umpqua National Forest. The Responsible Official for concurrence on issuance of the ROW Grant by Reclamation is the Area Manager of the Mid-Pacific Region's Klamath Basin Area Office. In accordance with 36 CFR 219.17(b)(2), the Deciding Official for the Forest Service has elected to use the 1982 planning rule procedures to amend Forest Service LRMPs as provided in the transition procedures of the 2000 planning rule.

If the BLM adopts the new FERC EIS for the Pacific Connector pipeline project (in Docket No. PF12–17–000), the Oregon/Washington State Director of the BLM will make the following decisions and determinations:

- Determine whether to amend the RMPs for the BLM Coos Bay, Roseburg, and Medford Districts and the Klamath Falls Resource Area of the Lakeview District as proposed or as described in an alternative to the Proposed Action; and
- Respond to the Pacific Connector application, with concurrence of Reclamation and Forest Service, by issuing a ROW Grant, granting the ROW with conditions, or denying the application.

If the Forest Service adopts the new FERC EIS for the Pacific Connector pipeline project (in Docket No. PF12–17–000), the Forest Supervisor of the Umpqua National Forest will make the following decisions and determinations:

- Decide whether to amend the LRMPs of the Umpqua, Rogue River, and Winema National Forests as proposed or as described in an alternative; and
- Determine the significance of the proposed amendments or alternatives in accordance with national forest planning regulation 36 CFR 219.10(f) (1982 procedures) using criteria in Forest Service Manual 1926.5

Amendment of BLM and Forest Service Land Management Plans

BLM/FS–1—Site-Specific Waiver of Management Recommendations for Survey and Manage Species on the BLM Coos Bay District, Roseburg District, Medford District, and Klamath Falls Resource Area of the Lakeview District RMPs, and the Umpqua National Forest, Rogue River National Forest, and Winema National Forest LRMPs

Applicable BLM District RMPs and National Forest LRMPs would be amended to exempt certain known sites within the area of the proposed Pacific Connector ROW Grant from the Management Recommendations required by the 2001 ''Record of Decision and Standards and Guidelines for Amendments to the Survey and Manage, Protection Buffer, and other Mitigation Measures Standards and Guidelines,'' as modified in July 2011. For known sites within the proposed ROW that cannot be avoided, the 2001 Management Recommendations for protection of known sites of Survey and Manage species would not apply. For known sites located outside the proposed ROW but with an overlapping protection buffer only that portion of the buffer within the ROW would be exempt from the protection requirements of the Management Recommendations. Those Management Recommendations would remain in effect for that portion of the protection buffer that is outside of the ROW. The proposed amendment would not exempt the BLM or the Forest Service from the requirements of the 2001 Survey and Manage Record of Decision, as modified, to maintain species persistence for affected Survey and Manage species within the range of the northern spotted owl. This is a site-specific amendment applicable only to the Pacific Connector ROW and would not change future management direction at any other location.

Amendments of BLM RMPs

BLM–1—Site-Specific Exemption of Requirement To Protect Marbled Murrelet Habitat on the BLM Coos Bay and Roseburg Districts

The Coos Bay District and Roseburg District RMPs would be amended to waive the requirements to protect contiguous existing and recruitment habitat for marbled murrelets within the Pacific Connector ROW that is within 0.5 miles of occupied marbled murrelet sites, as mapped by the BLM. This is a

site-specific amendment applicable only to the Pacific Connector ROW and would not change future management direction at any other location.

BLM–2—Site Specific Exemption of Requirement To Retain Habitat in KOAC on the BLM Roseburg District

The Roseburg District RMP would be amended to exempt the Pacific Connector pipeline project from the requirement to retain habitat in KOAC at three locations. This is a site-specific amendment applicable only to the Pacific Connector ROW and would not change future management direction at any other location.

BLM–3—Reallocation of Matrix Lands to LSR, Roseburg District

The Roseburg District RMP would be amended to change the designation of approximately 409 acres from Matrix land allocations to the LSR land allocation in Sections 32 and 34, Township (T.) 29½ South (S.), Range (R.) 7 West (W.); and Section 1, T.30S., R.7W.,Willamette Meridian (W.M.), Oregon (OR). This change in land allocation is proposed to mitigate the potential adverse impact of the Pacific Connector pipeline project on LSRs in the Roseburg District. The amendment would change future management direction for the lands reallocated from Matrix lands to LSR.

BLM–4—Reallocation of Matrix Lands to LSR, Coos Bay District

The Coos Bay District RMP would be amended to change the designation of approximately 454 acres from Matrix land allocations to the LSR land allocation in Sections 19 and 29 of T.28S., R.10W., W.M., OR. This change in land allocation is proposed to mitigate the potential adverse impact of the Pacific Connector pipeline project on LSRs in the Coos Bay District. The amendment would change future management direction for the lands reallocated from Matrix lands to LSR.

Amendment of the Umpqua National Forest LRMP

UNF–1—Site-Specific Amendment To Allow Removal of Effective Shade on Perennial Streams

The Umpqua National Forest LRMP would be amended to change the Standards and Guidelines for Fisheries (Umpqua National Forest LRMP, page IV–33, Forest-Wide) to allow the removal of effective shading vegetation where perennial streams are crossed by the Pacific Connector ROW. This change would potentially affect an estimated total of three acres of effective shading vegetation at approximately five perennial stream crossings in the East Fork of Cow Creek subwatershed from pipeline mileposts (MP) 109 to 110 in Sections 16 and 21, T.32S., R.2W., W.M., OR. This is a site-specific amendment applicable only to the Pacific Connector ROW and would not change future management direction at any other location.

UNF–2—Site-Specific Amendment To Allow Utility Corridors in Riparian Areas

The Umpqua National Forest LRMP would be amended to change prescriptions C2–II (LRMP IV–173) and C2–IV (LRMP IV–177) to allow the Pacific Connector pipeline route to run parallel to the East Fork of Cow Creek for approximately 0.1 mile between about pipeline MPs 109.5 and 109.6 in Section 21, T.32S., R.2W., W. M., OR. This change would potentially affect approximately one acre of riparian vegetation along the East Fork of Cow Creek. This is a site-specific amendment applicable only to the Pacific Connector ROW and would not change future management direction at any other location.

UNF–3—Site-Specific Amendment To Waive Limitations on Detrimental Soil Conditions Within the Pacific Connector ROW in All Management Areas

The Umpqua National Forest LRMP would be amended to waive limitations on the area affected by detrimental soil conditions from displacement and compaction within the Pacific Connector ROW. Standards and Guidelines for Soils (LRMP page IV–67) requires that not more than 20 percent of the project area have detrimental compaction, displacement, or puddling after completion of a project. This is a site-specific amendment applicable only to the Pacific Connector ROW and would not change future management direction at any other location.

UNF–4—Reallocation of Matrix Lands to LSR

The Umpqua National Forest LRMP would be amended to change the designation of approximately 588 acres from Matrix land allocations to the LSR land allocation in Sections 7, 18, and 19, T.32S., R.2W.; and Sections 13 and 24, T.32S., R.3W., W.M., OR. This change in land allocation is proposed to partially mitigate the potential adverse impact of the Pacific Connector pipeline project on LSR 223 on the Umpqua National Forest. This amendment would change future management direction for the lands reallocated from Matrix to LSR.

Amendment of the Rogue River National Forest LRMP

RRNF–1—Amendment To Provide for Energy Transmission

The Rogue River National Forest LRMP would be amended to establish a Forest Plan objective that states: ''While considering other multiple use values, the Forest shall facilitate and make provision for energy transmission via the Pacific Connector consistent with the Energy Policy Act of 2005, the Mineral Leasing Act, the Natural Gas Act, the Multiple Use Sustained Yield Act, and the National Forest Management Act.''

RRNF–2—Site-Specific Amendment of Visual Quality Objectives (VQO) on the Big Elk Road

The Rogue River National Forest LRMP would be amended to change the VQO where the Pacific Connector pipeline route crosses the Big Elk Road at about pipeline MP 161.4 in Section 16, T.37S., R.4E., W.M., OR, from Foreground Retention (Management Strategy 6, LRMP page 4–72) to Foreground Partial Retention (Management Strategy 7, LRMP page 4–86) and allow 10–15 years for amended VQO to be attained. The existing Standards and Guidelines for VQO in Foreground Retention where the Pacific Connector pipeline route crosses the Big Elk Road require that VQOs be met within one year of completion of the project and that management activities not be visually evident. This amendment would apply only to the Pacific Connector pipeline project in the vicinity of Big Elk Road and would not change future management direction for any other project.

RRNF–3—Site-Specific Amendment of VQO on the Pacific Crest Trail

The Rogue River National Forest LRMP would be amended to change the VQO where the Pacific Connector pipeline route crosses the Pacific Crest Trail at about pipeline MP 168 in Section 32, T.37S., R.5E., W.M., OR, from Foreground Partial Retention (Management Strategy 7, LRMP page 4–86) to Modification (USDA Forest Service Agricultural Handbook 478) and to allow 15–20 years for amended VQOs to be attained. The existing Standards and Guidelines for VQOs in Foreground Partial Retention in the area where the Pacific Connector pipeline route crosses the Pacific Crest Trail require that visual mitigation measures meet the stated VQO within three years of the completion of the project and that management activities be visually subordinate to the landscape. This

amendment would apply only to the Pacific Connector pipeline project in the vicinity of the Pacific Crest Trail and would not change future management direction for any other project.

RRNF–4—Site-Specific Amendment of Visual Quality Objectives Adjacent to Highway 140

The Rogue River National Forest LRMP would be amended to allow 10–15 years to meet the VQO of Middleground Partial Retention between Pacific Connector pipeline MPs 156.3 to 156.8 and 157.2 to 157.5 in Sections 11 and 12, T.37S., R.3E., W.M., OR. Standards and Guidelines for Middleground Partial Retention (Management Strategy 9, LRMP Page 4–112) require that VQOs for a given location be achieved within three years of completion of the project. Approximately 0.8 miles or 9 acres of the Pacific Connector ROW in the Middleground Partial Retention VQO visible at distances of 0.75 to 5 miles from State Highway 140 would be affected by this amendment. This amendment would apply only to the Pacific Connector pipeline project in Sections 11 and 12, T.37S., R.3E., W.M., OR, and would not change future management direction for any other project.

RRNF–5—Site-Specific Amendment To Allow Utility Transmission Corridors in Management Strategy 26, Restricted Riparian Areas

The Rogue River National Forest LRMP would be amended to allow the Pacific Connector ROW to cross the Restricted Riparian land allocation. This would potentially affect approximately 2.5 acres of the Restricted Riparian Management Strategy at one perennial stream crossing on the South Fork of Little Butte Creek at about pipeline MP 162.45 in Section 15, T.37S., R.4E., W.M., OR. Standards and Guidelines for the Restricted Riparian land allocation prescribe locating transmission corridors outside of this land allocation (Management Strategy 26, LRMP page 4–308,). This is a site-specific amendment applicable only to the Pacific Connector ROW and would not change future management direction at any other location.

RRNF–6—Site-Specific Amendment To Waive Limitations on Detrimental Soil Conditions Within the Pacific Connector ROW in All Management Areas

The Rogue River National Forest LRMP would be amended to waive limitations on areas affected by detrimental soil conditions from displacement and compaction within the Pacific Connector ROW in all affected Management Strategies. Standards and Guidelines for detrimental soil impacts in affected Management Strategies require that no more than 10 percent of an activity area should be compacted, puddled or displaced upon completion of project (not including permanent roads or landings). No more than 20 percent of the area should be displaced or compacted under circumstances resulting from previous management practices including roads and landings. Permanent recreation facilities or other permanent facilities are exempt (RRNF LRMP 4–41, 4–83, 4–97, 4–123, 4–177, 4–307). This is a site-specific amendment applicable only to the Pacific Connector ROW and would not change future management direction at any other location.

RRNF–7—Reallocation of Matrix Lands to LSR

The Rogue River National Forest LRMP would be amended to change the designation of approximately 512 acres from Matrix land allocations to the LSR land allocation in Section 32, T.36S., R.4E. W.M., OR. This change in land allocation is proposed to partially mitigate the potential adverse impact of the Pacific Connector pipeline project on LSR 227 on the Rogue River National Forest. This amendment would change future management direction for the lands reallocated from Matrix to LSR.

Amendment of the Winema National Forest LRMP

WNF–1—Site-Specific Amendment To Allow Utility Corridors in Management Area 3

The Winema National Forest LRMP would be amended to change the Standards and Guidelines for Management Area 3 (MA–3) (LRMP page 4–103–4, Lands) to allow the 95-foot-wide Pacific Connector pipeline corridor in MA–3 from the Forest Boundary in Section 32, T.37S., R.5E., W.M., OR, to the Clover Creek Road corridor in Section 4, T.38S, R.5. E., W.M., OR. Standards and Guidelines for MA–3 state that the area is currently an avoidance area for new utility corridors. This proposed new utility corridor is approximately 1.5 miles long and occupies approximately 17 acres. This is a site-specific amendment applicable only to the Pacific Connector ROW and would not change future management direction at any other location.

WNF–2—Site-Specific Amendment of VQO on the Dead Indian Memorial Highway

The Winema National Forest LRMP would be amended to allow 10–15 years to achieve the VQO of Foreground Retention where the Pacific Connector ROW crosses the Dead Indian Memorial Highway at approximately pipeline MP 168.8 in Section 33, T.37S., R.5E., W. M., OR. Standards and Guidelines for Scenic Management, Foreground Retention (LRMP 4–103, MA 3A, Foreground Retention) requires VQOs for a given location be achieved within one year of completion of the project. The Forest Service proposes to allow 10–15 years to meet the specified VQO at this location. This is a site-specific amendment that would apply only to the Pacific Connector pipeline project in the vicinity of the Dead Indian Memorial Highway and would not change future management direction for any other project.

WNF–3—Site-Specific Amendment of VQO Adjacent to the Clover Creek Road

The Winema National Forest LRMP would be amended to allow 10–15 years to meet the VQO for Scenic Management, Foreground Partial Retention, where the Pacific Connector Right-of-Way is adjacent to the Clover Creek Road from approximately pipeline MP 170 to 175 in Sections 2, 3, 4, 11, and 12, T.38S., R.5E., and Sections 7 and 18, T.38S., R.6E., W.M., OR. This change would potentially affect approximately 50 acres. Standards and Guidelines for Foreground Partial Retention (LRMP, page 4–107, MA 3B) require that VQOs be met within three years of completion of a project. This is a site-specific amendment would apply only to the Pacific Connector pipeline project in the vicinity of Clover Creek Road and would not change future management direction for any other project.

WNF–4—Site-Specific Amendment To Waive Limitations on Detrimental Soil Conditions Within the Pacific Connector ROW in All Management Areas

The Winema National Forest LRMP would be amended to waive restrictions on detrimental soil conditions from displacement and compaction within the Pacific Connector ROW in all affected management areas. Standards and Guidelines for detrimental soil impacts in all affected management areas require that no more than 20 percent of the activity area be detrimentally compacted, puddled, or displaced upon completion of a project (LRMP page 4–73, 12–5). This is a site-

specific amendment applicable only to the Pacific Connector ROW and would not change future management direction at any other location.

WNF–5—Site-Specific Amendment To Waive Limitations on Detrimental Soil Conditions Within the Pacific Connector ROW in Management Area 8

The Winema National Forest LRMP would be amended to waive restrictions on detrimental soil conditions from displacement and compaction within the Pacific Connector ROW within the Management Area 8, Riparian Area (MA–8). This change would potentially affect approximately 0.5 mile or an estimated 9.6 acres of MA–8. Standards and Guidelines for Soil and Water, MA–8 require that not more than 10 percent of the total riparian zone in an activity area be in a detrimental soil condition upon the completion of a project (LRMP page 4–137, 2). This is a site-specific amendment applicable only to the Pacific Connector ROW and would not change future management direction at any other location.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the Jordan Cove and Pacific Connector projects, and proposed BLM and Forest Service land management plan amendments. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please send your comments so that the Commission receives them in Washington DC on or before September 4, 2012.

The BLM, Reclamation, and Forest Service are participating as cooperating agencies with the FERC in this public scoping process. With this notice, the BLM is requesting comments through the FERC's public scoping process on proposed amendments of BLM RMPs to make provision for the Pacific Connector ROW on the Coos Bay, Roseburg, and Medford Districts and Klamath Falls Resource Area of the Lakeview District. The BLM is also requesting public comments on the issuance of the ROW Grant that would allow the Pacific Connector pipeline to occupy federal land. The Forest Service is requesting public comments on the proposed amendments of Forest Service LRMPs to make provision for the Pacific Connector ROW on the Rogue River, Umpqua, and Winema National Forests. Timely comments submitted by the public in response to the NOI previously issued by the Forest Service to make provision for the Pacific Connector ROW, published in the **Federal Register** on June 15, 2009 (Vol. 74, No. 113, pages 27214–28217), will be considered in this scoping process if they are applicable to the current Forest Service proposal. Reclamation has no proposed land management plan amendments, but will consider comments related to the ROW Grant on Reclamation-administered lands and facilities.

Comments on actions by the BLM, Reclamation, or Forest Service should be submitted through the FERC comment process and within the timeline described. The submission of timely and specific comments can affect a reviewer's ability to participate in subsequent administrative or judicial review of BLM and Forest Service decisions. Comments concerning BLM and Forest Service actions submitted anonymously will be accepted and considered; however such anonymous submittals would not provide the commenters with standing to participate in administrative or judicial review of BLM and Forest Service decisions.

For your convenience, there are three methods you can use to submit your comments to the FERC. In all instances, please reference the docket numbers for these projects (PF12–7–000 and PF12–17–000) with your submission. The Commission encourages electronic filing of comments, and has expert staff available to assist you at (202) 502–8258 or *efiling@ferc.gov*.

(1) You can file your comments electronically using the eComment feature located on the Commission's Web site (*www.ferc.gov*) under the Documents & Filings link. This is an easy method for interested persons to submit brief, text-only comments on a project;

(2) You can file your comments electronically using the eFiling feature located on the Commission's Web site (*www.ferc.gov*) under the Documents & Filings link. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''eRegister.'' You must select the type of filing you are making. If you are filing a comment on a particular project, please select ''Comment on a Filing;'' or

(3) You can file a paper copy of your comments by mailing them to the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Room 1A, Washington, DC 20426.

Before including your address, phone number, email address, or other personal identifying information in your comments, you should be aware that the entire text of your comments—including your personal identifying information—would be publicly available through the FERC eLibrary system, if you file your comments with the Secretary of the Commission.

Environmental Mailing List

The FERC's environmental mailing list includes federal, state, and local government representatives and agencies; elected officials; environmental groups and non-governmental organizations; interested Indian tribes; other interested parties; and local libraries and newspapers. This list also includes all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within certain distances of aboveground facilities, and anyone who submits comments on the projects. We will update the environmental mailing list as the analysis proceeds to ensure that we send the information related to this environmental review to all individuals, organizations, and government entities interested in and/or potentially affected by the planned projects. Please note that if you submitted comments on the previously reviewed projects (CP07–441–000 and CP07–444–000) and want to be involved in the currently proposed projects (PF12–7–000 and PF12–17–000) you must resubmit comments.

Copies of the completed draft EIS on compact discs (CD) will be sent to the environmental mailing list for public review and comment. If you would prefer to receive a paper copy of the document instead of the CD version, or would like to remove your name from the mailing list, please return the attached Information Request (Appendix 2).

Becoming an Intervenor

Once Jordan Cove and Pacific Connector file their applications with the FERC, the Commission will issue a *Notice of Application.* In response to the *Notice of Application,* you may want to file a request to become an ''intervenor,'' which is an official party to the Commission's proceeding. Intervenors play a more formal role in the FERC process, and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. Instructions for becoming an intervenor are in the User's Guide under the ''e-filing'' link

on the Commission's Web site. Please note that the Commission will not accept requests for intervenor status during the pre-filing period. You must wait until the Commission receives applications for these projects.

Administrative Review of BLM and Forest Service Decisions To Amend Land Management Plans

Decisions by the BLM and Forest Service to amend land management plans are subject to administrative review. In accordance with 36 CFR 219.59, the Forest Service has elected to use the administrative review procedures (otherwise known as protest procedures) of the BLM. Administrative objections to Forest Service land management plan amendment decisions and protests of BLM land management plan amendment decisions may be filed under the provisions of 43 CFR 1610.5–2.

Additional Information

Additional information about the projects is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC Web site (*www.ferc.gov*). On the FERC Web page, go to Documents & Filings, and click on the eLibrary link. Then click on ''General Search,'' and enter the docket number, excluding the last three digits in the field (i.e., PF12–7 or PF12–17). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *www.ferc.gov/esubscribenow.htm.*

Finally, public meetings or site visits will be posted on the Commission's calendar located at *www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

Dated: August 2, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–19781 Filed 8–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. PF12–12–000; PF12–13–000]

Cameron Interstate Pipeline, LLC, Cameron LNG, LLC; Notice of Intent To Prepare an Environmental Impact Statement for the Planned Cameron Pipeline Expansion Project and Cameron LNG Liquefaction Project, Request for Comments on Environmental Issues, and Notice of Public Scoping Meeting

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental impact statement (EIS) that will identify and address the environmental impacts that could result from the construction and operation of the Cameron Pipeline Expansion Project and the Cameron Liquefied Natural Gas (LNG) Liquefaction Project (collectively Cameron Liquefaction Project or Project) planned by Cameron Interstate Pipeline, LLC and Cameron LNG, LLC (collectively Cameron), respectively. The Commission will use this EIS in its decision-making process to determine whether the Project is in the public interest.

This notice announces the opening of the scoping process the Commission will use to gather input from the public and interested agencies on the Project. Your input will help the Commission staff determine what issues they need to evaluate in the EIS. Please note that the scoping period will close on September 4, 2012.

You may submit comments in written form or verbally. Further details on how to submit written comments are in the Public Participation section of this notice. In lieu of or in addition to sending written comments, the Commission invites you to attend the public scoping meeting scheduled as follows: FERC Public Scoping Meeting, Cameron Liquefaction Project, August 21, 2012, 6:00 p.m., Holiday Inn Express (Indigo Meeting), 330 Arena Road, Sulphur, LA 70665.

This notice is being sent to the Commission's current environmental mailing list for this Project. State and local government representatives should notify their constituents of this planned project and encourage them to comment on their areas of concern.

If you are a landowner receiving this notice, a company representative may contact you about the acquisition of an easement to construct, operate, and maintain the planned facilities. The company would seek to negotiate a mutually acceptable agreement. However, if the Commission approves the Project, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail to produce an agreement, Cameron could initiate condemnation proceedings where compensation would be determined in accordance with state law.

A fact sheet prepared by the FERC entitled ''An Interstate Natural Gas Facility on My Land? What Do I Need To Know?'' is available for viewing on the FERC Internet Web site (*www.ferc.gov*). This fact sheet addresses a number of typically asked questions, including the use of eminent domain and how to participate in the Commission's proceedings.

Summary of the Planned Project

Cameron plans to expand its existing LNG import terminal in Cameron Parish, Louisiana to enable the terminal to liquefy natural gas and export the LNG. The planned facility would have an export capacity of 12 million metric tons per year (MTPY) while maintaining the current capability to import and re-gasify LNG. The related Cameron Pipeline Expansion Project would be constructed and operated to provide natural gas to the planned export terminal. The general locations of the planned pipeline and LNG export terminal are depicted in the figure included as Appendix 1.[1]

The Cameron Pipeline Expansion Project would include construction and operation of the following facilities:

- Approximately 21 miles of new 42-inch-diameter pipeline extending from an interconnection with the Florida Gas Transmission Pipeline in Calcasieu Parish, Louisiana to a new interconnection with the Trunkline Gas Pipeline in Beauregard Parish, Louisiana;
- A new 66,000-horsepower compressor station in Calcasieu Parish, Louisiana;
- A new interconnection and metering facilities with the Trunkline Gas Pipeline in Beauregard Parish, Louisiana; and
- Modifications to existing interconnections and metering facilities in Beauregard, Calcasieu, and Cameron Parishes.

[1] The appendices referenced in this notice will not appear in the **Federal Register**. Copies of the appendices were sent to all those receiving this notice in the mail and are available at *www.ferc.gov* using the link called ''eLibrary'' or from the Commission's Public Reference Room, 888 First Street NE., Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to eLibrary, refer to the last page of this notice.

Cameron plans to initiate construction of the Cameron Pipeline Expansion Project in the first quarter of 2015 and complete construction during the second quarter of 2016. The construction schedule would be driven by the need to complete construction of the pipeline by the planned time for commissioning of the initial liquefaction train at the LNG terminal in the fourth quarter of 2016 as described below.

The Cameron LNG Liquefaction Project would include construction and operation of the following facilities:

- Three liquefaction trains, with each train including a feed gas treatment unit, a heavy hydrocarbon removal unit, and a liquefaction unit (with a maximum LNG production capacity of 4 million MTPY each);
- A new 160,000-cubic-meter LNG storage tank;
- A new natural gas liquids (NGL) and refrigerant storage area;
- A new truck loading/unloading facility to unload refrigerants for transport to the storage area and to load NGLs produced during the gas liquefaction process;
- A new construction dock designed to receive barges transporting large equipment via the Calcasieu Ship Channel; and
- Nine natural gas-fueled combustion turbine generators that would generate approximately 200 megawatts of electric power.

Cameron plans to initiate construction of the Cameron LNG Liquefaction Project in the fourth quarter of 2013 and complete construction of the first LNG liquefaction train in the fourth quarter of 2016. Operations would commence after the commissioning of the first LNG liquefaction train. Cameron plans to have the Cameron Liquefaction Project fully constructed and operational by the fourth quarter of 2017.

Land Requirements for Construction

The Cameron Pipeline Expansion Project would require about 368 acres for construction, with 140 acres as previously disturbed during construction of the existing Cameron pipeline. A 25-acre temporary contractor yard would be located adjacent to the Ragley Compressor Station in Beauregard Parish, Louisiana. The new compressor station would require 30 acres for construction and operation. After construction, Cameron would maintain about 80 acres as permanent right-of-way. The remaining 258 acres of temporary workspace (including all temporary construction rights-of-way and extra workspaces) would be restored and allowed to revert to its former use. Approximately 16 miles of the new 21-mile-long pipeline would be constructed within existing permanent rights-of-way. The remaining 5 miles would be adjacent to existing pipeline/utility corridors, but outside of the existing permanent rights-of-way.

The Cameron LNG Liquefaction Project would be constructed adjacent to and north of the existing Cameron LNG Terminal on approximately 430 acres, of which approximately 50 acres is part of the existing terminal. All 430 acres would be used for construction (including an equipment laydown area) and operation of the terminal.

The EIS Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity under section 7(c) of the Natural Gas Act (NGA) and authorization to construct, install, and operate LNG facilities under Section 3(a) of the NGA. NEPA also requires us [2] to discover and address concerns the public may have about proposals. This process is referred to as ''scoping''. The main goal of the scoping process is to focus our analysis in the EIS on the important environmental issues. By this notice, the Commission requests public comments on the scope of issues to be addressed in the EIS. We will consider all filed comments during the preparation of the EIS.

In the EIS, we will discuss impacts that could occur as a result of the construction and operation of the planned Cameron Liquefaction Project under the following general headings:

- Geology and soils;
- Water resources;
- Wetlands and vegetation;
- Fish and wildlife;
- Threatened and endangered species;
- Land use, recreation, and visual resources;
- Air quality and noise;
- Cultural resources;
- Socioeconomics;
- Reliability and safety;
- Engineering and design material; and
- Cumulative environmental impacts.

We will also evaluate possible alternatives to the planned Project or portions of the Project in the EIS, and make recommendations on how to lessen or avoid impacts on affected resources.

[2] ''We,'' ''us,'' and ''our'' refer to the environmental staff of the Commission's Office of Energy Projects.

Although no formal application has been filed by Cameron, we have already initiated our NEPA review under the Commission's pre-filing process. The purpose of the pre-filing process is to encourage the early involvement of interested stakeholders and to identify and resolve issues before the FERC receives an application. As part of our pre-filing review, we have begun to contact some federal and state agencies to discuss their involvement in the scoping process and the preparation of the EIS.

The EIS will present our independent analysis of the issues. We will publish and distribute the draft EIS for public comment. After the comment period, we will consider all timely comments and revise the document, as necessary, before issuing a final EIS. To ensure we have the opportunity to consider and address your comments, please carefully follow the instructions in the Public Participation section beginning on page 7.

With this notice, we are asking agencies with jurisdiction by law and/or special expertise with respect to the environmental issues related to this Project to formally cooperate with us in the preparation of the EIS.[3] Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the Public Participation section of this notice. Currently, the Department of Energy has expressed its intention to participate as a cooperating agency in the preparation of the EIS to satisfy its NEPA responsibilities related to these projects.

Consultations Under Section 106 of the National Historic Preservation Act

In accordance with the Advisory Council on Historic Preservation's implementing regulations for section 106 of the National Historic Preservation Act, we are using this notice to initiate consultation with the Office of the State of Louisiana Cultural Development, which has been given the role of State Historic Preservation Office (SHPO), and to solicit its views and those of other government agencies, interested Indian tribes, and the public on the Project's potential effects on historic properties.[4] We will define the

[3] The Council on Environmental Quality regulations addressing cooperating agency responsibilities are at Title 40, Code of Federal Regulations, 1501.6.

[4] The Advisory Council on Historic Preservation regulations are at Title 36, Code of Federal Regulations, Part 800. Those regulations define historic properties as any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register for Historic Places.

project-specific Area of Potential Effects in consultation with the SHPO as the Project develops. On natural gas facility projects, the Area of Potential Effects at a minimum encompasses all areas subject to ground disturbance (examples include construction right-of-way, contractor/pipe storage yards, compressor stations, and access roads). Our EIS for the Project will document our findings on the impacts on historic properties and summarize the status of consultations under section 106.

Currently Identified Environmental Issues

We have already identified many issues that we think deserve attention based on a preliminary review of the Project site and facilities and information provided by Cameron. The following preliminary list of issues may be changed based on your comments and our analysis:

- Potential impacts on perennial and intermittent waterbodies, including waterbodies with federal and/or state designations/protections;
- Evaluation of temporary and permanent impacts on wetlands and the development of appropriate mitigation;
- Potential impacts to fish and wildlife habitat, including potential impacts to federally and state-listed threatened and endangered species;
- Potential effects on prime farmland and erodable soils;
- Potential visual effects of the aboveground facilities on surrounding areas;
- Potential impacts and potential benefits of construction workforce on local housing, infrastructure, public services, and economy;
- Impacts on air quality and noise associated with construction and operation of the Project; and
- Public safety and hazards associated with the transport of natural gas and LNG.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the Project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please send your comments so that the Commission receives them in Washington, DC on or before September 4, 2012. This is not your only public input opportunity; please refer to the Environmental Review Process flow chart in Appendix 2.

For your convenience, there are three methods you can use to submit your comments to the Commission. In all instances, please reference either or both Project docket numbers (PF12–12–000 and PF12–13–000) with your submission. The Commission encourages electronic filing of comments and has expert staff available to assist you at (202) 502–8258 or *efiling@ferc.gov*.

(1) You can file your comments electronically using the *eComment* feature located on the Commission's Web site (*www.ferc.gov*) under the link to Documents and Filings. This is an easy method for interested persons to submit brief, text-only comments on a project;

(2) You can file your comments electronically using the *eFiling* feature located on the Commission's Web site (*www.ferc.gov*) under the link to *Documents and Filings.* With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''*eRegister.*'' You must select the type of filing you are making. If you are filing a comment on a particular project, please select ''Comment on a Filing''; or

(3) You can file a paper copy of your comments by mailing them to the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Room 1A, Washington, DC 20426.

Environmental Mailing List

The environmental mailing list includes federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American Tribes; other interested parties; and local libraries and newspapers. This list also includes all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within certain distances of aboveground facilities, and anyone who submits comments on the Project. We will update the environmental mailing list as the analysis proceeds to ensure that we send the information related to this environmental review to all individuals, organizations, and government entities interested in and/or potentially affected by the planned Project.

Copies of the completed draft EIS will be sent to the environmental mailing list for public review and comment. If you would prefer to receive a paper copy of the document instead of the CD version or would like to remove your name from the mailing list, please return the attached Information Request (Appendix 3).

Becoming an Intervenor

Once Cameron files its applications with the Commission, you may want to become an ''intervenor,'' which is an official party to the Commission's proceeding. Intervenors play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. An intervenor formally participates in the proceeding by filing a request to intervene. Instructions for becoming an intervenor are in the User's Guide under the ''e-filing'' link on the Commission's Web site. Please note that the Commission will not accept requests for intervenor status at this time. You must wait until the Commission receives a formal application for the planned Project.

Additional Information

Additional information about the Project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC Web site (*www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on ''General Search'' and enter one of the docket numbers (enter only one docket number per search), excluding the last three digits in the Docket Number field (i.e., PF12–13). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *www.ferc.gov/esubscribenow.htm.*

Public meetings or site visits will be posted on the Commission's calendar located at *www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

Finally, Cameron has established an Internet Web site for the Project at *http://cameron.sempralng.com/liquefaction.html.* The Web site includes a description of the Project,

viewing locations for project materials and maps, frequently asked questions and responses, and links to related documents. You can also request additional information or provide comments directly to Cameron at (713) 298–5479.

Dated: August 6, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–19777 Filed 8–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER12–2413–000]

Energy Alternatives Wholesale, 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 Energy Alternatives Wholesale, LLC's application for market-based rate authority, with an accompanying rate schedule, 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 August 27, 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(s) 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: August 7, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–19752 Filed 8–10–12; 8:45 am]

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER12–2405–000]

Helvetia Solar, 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 Helvetia Solar, LLC's application for market-based rate authority, with an accompanying rate schedule, 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 August 27, 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(s) 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: August 7, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–19754 Filed 8–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER12–2398–000]

NRG Solar Borrego I 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 NRG Solar Borrego I LLC's application for market-based rate authority, with an accompanying rate schedule, 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 August 27, 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(s) 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: August 7, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–19753 Filed 8–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14431–000]

Coralville Energy, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On July 5, 2012, Coralville Energy, LLC filed an application for a preliminary permit under section 4(f) of the Federal Power Act proposing to study the feasibility of the Burlington Street Dam Hydroelectric Project No. 14431, to be located at the existing Burlington Street Dam on the Iowa River, near Iowa City in Johnson County, Iowa. The Burlington Street Dam is owned and operated by the University of Iowa.

A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of: (1) The existing 291-foot-long by 14-foot-high concrete gravity dam; (2) a new 50-foot-long by 50-foot-wide by 50-foot-high powerhouse, containing two 0.75-megawatt (MW) vertical flume propeller-type turbine/generator units for a total capacity of 1.5 MW; (3) a new 2-foot-long by 40-foot-wide by 15-foot-high intake structure; (4) a new 400-foot-long, 12.7-kilovolt transmission line; and (5) appurtenant facilities. The project would have an estimated annual generation of 8,542 megawatt-hours.

Applicant Contact: Mr. Mark Boumansour, 1035 Pearl Street, 4th Floor, Boulder, CO 80302; (720) 295–3317.

FERC Contact: Tyrone A. Williams, (202) 502–6331.

Deadline for filing comments, motions to intervene, and competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp*. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp*. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

More information about this project, including a copy of the application can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–14431) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: August 7, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–19783 Filed 8–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP12–487–000]

Columbia Gas Transmission, L.L.C.; Notice of Request Under Blanket Authorization

Take notice that on July 24, 2012 Columbia Gas Transmission, L.L.C. (Columbia), P.O. Box 1273, Charleston, West Virginia 25325, filed in Docket No. CP12–487–000, a Prior Notice request pursuant to sections 157.205 and 157.216 of the Commission's Regulations under the Natural Gas Act for authorization to abandon four underperforming natural gas storage wells in Ashland, Hocking, and Lorain Counties, Ohio. Specifically, Columbia proposes to permanently plug and abandon Benton Storage Well No. 8620, Laurel Storage Well No. 9019, Lucas Storage Well No. 582, and Wellington Storage Well No. 8702 together with the associated well pipeline and appurtenances. The proposed wells to be abandoned have historically performed poorly in relation to other wells and Columbia has determined that plugging and abandoning the wells is the best course of action, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing may also be viewed on the Web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or TTY, (202) 502–8659.

Any questions regarding this Application should be directed to Fredric J. George, Senior Counsel, Columbia Gas Transmission, L.L.C., P.O. Box 1273, Charleston, West Virginia 25325, or call (304) 357–2359, or fax (304) 357–3206, or by email: *fgeorge@nisource.com*.

Any person may, within 60 days after the issuance of the instant notice by the

Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention. Any person filing to intervene or the Commission's staff may, pursuant to section 157.205 of the Commission's Regulations under the NGA (18 CFR 157.205) file a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commentary will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests, and interventions via the internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*www.ferc.gov*) under the ''e-Filing'' link.

Dated: August 6, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–19778 Filed 8–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP12–488–000]

Carolina Gas Transmission Corporation; Notice of Request Under Blanket Authorization

Take notice that on July 25, Carolina Gas Transmission Corporation (Carolina Gas), 601 Old Taylor Road, Cayce, South Carolina 29033, filed in Docket No. CP12–488–000, an application pursuant to sections 157.205 and 157.210 of the Commission's Regulations under the Natural Gas Act (NGA) as amended, to convert three existing standby compressor units at its Grover Compressor Station in Cherokee County, South Carolina, to base load service under Carolina Gas' blanket certificate issued in Docket Nos. CP06–71–000 *et al.,*[1] all as more fully set forth in the application which is on file with the Commission and open to the public for inspection.

Carolina Gas proposes to convert three existing standby 1,050 horsepower (HP) Solar Saturn turbine compressor units to base load service at the Grover Compressor Station. Carolina Gas states that it would convert the three standby compressor units to base load service in order to provide additional firm transportation capacity to three customers who have requested additional capacity on Carolina Gas' system. Carolina Gas also states that no construction, abandonment, or earth disturbance would be involved with this proposal. Carolina Gas estimates that the proposed compressor conversions would cost $85,000 to implement.

Any questions concerning this application may be directed to Randy D. Traylor, Jr., Manager—System Planning, Carolina Gas Transmission Corporation, 601 Old Taylor Road, Cayce, South Carolina 29033, telephone (803) 217–2255, or by Email: *dtraylor@scana.com.*

This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov,* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number filed to access the document. For assistance, please contact FERC Online Support at FERC *OnlineSupport@ferc.gov* or call toll-free at (866) 206–3676, or, for TTY, contact (202) 502–8659. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages intervenors to file electronically.

Any person or the Commission's staff may, within 60 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the regulations under the NGA (18 CFR 157.205), a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the allowed time for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the NGA.

Dated: August 7, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–19784 Filed 8–10–12; 8:45 am]

BILLING CODE 6717–01–P

[1] 116 FERC ¶ 61,049 (2006).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP12–492–000]

Transwestern Pipeline Company, LLC; Notice of Request Under Blanket Authorization

Take notice that on July 27, 2012, Transwestern Pipeline Company, LLC (Transwestern), 711 Louisiana Street, Suite 900, Houston, Texas 77002–2716, filed a prior notice request pursuant to sections 157.205, 157.208, and 157.210 of the Commission's regulations under the Natural Gas Act (NGA) for authorization to install piping modifications at its Gallup Compressor Station in McKinley County, New Mexico, and to update its West of Thoreau area mainline design capacity by 15 million cubic feet per day. Transwestern estimates the cost of the proposed project to be approximately $550,000, all as more fully set forth in the application, which is on file with the Commission and open to public inspection. The filing may also be viewed on the Web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or TTY, (202) 502–8659.

Any questions regarding the application should be directed to Mr. Kelly Allen, Manager of Certificates and Reporting, Transwestern Pipeline Company, LLC, 711 Louisiana Street, Suite 900, Houston, Texas 77002–2716, by telephone at (281) 714–2056, by facsimile at (281) 714–2181, or by email at *Kelly.Allen@energytransfer.com.*

Any person may, within 60 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention. Any person filing to intervene or the Commission's staff may, pursuant to section 157.205 of the Commission's regulations under the NGA (18 CFR 157.205) file a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

The Commission strongly encourages electronic filings of comments, protests, and interventions via the Internet in lieu of paper. See 18 CFR 385.2001(a) (1) (iii) and the instructions on the Commission's Web site (*www.ferc.gov*) under the ''e-Filing'' link.

Dated: August 6, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–19779 Filed 8–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Western Area Power Administration

Boulder Canyon Project

AGENCY: Western Area Power Administration, DOE.

ACTION: Notice of Base Charge and Rates.

SUMMARY: In this notice, the Deputy Secretary of Energy (Deputy Secretary) approves the Fiscal Year (FY) 2013 Base Charge and Rates for Boulder Canyon Project (BCP) electric service provided by the Western Area Power Administration (Western). The Base Charge will provide sufficient revenue to pay all annual costs, including interest expense, and repay investments within the allowable period.

DATES: The revised Base Charge and Rates will be effective the first day of the first full billing period beginning on or after October 1, 2012, and will stay in effect through September 30, 2013, or until superseded.

FOR FURTHER INFORMATION CONTACT: Mr. Jack Murray, Rates Manager, Desert Southwest Customer Service Region, Western Area Power Administration, P.O. Box 6457, Phoenix, AZ 85005–6457, (602) 605–2442, email *jmurray@wapa.gov.*

SUPPLEMENTARY INFORMATION: Hoover Dam, authorized by the Boulder Canyon Project Act (45 Stat. 1057, December 21, 1928), sits on the Colorado River along the Arizona and Nevada border. Hoover Dam power plant has nineteen (19) generating units (two for plant use) and an installed capacity of 2,078,800 kilowatts (kW) (4,800 kW for plant use). High-voltage transmission lines and substations connect BCP power to consumers in southern Nevada, Arizona, and southern California. BCP electric service rates are adjusted annually using an existing rate formula established on April 19, 1996. The rate formula requires the BCP Contractors to pay a Base Charge (expressed in dollars), rather than a rate, for their power. The Base Charge is calculated to generate sufficient revenue to cover all annual costs and to repay investment obligations within allowable time periods. The Base Charge is allocated to each BCP Contractor in proportion to their allocation of Hoover power. A BCP composite power rate, expressed in mills per kilowatt-hour (mills/kWh), can be inferred by dividing the Base Charge by energy sales in the year; however, the rate is not used to determine customers' bills.

Rate Schedule BCP–F8, Rate Order No. WAPA–150, effective October 1, 2010, through September 30, 2015, allows for an annual recalculation of the Base Charge and Rates.[1] This notice sets forth the recalculation for FY 2013. Under Rate Schedule BCP–F8, the existing composite rate, effective on October 1, 2011, is 21.12 mills/kWh. The Base Charge is $84,536,772, the energy rate was 10.56 mills/kWh, and the capacity rate is $1.84 per kilowatt-month (kW-month).

The recalculated Base Charge for BCP electric service, effective October 1, 2012, is $82,379,637, a 2.55-percent decrease from the FY 2012 Base Charge. The decrease is due to a decrease in the annual revenue requirement, driven primarily by decreases in FY 2011 annual operation and maintenance expenses and replacement costs, and increases in the other non-power revenues. The decrease in FY 2011 expenses resulted in additional carryover in FY 2012 and FY 2013, which reduced the FY 2013 Base Charge. The FY 2013 composite rate of 21.28 mills/kWh is an increase of approximately 1 percent compared to the FY 2012 BCP composite rate. The FY 2013 energy rate of 10.64 mills/kWh reflects an increase of approximately 1 percent compared to the existing energy rate of 10.56 mills/kWh. Energy sales are decreasing compared with FY 2012 due to deteriorating hydrological conditions in FY 2013. The FY 2013 capacity rate of $1.96/kW-month reflects an increase of approximately 7 percent compared to the existing capacity rate of $1.84/kW-month. Capacity sales are decreasing compared with FY 2012, due to a forecast of poor hydrology in FY 2013 compared to FY 2012. Although the revenue requirement for FY 2013 is decreasing, the decrease in energy sales results in an increase to the composite and energy rates, and the decrease in capacity sales results in an increase to the capacity rate. The proposed rates were calculated using Western's FY 2012 Final Master Schedule which provides the FY 2013 projections for energy and capacity sales.

The following summarizes the steps taken by Western to ensure involvement of all interested parties in determining the Base Charge and Rates:

1. A **Federal Register** notice was published on January 18, 2012 (77 FR 2533), announcing the proposed rate adjustment process, initiating a public consultation and comment period, announcing public information and public comment forums, and presenting procedures for public participation.

2. Discussion of the proposal was initiated at an informal BCP Contractor meeting held March 7, 2012, in Phoenix, Arizona. At this informal meeting, representatives from Western and the Bureau of Reclamation (Reclamation) explained the basis for estimates used to calculate the Base Charge and Rates and held a question and answer session.

3. At the public information forum held on March 28, 2012, in Phoenix, Arizona, Western and Reclamation representatives explained the proposed Base Charge and Rates for FY 2013 in greater detail and held a question and answer session.

4. A public comment forum held on April 11, 2012, in Phoenix, Arizona, provided the public an opportunity to comment for the record. One individual commented at this forum.

5. Western received three comment letters during the 90-day consultation and comment period. The consultation and comment period ended April 17, 2012. Western responds to comments received in this **Federal Register** notice. The written comments were received from the following interested parties representing various customers of the BCP Contractors:

- Arizona Westside Irrigation & Electrical Districts, Phoenix, Arizona.

[1] FERC confirmed and approved Rate Order No. WAPA–150 on December 9, 2010, in Docket No. EF10–7–000, *See United States Department of Energy, Western Area Power Administration, Boulder Canyon Project,* 133 FERC ¶ 62,229 (December 9, 2010).

• Irrigation & Electrical Districts Association of Arizona, Phoenix, Arizona.

• Ryley Carlock & Applewhite Attorneys, Phoenix, Arizona.

Comments and responses, paraphrased for brevity when not affecting the meaning of the statements, are presented below.

Rate Impacting Issues

Comment: Commenters expressed their belief that Hoover rates should be insulated from initiatives they consider of questionable economic merit for Western customers, such as an Energy Imbalance Market (EIM). The commenters emphasized that they strongly oppose any expenditures collected through the FY 2013 rates for the study, design, implementation or operation of, or Western's participation in, an EIM.

Response: Western is evaluating whether to participate in an EIM based on the possible range of costs, benefits, risks, and market alternatives, but has not included any direct costs in the proposed BCP FY 2013 Base Charge and Rates that relate to design and implementation or operation of, or Western's participation in, an EIM. Costs that may be incurred in the future will be addressed during base charge and rates calculations at that time.

Future Rates

Comment: Commenters expressed a concern that extraneous costs may result from Secretary Chu's March 16, 2012, memorandum concerning new roles for Power Marketing Administrations and creep into future Hoover power rates.

Response: No specific action has been taken as a result of the memorandum from Secretary Chu and no direct costs, as mentioned in the above response, are included in the FY 2013 Base Charge and Rates.

BCP Electric Service Rates

BCP Base Charge and the resulting calculated Rates for electric service are designed to recover an annual revenue requirement that includes operation and maintenance expenses, payments to states, visitor services, the uprating program, replacements, investment repayment, and interest expense. Western's power repayment study (PRS) allocates the projected annual revenue requirement for electric service equally between capacity and energy.

Availability of Information

Information about this Base Charge and Rate adjustment, including PRS, comments, letters, memorandums, and other supporting material developed or maintained by Western used to develop the FY 2013 BCP Base Charge and Rates is available for public review at the Desert Southwest Customer Service Regional Office, Western Area Power Administration, 615 South 43rd Avenue, Phoenix, AZ 85005. The information is also available on Western's Web site at *www.wapa.gov/dsw/pwrmkt/BCP/RateAdjust.htm.*

Ratemaking Procedure Requirements

BCP electric service rates are developed under the Department of Energy Organization Act (42 U.S.C. 7101–7352), through which the power marketing functions of the Secretary of the Interior and Reclamation under the Reclamation Act of 1902 (ch. 1093, 32 Stat. 388), as amended and supplemented by subsequent enactments, particularly section 9(c) of the Reclamation Project Act of 1939 (43 U.S.C. 485h(c)), and other acts that specifically apply to the project involved, were transferred to and vested in the Secretary of Energy, acting by and through Western.

By Delegation Order No. 00–037.00, effective December 6, 2001, the Secretary of Energy delegated: (1) The authority to develop long-term power and transmission rates on a non-exclusive basis to Western's Administrator; (2) the authority to confirm, approve, and place such rates into effect on an interim basis to the Deputy Secretary; and (3) the authority to confirm, approve, and place into effect on a final basis, to remand or to disapprove such rates to the Federal Energy Regulatory Commission (FERC). Existing Department of Energy procedures for public participation in electric service rate adjustments are located at 10 CFR part 903, effective September 18, 1985 (50 FR 37835), and 18 CFR part 300. Department of Energy procedures were followed by Western in developing the rate formula approved by FERC on December 9, 2010, at 133 FERC ¶ 62,229.[2]

The Boulder Canyon Project Implementation Agreement requires that Western determine the annual base charge and rates for the next fiscal year before October 1 of each rate year. The rates for the first rate year, and each fifth rate year thereafter, become effective provisionally upon approval by the Deputy Secretary and subject to final approval by FERC. For all other rate years, the rates become effective on a final basis upon approval by the Deputy Secretary. Because FY 2013 is an interim year, these rates become effective on a final basis upon approval by the Deputy Secretary.

Western will continue to provide annual rates to the BCP Contractors by October 1 of each year using the same rate-setting formula. The rates are reviewed annually and adjusted upward or downward to assure sufficient revenues are collected to achieve payment of all costs and financial obligations associated with the project. Each fiscal year, Western prepares a PRS for the BCP to update actual revenues and expenses including interest, estimates of future revenues, expenses, and capitalized costs.

The BCP rate-setting formula includes a base charge, an energy rate, and a capacity rate. The rate-setting formula was used to determine the BCP FY 2013 Base Charge and Rates.

Western proposed a FY 2013 Base Charge of $82,379,637, an energy rate of 10.64 mills/kWh, and a capacity rate of $1.96/kW-month.

Consistent with procedures set forth in 10 CFR part 903 and 18 CFR part 300, Western held a consultation and comment period. The notice of the proposed FY 2013 Base Charge and Rates for electric service was published in the **Federal Register** on January 18, 2012 (77 FR 2533).

Under Delegation Order Nos. 00–037.00 and 00–001.00C, and in compliance with 10 CFR part 903 and 18 CFR part 300, I hereby approve the FY 2013 Base Charge and Rates for BCP Electric Service on a final basis under Rate Schedule BCP–F8 through September 30, 2013.

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

Daniel B. Poneman,

Deputy Secretary of Energy.

[FR Doc. 2012–19769 Filed 8–10–12; 8:45 am]

BILLING CODE 6450–01–P

[2] The existing rate-setting formula was established in Rate Order No. WAPA–70 on April 19, 1996, in Docket No. EF96–5091–000, at 75 FERC ¶ 62,050, for the period beginning November 1, 1995, and ending September 30, 2000. Rate Order No. WAPA–94, extending the existing rate-setting formula beginning on October 1, 2000, and ending September 30, 2005, was approved on July 31, 2001, in Docket No. EF00–5092–000, at 96 FERC ¶ 61,171. Rate Order No. WAPA–120, extending the existing rate-setting formula for another five-year period beginning on October 1, 2005, and ending September 30, 2010, was approved on June 22, 2006, in Docket No. EF05–5091–000 at 115 FERC ¶ 61,362. WAPA–150, extending the existing rate-setting formula for another five-year period beginning on October 1, 2010, was approved on December 9, 2010, in Docket No. EF10–7–000 at 133 FERC ¶ 62,229.

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2012–0375, FRL–9715–7]

Protection of Stratospheric Ozone: Request for Methyl Bromide Critical Use Exemption Applications for 2015, Deadline Extension

AGENCY: Environmental Protection Agency (EPA).

ACTION: Extension to submittal date for applications.

SUMMARY: On May 17, 2012, the EPA published a notice in the **Federal Register** requesting applications for the Critical Use Exemption from the phaseout of methyl bromide for 2015. On August 3, 2012, EPA received a letter from methyl bromide stakeholders requesting an extension to the August 15, 2012 deadline for submitting Critical Use Exemption applications. The letter requested a deadline of August 29, 2012. The letter explained that additional time is needed by the stakeholders to complete their Critical Use Exemption applications, citing recent industry involvement with associated international meetings as impeding their ability to devote adequate time to the application process. EPA believes that the requested extension is reasonable, and is granting the extension to all applicants. Critical Use Exemption Applications for 2015 are now due to the agency on or before August 29, 2012. A copy of the August 3, 2012 letter to the agency is available in the EPA Docket.

DATES: Applications for the 2015 Critical Use Exemption must be postmarked on or before August 29, 2012.

ADDRESSES: EPA encourages users to submit their applications electronically to Jeremy Arling, Stratospheric Protection Division, at *arling.jeremy@epa.gov*. If the application is submitted electronically, applicants must fax a signed copy of Worksheet 1 to 202–343–9055 by the application deadline. Applications for the methyl bromide critical use exemption can also be submitted by U.S. mail to: U.S. Environmental Protection Agency, Office of Air and Radiation, Stratospheric Protection Division, Attention Methyl Bromide Team, Mail Code 6205J, 1200 Pennsylvania Ave. NW., Washington, DC 20460 or by courier delivery to: U.S. Environmental Protection Agency, Office of Air and Radiation, Stratospheric Protection Division, Attention Methyl Bromide Review Team, 1310 L St. NW., Room 1047E, Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: *General Information:* U.S. EPA Stratospheric Ozone Information Hotline, 1–800–296–1996; also *http://www.epa.gov/ozone/mbr*.

Technical Information: Bill Chism, U.S. Environmental Protection Agency, Office of Pesticide Programs (7503P), 1200 Pennsylvania Ave. NW., Washington, DC 20460, 703–308–8136. Email: *chism.bill@epa.gov*.

Regulatory Information: Jeremy Arling, U.S. Environmental Protection Agency, Stratospheric Protection Division (6205J), 1200 Pennsylvania Ave., NW., Washington, DC 20460, 202–343–9055. Email: *arling.jeremy@epa.gov*.

EPA Docket: The docket can be accessed at the *http://www.regulations.gov* site. To obtain copies of materials in hard copy, please email the EPA Docket Center: *a-and-r-docket@epa.gov*. The Docket ID No. for Critical Use Exemption Applications for 2015 is: EPA–HQ–OAR–2012–0375.

Sarah Dunham,

Director, Office of Atmospheric Programs.

[FR Doc. 2012–19788 Filed 8–10–12; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Federal Advisory Committee Act; Communications Security, Reliability, and Interoperability Council

AGENCY: Federal Communications Commission.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, this notice advises interested persons that the Federal Communications Commission's (FCC or Commission) Communications Security, Reliability, and Interoperability Council (CSRIC) will hold its fifth meeting. The CSRIC will vote on recommendations from several Working Groups and receive progress reports from the remaining Working Groups.

DATES: September 12, 2012.

ADDRESSES: Federal Communications Commission, Room TW–C305 (Commission Meeting Room), 445 12th Street SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Jeffery Goldthorp, Designated Federal Officer, (202) 418–1096 (voice) or *jeffery.goldthorp@fcc.gov* (email); or Lauren Kravetz, Deputy Designated Federal Officer, (202) 418–7944 (voice) or *lauren.kravetz@fcc.gov* (email).

SUPPLEMENTARY INFORMATION: The meeting will be held on September 12, 2012, from 9:00 a.m. to 1:00 p.m. in the Commission Meeting Room of the Federal Communications Commission, Room TW–C305, 445 12th Street SW., Washington, DC 20554. The CSRIC.

The CSRIC is a Federal Advisory Committee that will provide recommendations to the FCC regarding best practices and actions the FCC can take to ensure the security, reliability, and interoperability of communications systems. On March 19, 2011, the FCC, pursuant to the Federal Advisory Committee Act, renewed the charter for the CSRIC for a period of two years through March 18, 2013. Working Groups are described in more detail at *http://www.fcc.gov/encyclopedia/communications-security-reliability-and-interoperability-council-iii.*

The FCC will attempt to accommodate as many attendees as possible; however, admittance will be limited to seating availability. The Commission will provide audio and/or video coverage of the meeting over the Internet from the FCC's Web page at *http://www.fcc.gov/live.* The public may submit written comments before the meeting to Jeffery Goldthorp, CSRIC Designated Federal Officer, by email to *jeffery.goldthorp@fcc.gov* or U.S. Postal Service Mail to Jeffery Goldthorp, Associate Bureau Chief, Public Safety and Homeland Security Bureau, Federal Communications Commission, 445 12th Street SW., Room 7–A325, Washington, DC 20554. Open captioning will be provided for this event. Other reasonable accommodations for people with disabilities are available upon request. Requests for such accommodations should be submitted via email to *fcc504@fcc.gov* or by calling the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (tty). Such requests should include a detailed description of the accommodation needed. In addition, please include a way the FCC can contact you if it needs more information. Please allow at least five days' advance notice; last-minute requests will be accepted, but may be impossible to fill.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2012–19728 Filed 8–10–12; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[DA 12–1211]

Notice of Suspension and Commencement of Proposed Debarment Proceedings; Schools and Libraries Universal Service Support Mechanism

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: The Enforcement Bureau (the ''Bureau'') gives notice of Mr. Willard Ross Lanham's suspension from the schools and libraries universal service support mechanism (or ''E-Rate Program''). Additionally, the Bureau gives notice that debarment proceedings are commencing against him. Mr. Lanham, or any person who has an existing contract with or intends to contract with him to provide or receive services in matters arising out of activities associated with or related to the schools and libraries support, may respond by filing an opposition request, supported by documentation to Joy Ragsdale, Federal Communications Commission, Enforcement Bureau, Investigations and Hearings Division, Room 4–C330, 445 12th Street SW., Washington, DC 20554.

DATES: Opposition requests must be received by 30 days from the receipt of the suspension letter or September 12, 2012, whichever comes first. The Bureau will decide any opposition request for reversal or modification of suspension or debarment within 90 days of its receipt of such requests.

ADDRESSES: Federal Communications Commission, Enforcement Bureau, Investigations and Hearings Division, Room 4–C330, 445 12th Street SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Joy Ragsdale, Federal Communications Commission, Enforcement Bureau, Investigations and Hearings Division, Room 4–C330, 445 12th Street SW., Washington, DC 20554. Joy Ragsdale may be contacted by phone at (202) 418–1697 or email at *Joy.Ragsdale@fcc.gov*. If Ms. Ragsdale is unavailable, you may contact Ms. Theresa Cavanaugh, Chief, Investigations and Hearings Division, by telephone at (202) 418–1420 and by email at *Terry.Cavanaugh@fcc.gov*.

SUPPLEMENTARY INFORMATION: The Bureau has suspension and debarment authority pursuant to 47 CFR 54.8 and 47 CFR 0.111(a)(14). Suspension will help to ensure that the party to be suspended cannot continue to benefit from the schools and libraries mechanism pending resolution of the debarment process. Attached is the suspension letter, DA 12–1211, which was mailed to Mr. Lanham and released on July 27, 2012. The complete text of the notice of suspension and initiation of debarment proceedings is available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portal II, 445 12th Street SW., Room CY–A257, Washington, DC 20554. In addition, the complete text is available on the FCC's Web site at *http://www.fcc.gov*. The text may also be purchased from the Commission's duplicating inspection and copying during regular business hours at the contractor, Best Copy and Printing, Inc., Portal II, 445 12th Street SW., Room CY–B420, Washington, DC 20554, telephone (202) 488–5300 or (800) 378–3160, facsimile (202) 488–5563, or via email *http://www.bcpiweb.com*.

Dated: July 27, 2012.

Federal Communications Commission.

Theresa Z. Cavanaugh,

Chief, Investigations and Hearings Division, Enforcement Bureau.

Sent Via Certified Mail, Return Receipt Requested and Email

Mr. Willard Ross Lanham, c/o Stephen N. Preziosi, Law Office of Stephen N. Preziosi P.C., 570 Seventh Avenue, Ninth Floor, New York, NY 10018.

Re: Notice of Suspension and Initiation of Debarment Proceeding File No. EB–12–IH–0847

Dear Mr. Lanham: The Federal Communications Commission (Commission or FCC) has received notice of your conviction for theft of federal education funds in violation of 18 U.S.C. 666(a)(1), and mail fraud in violation of 18 U.S.C. 1341, in connection with the federal schools and libraries universal service support mechanism (E-Rate program).[1] Consequently, pursuant to 47 CFR 54.8, this letter constitutes official notice of your suspension from participating in activities associated with the E-Rate program. In addition, the Enforcement Bureau (Bureau) hereby notifies you that it will commence debarment proceedings against you.[2]

I. Notice of Suspension

The Commission has established procedures to prevent persons who have ''defrauded the government or engaged in similar acts through activities associated with or related to the [E-Rate program]'' from receiving the benefits associated with that program.[3] The statutory provisions and Commission rules relating to the E-Rate program are designed to ensure that all E-Rate funds are used for their intended purpose.[4] For example, section 254(h)(1)(B) of the Communications Act of 1934, as amended, requires E-Rate program applicants to make bona fide requests for services intended for educational purposes in order to receive E-Rate discounts.[5] Further, the Commission has stated that ''[a] funding request may not be bona fide where a service provider has charged the beneficiary an inflated price.'' [6] The Commission also

[1] Any further reference in this letter to ''your conviction'' refers to the jury's verdict finding you guilty on one count of theft of federal funds and three counts of mail fraud. Trial Transcript at 887, *United States* v. *Willard Lanham,* Jury Trial, No. 11 CR 548 GBD (S.D.N.Y. 2012) (Trial Tr.); *United States* v. *Willard Lanham,* No. 11 CR 548 GBD, Order (S.D.N.Y. June 13) (order denying motions for judgment of acquittal and for a new trial).

[2] *See* 47 CFR 0.111 (delegating authority to the Bureau to resolve universal service suspension and debarment proceedings). The Commission adopted debarment rules for the E-Rate program in 2003. *See Schools and Libraries Universal Service Support Mechanism,* Second Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 9202 (2003) (*Second Report and Order*) (adopting § 54.521 to suspend and debar parties from the E-Rate program). In 2007 the Commission extended the debarment rules to apply to all federal universal service support mechanisms. *Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight; Federal-State Joint Board on Universal Service; Schools and Libraries Universal Service Support Mechanism; Rural Health Care Support Mechanism; Lifeline and Link Up; Changes to the Board of Directors for the National Exchange Carrier Association, Inc.,* Report and Order, 22 FCC Rcd 16372, app. C at 16410–12 (2007) (*Program Management Order*) (renumbering § 54.521 of the universal service debarment rules as § 54.8 and amending subsections (a)(1), (a)(5), (c), (d), (e)(2)(i), (e)(3), (e)(4), and (g)).

[3] *Second Report and Order,* 18 FCC Rcd at 9225, para. 66; *Program Management Order,* 22 FCC Rcd at 16387, para. 32. The Commission's debarment rules define a ''person'' as ''[a]ny individual, group of individuals, corporation, partnership, association, unit of government or legal entity, however organized.'' 47 CFR 54.8(a)(6).

[4] *NEC–Business Network Solutions, Inc.,* Notice of Debarment and Order Denying Waiver Petition, 21 FCC Rcd 7491, 7493, para. 7 (2006).

[5] 47 U.S.C. 245(h)(1)(B); *Request for Review by Ysleta Independent School District of the Decision of the Universal Service Administrator,* CC Docket Nos. 96–45, 97–21, Order, 18 FCC Rcd 26407, 26409, para. 5 (2003), (citing *Federal-State Joint Board on Universal Service,* CC Docket No. 96–45, Report and Order, 12 FCC Rcd 8776, 9076, para. 570 (1997)).

[6] *Schools and Libraries Universal Service Support Mechanism,* Fifth Report and Order and Order, 19 FCC Rcd 15808, 15818, para. 30 (2004). The Commission has taken enforcement action against service providers who inflated their rates and subsequently requested E-Rate funding for those associated costs. See Letter from William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal

limits E-Rate funding to certain eligible services, which does not include consulting services.[7]

On March 5, 2012, a jury rendered a guilty verdict convicting you on one count of theft of federal funds and three counts of mail fraud in connection with your activities as an E-Rate consultant for the New York City Department of Education (DOE).[8] Your responsibilities as a DOE consultant included overseeing Project Connect, a project designed to bring Internet connectivity to New York City schools.[9] On April 28, 2011, the Special Commissioner of Investigation for the New York City School District (SCI) released a report alleging, among other matters, that you had orchestrated a fraudulent invoicing and billing scheme using DOE vendors and subcontractors to overcharge DOE for Project Connect.[10]

Testimony and documentary evidence admitted during your trial corroborates SCI's allegations. Specifically, witnesses testified that you: (1) Arranged for employees of your company, Lanham Enterprises, Inc., to work as consultants for DOE,[11] (2) inflated their hourly rates far above their salaries,[12] and (3) arranged for Project Connect subcontractors to bill those inflated rates to a Project Connect contractor using invoices that misstated the true nature of the charges.[13] Witnesses further testified you directed employees of that contractor to ''bundle'' the consultant charges with services eligible for E-Rate funding on invoices and billing spreadsheets sent to DOE in order to make it appear that the consultants were doing work associated with wiring the schools for Internet access service.[14] Your scheme resulted in DOE being fraudulently billed more than $3.6 million for Project Connect between 2002 and 2008, of which you profited approximately $1.7 million.[15] The DOE included at least a portion of these overcharges in its E-Rate funding requests for Project Connect.[16]

Pursuant to § 54.8(b) of the Commission's rules,[17] upon your conviction the Bureau is required to suspend you from participating in any activities associated with or related to the E-Rate program, including the receipt of funds or discounted services through the E-Rate program, or consulting with, assisting, or advising applicants or service providers regarding the E-Rate program.[18] Your suspension becomes effective upon receipt of this letter or its publication in the **Federal Register**, whichever comes first.[19]

In accordance with the Commission's suspension and debarment rules, you may contest this suspension or the scope of this suspension by filing arguments, with any relevant documents, within thirty (30) calendar days of receipt of this letter or it's publication in the **Federal Register** whichever comes first.[20] Such requests, however, will not ordinarily be granted.[21] The Bureau may reverse or limit the scope of suspension only upon a finding of extraordinary circumstances.[22] The Bureau will decide any request to reverse or modify a suspension within ninety (90) calendar days of its receipt of such request.[23]

II. Initiation of Debarment Proceedings

In addition to requiring your immediate suspension from the E-Rate program, your conviction is cause for debarment as defined in § 54.8(c) of the Commission's rules.[24] Therefore, pursuant to § 54.8(b) of the rules, your conviction requires the Bureau to commence debarment proceedings against you.[25]

As with the suspension process, you may contest the proposed debarment or the scope of the proposed debarment by filing arguments and any relevant documentation within thirty (30) calendar days of receipt of this letter or its publication in the **Federal Register**, whichever comes first.[26] The Bureau, in the absence of extraordinary circumstances, will notify you of its decision to debar within ninety (90) calendar days of receiving any information you may have filed.[27] If the Bureau decides to debar you, its decision will become effective upon either your receipt of a debarment notice or publication of the decision in the **Federal Register**, whichever comes first.[28]

If and when your debarment becomes effective, you will be prohibited from participating in activities associated

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Communications Commission, to Steven G. Mihaylo, Notice of Suspension and of Proposed Debarment, 20 FCC Rcd 1372 (Enf. Bur. 2005); *see also* Letter from Hillary S. DeNigro, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Richard E. Brown, Notice of Debarment, 22 FCC Rcd 20569 (Enf. Bur. 2007) (debarment of service provider who inflated costs in an attempt to defraud the E-Rate program).

[7] *Federal-State Joint Board on Universal Service, Total Communications, Inc., Site Link Communications, Inc., Requests for Review of Decisions of the Universal Service Administrator,* Order, 16 FCC Rcd 14020, 14023–24, para. 9 & n.23 (Com. Car. Bur. 2001) (*Site Link Order*).

[8] Trial Tr. at 887.

[9] *See* Trial Testimony of Tom Kambouras; Trial Tr. at 34–36; Testimony of Stephen Vigilante, Trial Tr. at 274–75.

[10] Special Commissioner of Investigation Report to Hon. Dennis M. Walcott, Chancellor New York City Public Schools, Dep't of Education from Richard J. Condon, Special Commissioner of Investigation for the New York City School District, SCI Case No. 2008–4446, at 1 (Apr. 28, 2011), *at http://www.nycsci.org/reports/04-11%20Lanham%20Rpt.pdf* (*SCI Report*).

[11] Testimony of Michael Pizza, Trial Tr. at 162–66; Testimony of Stephen Vigilante, Trial Tr. at 289–96. These consultants also worked on a second project that you managed for DOE that involved reviewing, paying, and centralizing DOE's telephone bills. Testimony of Stephen Vigilante, Trial Tr. at 282, 290.

[12] Testimony of Tamika Stevenson, Trial Tr. at 218; *see also* SCI Report at 6 & n.18 (stating three of the consultants who were paid $30 to $70 per hour had their services billed to DOE at $290 an hour or more).

[13] Testimony of Christopher Louridas, Trial Tr. at 124–38; *see also* SCI Report at 7 & n.20.

[14] Testimony of Christopher Louridas, Trial Tr. at 124–26; Testimony of Joseph Iacoviello, Trial Tr. at 81–82; Testimony of Stephen Vigilante, Trial Tr. at 294–96; Testimony of Willard Lanham, Trial Tr. at 613, 616–18, 636–38, 702–12, 735–38.

[15] *See* Testimony of Valerie Batista, Trial Tr. at 453–54 (testifying that Verizon billed DOE $3.9 million for the telecommunications consultants' work); SCI Report at 1 (stating that DOE paid Mr. Lanham approximately $3.6 million for the consultants' work).

[16] *See* Testimony of Stephen Vigilante, Trial Tr. at 274–75; see also News Release, Representative Charles B. Rangel, Ranking Democrat, Committee on Ways and Means, Chancellor Harold O. Levy and Congressman Charles Rangel Announce Utilization of Federal Assistance for School Modernization (Jan. 8, 2002), at *http://www.house.gov/apps/list/speech/ny15_rangel/pr.wm.schoolsqzab.html* (*News Release*) (stating Project Connect would be ''largely financed through the federal E-[R]ate program'').

[17] 47 CFR 54.8(b); *see Second Report and Order,* 18 FCC Rcd at 9225–27, paras. 67–74.

[18] 47 CFR 54.8(a)(1), (d).

[19] *Second Report and Order,* 18 FCC Rcd at 9226, para. 69; 47 CFR 54.8(e)(1).

[20] 47 CFR 54.8(e)(4).

[21] *Id.*

[22] *Id.* 54.8(f).

[23] *See Second Report and Order,* 18 FCC Rcd at 9226, para. 70; 47 CFR 54.8(e)(5).

[24] ''Causes for suspension and debarment are conviction of or civil judgment for attempt or commission of criminal fraud, theft, embezzlement, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, obstruction of justice and other fraud or criminal offense arising out of activities associated with or related to the schools and libraries support mechanism, the high-cost support mechanism, the rural healthcare support mechanism, and the low-income support mechanism.'' 47 CFR. 54.8(c). Associated activities ''include the receipt of funds or discounted services through [the federal universal service] support mechanisms, or consulting with, assisting, or advising applicants or service providers regarding [the federal universal service] support mechanisms.'' *Id.* 54.8(a)(1).

[25] *Id.* 54.8(b).

[26] *Second Report and Order,* 18 FCC Rcd at 9226, para. 70; 47 CFR 54.8(e)(3).

[27] *Second Report and Order,* 18 FCC Rcd at 9226, para. 70; 47 CFR 54.8(e)(5).

[28] 47 CFR 54.8(e)(5). The Commission may reverse a debarment, or may limit the scope or period of debarment, upon a finding of extraordinary circumstances, following the filing of a petition by you or an interested party or upon motion by the Commission. *Id.*54.8(f).

with or related to the E-Rate program for three years from the date of debarment.[29] The Bureau may set a longer debarment period or extend an existing debarment period if necessary to protect the public interest.[30]

Please direct any response, if sent by messenger or hand delivery, to Marlene H. Dortch, Secretary, Federal Communications Commission, 445 12th Street SW., Room TW–A325, Washington, DC 20554, to the attention of Joy M. Ragsdale, Attorney Advisor, Investigations and Hearings Division, Enforcement Bureau, Room 4–C330, with a copy to Theresa Z. Cavanaugh, Chief, Investigations and Hearings Division, Enforcement Bureau, Room 4–C330, Federal Communications Commission. All messenger or hand delivery filings must be submitted without envelopes.[31] If sent by commercial overnight mail (other than U.S. Postal Service (USPS) Express Mail and Priority Mail), the response must be sent to the Federal Communications Commission, 9300 East Hampton Drive, Capitol Heights, Maryland 20743. If sent by USPS First Class, Express Mail, or Priority Mail, the response should be addressed to Joy Ragsdale, Attorney Advisor, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street SW., Room 4–C330, Washington, DC 20554, with a copy to Theresa Z. Cavanaugh, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street SW., Room 4–C330, Washington, DC 20554. You shall also transmit a copy of your response via email to Joy M. Ragsdale, *Joy.Ragsdale@fcc.gov* and to Theresa Z. Cavanaugh, *Terry.Cavanaugh@fcc.gov*.

If you have any questions, please contact Ms. Ragsdale via U.S. postal mail, email, or by telephone at (202) 418–1697. You may contact me at (202) 418–1553 or at the email address noted above if Ms. Ragsdale is unavailable.

Sincerely yours,

Theresa Z. Cavanaugh,
Chief, Investigations and Hearings Division, Enforcement Bureau.

[FR Doc. 2012–19813 Filed 8–10–12; 8:45 am]

BILLING CODE 6712–01–P

[29] *Second Report and Order,* 18 FCC Rcd at 9225, para. 67; 47 CFR 54.8(d), (g).

[30] 47 CFR 54.8(g).

[31] *See FCC Announces Change in Filing Location for Paper Documents,* Public Notice, 24 FCC Rcd 14312 (2009) for further filing instructions.

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice to All Interested Parties of the Termination of the Receivership of 10385, Virginia Business Bank, Richmond, VA

Notice is hereby given that the Federal Deposit Insurance Corporation (''FDIC'') as Receiver for Virginia Business Bank, (''the Receiver'') intends to terminate its receivership for said institution. The FDIC was appointed receiver of Virginia Business Bank on July 29, 2011. The liquidation of the receivership assets has been completed. To the extent permitted by available funds and in accordance with law, the Receiver will be making a final dividend payment to proven creditors.

Based upon the foregoing, the Receiver has determined that the continued existence of the receivership will serve no useful purpose. Consequently, notice is given that the receivership shall be terminated, to be effective no sooner than thirty days after the date of this Notice. If any person wishes to comment concerning the termination of the receivership, such comment must be made in writing and sent within thirty days of the date of this Notice to: Federal Deposit Insurance Corporation, Division of Resolutions and Receiverships, Attention: Receivership Oversight Department 8.1, 1601 Bryan Street, Dallas, TX 75201.

No comments concerning the termination of this receivership will be considered which are not sent within this time frame.

Dated: August 8, 2012.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2012–19799 Filed 8–10–12; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than August 28, 2012.

A. Federal Reserve Bank of Atlanta (Chapelle Davis, Assistant Vice President) 1000 Peachtree Street NE., Atlanta, Georgia 30309:

1. *Guice Slawson, Jr., Joe Stinson Slawson, and William Edgar Slawson,* all of Montgomery, Alabama; to collectively acquire voting shares of FEB Bancshares, Inc., and thereby indirectly acquire voting shares of Farmers Exchange Bank, both in Louisville, Alabama.

B. Federal Reserve Bank of Minneapolis (Jacqueline G. King, Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. *MVC Private Equity Fund, LP, Purchase, NY; MVC GP II, LLC; MVC Financial Services, Inc.; MVC Partners LLC; MVC Capital, Inc.; The Tokarz Group Advisors LLC; Michael Tokarz, all of Purchase, New York; and James Pinto,* Greenwich, Connecticut (collectively ''MVC''); to acquire voting shares of BNCCORP, Inc., Bismarck, North Dakota, and thereby indirectly acquire voting shares of BNC National Bank, Glendale, Arizona.

2. *MVC; Prairie Petroleum Inc., and William Coleman, both of Denver, Colorado; Eugene Nicholas, Cando, North Dakota; Timothy Dodd and Bradley Fey, both of Bismarck, North Dakota; Jeffrey Topp, Grace City, North Dakota; Janet Topp, Grace City, North Dakota; and Roger Kenner, Leeds, North Dakota;* as a group acting in concert, to collectively acquire voting shares of BNCCORP, Inc., Bismarck, North Dakota, and thereby indirectly acquire voting shares of BNC National Bank, Glendale, Arizona.

Board of Governors of the Federal Reserve System, August 8, 2012.

Robert deV. Frierson,

Secretary of the Board.

[FR Doc. 2012–19772 Filed 8–10–12; 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 September 7, 2012.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *American National Corporation,* Omaha, Nebraska; to acquire 100 percent of the voting shares of Western Bank, St. Paul, Minnesota.

Board of Governors of the Federal Reserve System, August 8, 2012.

Robert deV. Frierson,

Secretary of the Board.

[FR Doc. 2012–19771 Filed 8–10–12; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the National Coordinator for Health Information Technology; Announcement of Requirements and Registration for Beat Down Blood Pressure Challenge

Authority: 15 U.S.C. 3719.

AGENCY: ONC, HHS.

Award Approving Official: Lygeia Ricciardi, Acting Director, Office of Consumer eHealth.

ACTION: Notice

SUMMARY: The Office of the National Coordinator for Health Information Technology (ONC) announces the launch of the *Managing Meds Video Challenge.* This challenge is an open call for the public to create short, inspiring videos sharing how you use technology to manage your medications effectively or how health care providers or caregivers support individuals to take their medications as directed, improving patient health and safety.

This is the fourth in a series of Health IT video contests that will occur throughout 2012. The goal of this video contest series is to generate content that will be used to motivate and inspire others to leverage technology to better manage their health and be more engaged partners in their health and health care. Each challenge will be a call to action for members of the public to create a short video clip [2 minutes or less] on a particular theme, and will award cash prizes to winners in several categories.

DATES: Effective on August 9, 2012.

FOR FURTHER INFORMATION CONTACT: Erin Poetter, Consumer e-Health Policy Analyst, *erin.poetter@hhs.gov*, 202–205–3310.

SUPPLEMENTARY INFORMATION:

Subject of Challenge Competition

ONC's Managing Meds Video Challenge invites you to create short, inspiring videos sharing how you use technology to manage your medications effectively or support individuals to take their medications as directed, improving patient health and safety.

If you are a consumer or patient, you can participate by creating a video demonstrating how you can use technology for medication management. For example, you could describe:

- E-prescribing tools your provider uses to send your order directly to the pharmacy so it's ready when you arrive and to avoid potential medication errors from illegible handwriting on a paper script.
- Electronic tools such as mobile apps that help you keep track of the medications you are taking and when it's time to take them, or that notify you when it's time to refill a prescription so you don't run out of your meds.
- Emailing your provider in between visits to notify them you've stopped taking the medication that was prescribed because of side effects.
- Logging on to your provider's portal and viewing your list of medications on file and sending a request to update the list to reflect which meds you are no longer taking or may have been prescribed by another doctor.

If you are a health care provider, such as a doctor, nurse or pharmacist, you can also participate by demonstrating how you use health information technology (health IT), such as e-prescribing and electronic health record systems, to support prescribing patients the right medications and dosage, and to prevent drug-drug interactions.

Eligibility Rules for Participating in the Competition

To be eligible to win a prize under this challenge, an individual or entity—

(1) Shall have registered to participate in the competition under the rules promulgated by HHS;

(2) Shall have complied with all the requirements under this section;

(3) In the case of a private entity, shall be incorporated in and maintain a primary place of business in the United States, and in the case of an individual, whether participating singly or in a group, shall be a citizen or permanent resident of the United States; and

(4) May not be a Federal entity or Federal employee acting within the scope of their employment.

(5) Shall not be an HHS employee working on their applications or submissions during assigned duty hours.

(6) Shall not be an employee of the Office of the National Coordinator for Health Information Technology.

(7) Federal grantees may not use Federal funds to develop COMPETES Act challenge applications unless consistent with the purpose of their grant award.

(8) Federal contractors may not use Federal funds from a contract to develop COMPETES Act challenge applications or to fund efforts in support of a COMPETES Act challenge submission.

(9) May not be:

a. An employee of a commercial business whose name, brand name, product or other trademark is mentioned or featured in the Video, or

b. A contractor or employee of an affiliate, subsidiary, advertising agency, or any other company involved in marketing a commercial business, brand name, product or other trademark mentioned or featured in the Video.

All individual members of a team must meet the eligibility requirements.

An individual or entity shall not be deemed ineligible because the individual or entity used Federal facilities or consulted with Federal employees during a competition if the facilities and employees are made available to all individuals and entities participating in the competition on an equitable basis.

Registration Process for Participants

1. During the Challenge Submission Period, visit

http://ManagingMeds.Challenge.gov and register (Registration is free) or log in with an existing ChallengePost account. After a Contestant signs up, a confirmation email will be sent to the email address provided. The Contestant must use the confirmation email to verify his or her email address. The registered Contestant will then be able to enter a Submission.

2. On *http://ManagingMeds.Challenge.gov,* click ''Accept this challenge'' to register your interest in participating. This step ensures that you will receive important challenge updates.

3. Create a video and ensure the following (please read the Official Rules on *http://ManagingMeds.Challenge.gov* for complete requirements):

a. Your video must demonstrate how technology can be used to help you take your meds as prescribed.

b. Your video encourages viewers to visit *www.HealthIT.gov* to learn more about using technology to improve your health.

c. Your video is no longer than 2 minutes.

4. Confirm that you have read and agreed to the Official Rules.

- The title of the Video;
- A link to the Video on *YouTube.com* or *Vimeo.com* (the Video should be no longer than 2 minutes);
- A text description of your use of health IT to improve medication management, and a transcript of the words spoken in the video;
- A transcript of the words spoken or sung in the video;
- Uploaded consent forms for everyone who appears in the video regardless of age.

All individuals that appear in a Video must complete and sign the Video Consent Form. If a minor appears in the Video, the minor's parent/legal guardian must also sign the Video Consent Form. A Submission will not be considered complete and eligible to win prizes without a completed Video Consent Form being uploaded from all individuals that appear in the Video. All completed Video Consent Forms must include a handwritten signature, and be scanned, combined in to a single file (ZIP, PDF, or doc), and uploaded on the submission form on *BloodPressure.Challenge.gov.*

AMOUNT OF THE PRIZE

Winner	Prize	Quantity
First Prize	$3,000	1
Second Prize	2,000	1
Third Prize	1,000	1
Honorable Prize	500	2
Popular Choice	500	1

Basis Upon Which Winner Will Be Selected

Videos will be judged based on the following criteria (to be equally weighted):

1. Quality of the Idea (Includes elements such as the relevance and originality of your use of health IT).

2. Potential Impact on health IT adoption (Includes whether the video is compelling, instructive, and easy to follow so that others can perform similar activities using health technology).

The five (5) Contestants whose Submissions earn the highest overall score will win, respectively, the prizes identified below in Section 8. In the event of a tie, winners will be selected based on their score on the criteria described in (3), then (2), and then (1). If there is still a tie then the winner will be selected based on a vote by the judging panel.

Dated: August 3, 2012.

Erin Poetter,

Consumer e-Health Policy Analyst, Office of Consumer e-Health,Office of the National Coordinator for Health Information Technology (ONC), Office of the Secretary (OS).

[FR Doc. 2012–19775 Filed 8–10–12; 8:45 am]

BILLING CODE 4150–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10390]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Agency: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the Agency's function; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* Revision of a currently approved collection;

Title of Information Collection: Hospice Quality Reporting Program; *Use:* Section 1814(i)(5) of the Social Security Act (the Act) added by section 3004 of the Patient Protection and Affordable Care Act, Public Law 111–148, enacted on March 23, 2010 (Affordable Care Act) authorizes the Secretary to establish a quality reporting for hospices. Section 1814(i)(5)(A)(i) of the Act requires the Secretary, beginning with FY 2014, reduce the market basket update by 2 percentage points for any hospice that does not comply with the quality data submission requirements with respect to that fiscal year.

The Hospice Quality Data Submission Form was created for hospice providers to collect specified quality data and submit that data to CMS, for the data collection period starting October 1, 2012, through December 31, 2012, and continuing on a calendar year thereafter. Webinar training on data collection and data submission has been and will continue to be provided by CMS. Use of the Hospice Quality Data Submission Form is necessary in order for hospices to submit the quality data specified for the Hospice Quality Reporting Program. *Form Number:* CMS–10390 (OCN: 0938–1153); *Frequency:* Yearly; *Affected Public:* Individuals and households; *Number of Respondents:* 3632; *Total Annual Responses:* 7264; *Total Annual Hours:* 657,392. (For policy questions regarding this collection contact Robin Dowell at 410–786–0060. For all other issues call 410–786–1326.)

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS Web Site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995,* or Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office on (410) 786–1326.

To be assured consideration, comments and recommendations for the proposed information collections must be received by the OMB desk officer at

the address below, no later than 5 p.m. on *September 12, 2012.*

OMB, Office of Information and Regulatory Affairs, Attention: CMS Desk Officer, Fax Number: (202) 395–6974, Email: *OIRA_submission@omb.eop.gov.*

Dated: August 7, 2012.

Martique Jones,

Director, Regulations Development Group, Division B, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2012–19689 Filed 8–10–12; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Tribal Consultation Meeting

AGENCY: Office of Head Start (OHS), Administration for Children and Families, HHS.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the Improving Head Start for School Readiness Act of 2007, notice is hereby given of a one-day Tribal Consultation Session to be held between the Department of Health and Human Services, Administration for Children and Families, Office of Head Start leadership and the leadership of Tribal Governments operating Head Start (including Early Head Start) programs. The purpose of this Consultation Session is to discuss ways to better meet the needs of American Indian and Alaska Native children and their families, taking into consideration funding allocations, distribution formulas, and other issues affecting the delivery of Head Start services in their geographic locations.

DATES: October 15, 2012 and October 17, 2012.

ADDRESSES: 2012 Office of Head Start Tribal Consultation Session will be held at the following locations: Monday, October 15, 2012—Portland, Oregon—Westin Portland, 750 SW Alder Street, Portland, OR 97205; and Wednesday, October, 17, 2012—Anchorage, Alaska—Hilton Anchorage Hotel, 500 West Third Avenue, Anchorage, AK 99501.

FOR FURTHER INFORMATION CONTACT: Ann Linehan, Deputy Director, Office of Head Start, email *Ann.Linehan@acf.hhs.gov* or phone (202) 205–8579. Additional information and online meeting registration is available at *http://www.headstartresourcecenter.org.*

SUPPLEMENTARY INFORMATION: The Department of Health and Human Services (HHS) announces Office of Head Start (OHS) Tribal Consultations for leaders of Tribal Governments operating Head Start and Early Head Start programs in Region X and in Alaska. The Consultation Session for Region X will take place Monday, October 15, 2012, in Portland, Oregon. The Consultation Session for the State of Alaska will take place Wednesday, October 17, 2012, in Anchorage, Alaska, immediately preceding the annual Alaska Federation of Natives convention. As much as possible, OHS Tribal Consultations are scheduled in conjunction with other Tribal Leader events. This is done in an effort to minimize the financial and travel burden for participants.

The agenda for the scheduled OHS Tribal Consultations will be organized around the statutory purposes of Head Start Tribal Consultations related to meeting the needs of AI/AN children and families, taking into consideration funding allocations, distribution formulas, and other issues affecting the delivery of Head Start services in their geographic locations. In addition, OHS will share actions taken and in progress to address the issues and concerns raised in 2011 OHS Tribal Consultations.

Tribal leaders and designated representatives interested in submitting written testimony or proposing specific agenda topics for the Oklahoma City Consultation Session should contact Ann Linehan at *Ann.Linehan@acf.hhs.gov.* Proposals must be submitted at least three days in advance of the session and should include a brief description of the topic area, along with the name and contact information of the suggested presenter.

The Consultation Session will be conducted with elected or appointed leaders of Tribal Governments and their designated representatives (42 U.S.C. 9835, Section 640(l)(4)(A)). Designees must have a letter from the Tribal Government authorizing them to represent the tribe. The letter should be submitted at least three days in advance of the Consultation Session to Ann Linehan at (202) 205–9721 (fax). Other representatives of tribal organizations and Native nonprofit organizations are welcome to attend as observers.

A detailed report of the Consultation Session will be prepared and made available within 90 days of the Consultation Session to all Tribal Governments receiving funds for Head Start and Early Head Start programs. Tribes wishing to submit written testimony for the report should send testimony to Ann Linehan at *Ann.Linehan@acf.hhs.gov* either prior to the Consultation Session or within 30 days after the meeting.

Oral testimony and comments from the Consultation Session will be summarized in each report without attribution, along with topics of concern and recommendations. Hotel and logistical information for the Consultation Session has been sent to tribal leaders via email and posted on the Head Start Resource Center Web site at *http://www.headstartresourcecenter.org.*

Dated: July 23, 2012.

Yvette Sanchez Fuentes,

Director, Office of Head Start.

[FR Doc. 2012–19587 Filed 8–10–12; 8:45 am]

BILLING CODE 4184–40–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–D–0523]

Draft Guidance for Industry and Food and Drug Administration Staff; Refuse To Accept Policy for 510(k)s; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of the draft guidance entitled ''Refuse to Accept Policy for 510(k)s.'' The purpose of this document is to explain the procedures and criteria FDA intends to use in determining whether a premarket notification (510(k)) submission is administratively complete, which determines whether it should be accepted for substantive review. This guidance is applicable to 510(k)s reviewed in the Center for Devices and Radiological Health (CDRH) and the Center for Biologics Evaluation and Research (CBER). This draft guidance is not final nor is it in effect at this time.

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit either electronic or written comments on the draft guidance by September 27, 2012.

ADDRESSES: Submit written requests for single copies of the draft guidance document entitled ''Refuse to Accept Policy for 510(k)s'' to the Division of Small Manufacturers, International and Consumer Assistance, Center for

Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 4613, Silver Spring, MD 20993–0002; or Office of Communication, Outreach and Development (HFM–40), Center for Biologics Evaluation and Research, Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448. Send one self-addressed adhesive label to assist that office in processing your request, or fax your request to 301–847–8149. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

Submit electronic comments on the draft guidance to *http://www.regulations.gov*. Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Identify comments with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Geeta Pamidimukkala, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 1564, Silver Spring, MD 20993–0002, 301–796–6453; or Stephen Ripley, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, Suite 200N, Rockville, MD 20852–1448, 301–827–6210.

I. Background

The purpose of the 510(k) acceptance review is to make a threshold determination whether a submission is administratively complete, which determines whether it should be accepted for substantive review to reach a determination regarding substantial equivalence under section 513(i) of the FD&C Act, 21 U.S.C. 360c(i). To find a device substantially equivalent under section 513(i) of the FD&C Act, FDA must find that it has the same intended use as the predicate device, and either: (1) Has the same technological characteristics as the predicate device or (2) has different technological characteristics, as defined at section 513(i)(1)(B), and the submission contains information, including appropriate clinical or scientific data if necessary, that demonstrates the device is as safe and effective as the predicate and does not raise different questions of safety and effectiveness than the predicate.

The purpose of this document is to explain the procedures and criteria FDA intends to use in determining whether a 510(k) submission is administratively complete and should be accepted for substantive review. This guidance document provides updated information to two existing guidance documents entitled ''Center for Devices and Radiological Health's Premarket Notification (510(k)) Refuse to Accept Policy'' issued on June 30, 1993, and ''510(k) Refuse to Accept Procedures, 510(k) Memorandum K94–1'' issued on May 20, 1994. Upon issuance as a final guidance document, this guidance will replace those documents.

To further focus the Agency's review resources on complete applications, which will provide a more efficient approach to ensuring that safe and effective medical devices reach patients as quickly as possible, we have modified the 1993 and 1994 guidances. For example, we have modified the 510(k) refuse to accept policy to include an early review against specific acceptance criteria and to inform the submitter within the first 15 calendar days of receipt of the submission if the submission is administratively complete, or if not, to identify the missing element(s). In order to enhance the consistency of our acceptance decisions and to help submitters better understand the types of information FDA needs to conduct a substantive review, this guidance, including the checklists included in the appendices, clarifies the necessary elements and contents of a complete 510(k) submission. These elements are applicable to all devices reviewed through the 510(k) notification process in CDRH and CBER and have been compiled into checklists for use by FDA review staff.

II. Significance of Guidance

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the Agency's current thinking on the refuse to accept policy for 510(k)s. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute and regulations.

III. Electronic Access

Persons interested in obtaining a copy of the draft guidance may do so by using the Internet. A search capability for all CDRH guidance documents is available at *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm*. Guidance documents are also available at *http://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/default.htm* or *http://www.regulations.gov*.

To receive ''Refuse to Accept Policy for 510(k)s,'' you may either send an email request to *dsmica@fda.hhs.gov* to receive an electronic copy of the document or send a fax request to 301–847–8149 to receive a hard copy. Please use the document number 1793 to identify the guidance you are requesting.

IV. Paperwork Reduction Act of 1995

This draft guidance refers to currently approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 807, subpart E, have been approved under OMB control number 0910–0120.

V. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**), either electronic or written comments regarding this document. It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: August 7, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–19744 Filed 8–10–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–0842]

Division of Cardiovascular Devices 30-Day Notices and Annual Reports; Public Workshop; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public workshop; request for comments.

The Food and Drug Administration (FDA) is announcing the following public workshop entitled ''Division of Cardiovascular Devices 30-Day Notices and Annual Reports.'' This public workshop will be cosponsored with Advanced Medical Technology Association (AdvaMed). The purpose of

this public workshop is to discuss details of, and issues relating to, two types of reporting requirements applicable to premarket approval applications (PMAs), 30-day notices and annual reports, specifically for cardiovascular devices.

DATES: *Date and Time:* The public workshop will be held on August 28, 2012, from 8 a.m. to 5 p.m.

Location: The public workshop will be held at FDA's White Oak Campus, 10903 New Hampshire Ave., Bldg. 31 Conference Center, the Great Room (rm. 1503), Silver Spring, MD 20993. Entrance for the public workshop participants (non-FDA employees) is through Building 1 where routine security check procedures will be performed. For parking and security information, please refer to: *http://www.fda.gov/AboutFDA/WorkingatFDA/BuildingsandFacilities/WhiteOakCampusInformation/ucm241740.htm.*

Contact: Lindsay K. Pack, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 1260, Silver Spring, MD 20993, 301–796–5214, email: *Lindsay.pack@fda.hhs.gov*.

Registration: Registration is free and available on a first-come, first-served basis. Persons interested in attending this public workshop must register online by 5 p.m., August 17, 2012. Early registration is recommended because facilities are limited and, therefore, FDA may limit the number of participants from each organization. If time and space permits, onsite registration on the day of the public workshop will be provided beginning at 7 a.m.

If you need special accommodations due to a disability, please contact Joyce Raines, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 4319, Silver Spring, MD 20993, 301–796–5709, email: *joyce.raines@fda.hhs.gov*.

To register for the public workshop, please visit FDA's Medical Devices News & Events—Workshops & Conferences calendar at *http://www.fda.gov/MedicalDevices/NewsEvents/WorkshopsConferences/default.htm*. (Select this public workshop from the posted events list.) Please provide complete contact information for each attendee, including name, title, affiliation, address, email, and telephone number. Those without Internet access should contact Lindsay Pack to register (see *Contact*). Registrants will receive confirmation after they have been accepted. You will be notified if you are on a waiting list.

Streaming Webcast of the Public Workshop: This public workshop will also be webcast. Persons interested in viewing the webcast must register online by 5 p.m., August 17, 2012. Early registration is recommended because webcast connections are limited. Organizations are requested to register all participants, but to view using one connection per location. Webcast participants will be sent technical system requirements after registration and will be sent connection access information after August 22, 2012. If you have never attended a Connect Pro event before, test your connection at *https://collaboration.fda.gov/common/help/en/support/meeting_test.htm*. To get a quick overview of the Connect Pro program, visit *http://www.adobe.com/go/connectpro_overview*. (FDA has verified the Web site addresses in this document, but FDA is not responsible for any subsequent changes to the Web sites after this document publishes in the **Federal Register**.)

Comments: FDA is holding this public workshop to discuss issues related to 30-day notices and annual reporting requirements as they pertain to manufacturing changes to class III cardiovascular devices that are the subject of a PMA. In order to permit the widest possible opportunity to obtain public comment, FDA is soliciting either electronic or written comments on all aspects of the public workshop topics. The deadline for submitting comments related to this public workshop is September 26, 2012.

Regardless of attendance at the public workshop, interested persons may submit either electronic or written comments. Submit electronic comments to *http://www.regulations.gov*. Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. It is only necessary to send one set of comments. Please identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday and will be posted to the docket at *http://www.regulations.gov*.

Transcripts: Please be advised that as soon as a transcript is available, it will be accessible at *http://www.regulations.gov*. It may be viewed at the Division of Dockets Management (see *Comments*). A transcript will also be available in either hardcopy or on CD–ROM, after submission of a Freedom of Information request. Written requests are to be sent to the Division of Freedom of Information (ELEM–1029), Food and Drug Administration, 12420 Parklawn Dr., Element Bldg., Rockville, MD 20857. A link to the transcripts will also be available approximately 45 days after the public workshop on the Internet at *http://www.fda.gov/MedicalDevices/NewsEvents/WorkshopsConferences/default.htm*. (Select this public workshop from the posted events list.)

SUPPLEMENTARY INFORMATION:

I. Background

Under section 515(d)(6)(A) of the Federal Food, Drug, and Cosmetic Act (section 360e(d)(6)(A) of the FD&C Act) and 21 CFR 814.39(a), PMA supplements are required for any change to a device subject to an approved application that affects safety or effectiveness, unless such change is a modification in a manufacturing procedure or method of manufacturing. Under the FD&C Act and 21 CFR 814.39(f), changes in manufacturing procedures or methods of manufacture that affect the safety or effectiveness of the device require a 30-day notice (however, if FDA finds that the notice is inadequate, a supplement will be required). Additionally, under 21 CFR 814.39(b), a manufacturer may make a change to a device after FDA's approval of a PMA for the device without submitting a PMA supplement if the change does not affect the safety or effectiveness of the device and the change is reported to FDA in a post approval periodic (annual) report.

This workshop is intended to focus on manufacturing method and procedure changes to Class III cardiovascular devices, which could be submitted to FDA in a 30-day notice or annual report, depending on the change. A guidance document issued on April 13, 2011, entitled ''30-Day Notices, 135-Day Premarket Approval (PMA) Supplements and 75-Day Humanitarian Device Exemption (HDE) Supplements for Manufacturing Method or Process Changes'' outlines FDA's current thinking on which changes may qualify for a 30-day notice and which changes may require other submission types (supplements, annual reports, etc.). This workshop will allow a deeper discussion of relevant considerations when determining the appropriate submission for manufacturing changes to Class III cardiovascular devices.

II. Topics for Discussion at the Public Workshop

FDA is holding this public workshop to discuss a variety of issues relating to two types of reporting requirements applicable to PMAs, 30-day notices and annual reports, specifically for

cardiovascular devices. These issues include, but are not limited to:

- Considerations that go into determining if a change is appropriate for an annual report or 30-day notice (e.g., equipment changes, software changes, supplier changes);
- Best practices for submission contents;
- Other issues and questions raised by the public workshop attendees that are relevant to 30-day notices and annual reports for cardiovascular devices.

Dated: August 7, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–19747 Filed 8–10–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Announcement of Requirements and Registration for the Challenge To Identify Audacious Goals in Vision Research and Blindness Rehabilitation

Authority: 15 U.S.C. 3719.

SUMMARY: The National Eye Institute (NEI) is announcing the launch of the *Challenge to Identify Audacious Goals in Vision Research and Blindness Rehabilitation* (Challenge) to stimulate innovation in establishing a national vision research agenda. This Challenge seeks entries from the general public, not just those typically engaged in vision research. The challenge calls for submission of audacious goals in any area relevant to NEI's mission to conduct and support research, training, health information dissemination, and other programs with respect to blinding eye diseases, visual disorders, mechanisms of visual function, preservation of sight, and the special health problems and requirements of the blind (42 U.S.C. 285i).

The NEI will select up to 20 winners to receive a $3,000 cash prize and will host the winners at the NEI Audacious Goals Development Meeting to present and discuss their winning entries with a broad audience of scientists, NEI staff, and other stakeholders. This challenge will generate valuable contributions from NEI's many and varied stakeholders to inform the Institute's strategic plan, energize the Institute's research efforts, increase public awareness of vision research, and enhance the national effort to reduce the burden of ocular disorders and diseases worldwide.

DATES:

(1) Submission period begins August 13, 2012.

(2) Submission period ends November 12, 2012, 6:00 p.m. ET.

(3) Winners notified January 7, 2013.

(4) Winners present and discuss their winning entry at the NEI Audacious Goals Development Meeting in early 2013 (date will be announced on *http://www.nei.nih.gov/challenge*).

FOR FURTHER INFORMATION CONTACT: Richard S. Fisher, Ph.D., Associate Director for Science Policy and Legislation, National Eye Institute, Phone: 301–496–4308. [*NEIPlan@mail.nih.gov*.]

SUPPLEMENTARY INFORMATION:

Subject of Challenge Competition

This *Challenge to Identify Audacious Goals in Vision Research and Blindness Rehabilitation* (Challenge) adds an exciting, unique component to the NEI's current strategic planning effort. In the past, these planning efforts relied primarily on the expertise of NEI-funded scientists to review the state of the science and describe current specific research needs and opportunities. This Challenge seeks input from all eligible individuals (Contestants)—not just vision research scientists—to describe (a) an audacious goal in vision research and blindness rehabilitation, (b) how to achieve the goal within about 10 years, and (c) the impact of reaching the goal.

Rules for Participating in the Competition

1. *Eligibility:* To be eligible to win a prize under this Challenge, a Contestant:

○ Shall have registered to participate in the competition under the rules promulgated by the NEI and explained in this Notice;

○ Shall have complied with all the requirements under this section;

○ Shall be an individual at least 18 years of age and shall be a citizen or permanent resident of the United States;

○ May not be a Federal entity or Federal employee acting within the scope of their employment. Federal employees seeking to participate in this contest outside the scope of their employment should consult their ethics official prior to developing their submission;

○ May not be employees of the NIH or any other company or individual involved with the design, production, execution, judging, or distribution of the Challenge and their immediate family (spouse, parents and step-parents, siblings and step-siblings, and children and step-children) and household members (people who share the same residence at least three (3) months out of the year);

2. Federal grantees may not use Federal funds to develop America COMPETES Act Challenge applications unless consistent with the purpose of their grant award (Grantees should consult with their cognizant Grants Management Official to make this determination); and

3. Federal contractors may not use Federal funds from a contract to develop a Challenge entry or to fund efforts in support of a Challenge submission.

4. A Contestant shall not be deemed ineligible because the individual used Federal facilities or consulted with Federal employees during a competition if the facilities and employees are made available to all individuals participating in the competition on an equitable basis.

5. *Liability:* By participating in this Challenge, Contestants agree to assume any and all risks and waive claims against the Federal Government and its related entities, except in the case of willful misconduct, for any injury, death, damage, or loss of property, revenue, or profits, whether direct, indirect, or consequential, arising from participation in this prize contest, whether the injury, death, damage, or loss arises through negligence or otherwise.

6. *Indemnification:* By participating in this Challenge, Contestants agree to indemnify the Federal Government against third party claims for damages arising from or related to competition activities.

7. *Insurance:* Based on the subject matter of the contest, the type of work that it will possibly require, as well as an analysis of the likelihood of any claims for death, bodily injury, or property damage, or loss potentially resulting from contest participation, Contestants are not required to obtain liability insurance or demonstrate financial responsibility in order to participate in this contest.

8. By participating in this Challenge, each individual agrees to abide by all rules set forth in this Notice and the Challenge.gov Terms of Participation (*http://challenge.gov/terms*).

9. *Each Entry Must:*

○ Be limited to a maximum of 4,000 characters, including spaces (roughly a single page). In addition to information requested by *http://www.nei.nih.gov/challenge* to identify the entry, Contestants must complete three statements about the proposed audacious goal. The following statements, which will be the subject of the judging, are:

■ It would be fantastic if * * *'' (Explain why the goal is audacious and

how the goal fits within NEI's mission, which is listed in the Challenge summary.)

▪ To achieve the audacious goal, * * *'' (Discuss the feasibility of achieving the goal within about a 10 year period, including the technological, scientific, or other advances that are needed to reach the goal.)

▪ If the audacious goal is achieved, the impact would be * * *''

Note: Examples of what would have been considered audacious goals in the past can be found at in the ''Additional Information'' section of this notice.

10. Contestants may submit more than one audacious goal entry, as long as they are unique.

11. The NEI will not select as a winner an individual who is currently on the Excluded Parties List (*https://www.epls.gov/*).

12. Entries must be original works developed solely by the Contestant and not infringe any intellectual property or any other rights of any third party.

Process for Registration and Submitting an Entry

For this challenge, registration and submitting an entry are completed in a single step. Participants can register and submit an entry for this challenge by following the instructions at the *Challenge to Identify Audacious Goals in Vision Research and Blindness Rehabilitation* Web site: *www.nei.nih.gov/challenge.*

Amount of the Prize

Up to 20 winners will each be awarded a $3,000 prize and up to $2,000 in travel reimbursement to participate in the NEI Audacious Goals Development Meeting in the Washington, DC area in early 2013. Prizes awarded under this competition will be paid by electronic funds transfer and may be subject to Federal income taxes. The NEI, one of the National Institutes of Health, which is a component of the Department of Health and Human Services, will comply with the Internal Revenue Service withholding and reporting requirements, where applicable. Winners will be invited to lead small group discussions on their submitted goal and understand that the submitted ideas may be combined with others during the meeting as part of the process to identify audacious goals. If winners are not present at the meeting, their entries will still be discussed. Travel expenses to and from the meeting location, lodging and meals will be separately reimbursed up to $2,000 and in accordance with Federal Government travel policy. Winners will need to provide receipts to document travel expenses for reimbursement purposes in accordance with National Institutes of Health policy and applicable laws and regulations (*http://oma.od.nih.gov/manualchapters/management/1500/*).

Basis Upon Which Winners Will Be Selected

The audacious goals entries will be de-identified and then will be judged by a selection board composed of NIH employees in compliance with the requirements of the America COMPETES Act and the Department of Health and Human Services judging guidelines (*http://www.hhs.gov/open/initiatives/challenges/judges_guidance.html*). Judges will be named after commencement of the challenge and will consist of senior scientists and clinicians with knowledge of vision research and ocular disorders as well as allied biomedical disciplines. The judges will consult with technical advisors from biomedical, clinical, or other scientific disciplines if it is necessary to properly evaluate entries. The judges will make selections based upon the following criteria:

1. *Relevance to the NEI Mission:* Each entry will be rated on how the goal would further the NEI mission to conduct and support research, training, health information dissemination, and other programs with respect to blinding eye diseases, visual disorders, mechanisms of visual function, preservation of sight, and the special health problems and requirements of the blind.

2. *Audaciousness:* Each entry will be rated on whether the proposed goal is bold, daring, original or unconventional, exceptionally innovative, creative, novel, or any combination.

3. *Feasibility:* Although it is recommended that contestants consider about a 10 year time period for achieving a proposed goal, NEI recognizes that estimates of the timeframe for an audacious goal could vary considerably depending on the nature of the goal. Thus, audacious goals with shorter or longer time periods may be acceptable. Each entry will be rated on how well it describes the technological, scientific, or other advances that are needed to reach the goal.

4. *Scope:* Each entry will be rated on the extent to which it is broad and/or far-reaching. Goals can include basic, translational, clinical research, or any combination. Goals may also encompass training or health information dissemination as appropriate within the NEI Mission. The goal could have multiple components, for example research requiring multidisciplinary approaches or involvement of multiple laboratories. Even a goal that addresses a disease affecting a relatively small number of patients may be considered broad and far-reaching if it requires the development of tools and techniques that can be applied to other problems (see the historical example of Lebers Congenital Amaurosis in the additional information section below).

5. *Impact:* Each entry will be rated on its transformative potential; its value in exerting a positive and powerful influence on the NEI mission.

The evaluation process will begin by de-identifying the entries and removing those that are not responsive to this Challenge or not in compliance with all Challenge rules. The judges may consult with technical advisors with relevant expertise if it is necessary to properly evaluate entries. Judges and technical advisors will examine multiple entries in accord with the aforementioned judging criteria. The judges will meet to discuss the most meritorious entries. Final selection of up to 20 winners will be determined by a vote of the judges.

Additional Information

NEI is one of 27 institutes and centers of the National Institutes of Health, a component of the Department of Health and Human Services. NEI is the principal U.S. government agency that supports vision research, both in its own labs and in universities and research facilities throughout the U.S. and around the world. NEI has the responsibility of establishing a national agenda for vision research. Since NEI was established over 40 years ago, it has conducted strategic planning activities culminating in a series of national plans and workshop reports that identify needs and opportunities in vision research. These planning efforts have relied primarily on the expertise of NEI-funded investigators to review the state of the science and describe current specific research needs and opportunities.

The current NEI strategic planning effort consists of three phases:

• *Phase I:* (Completed). Reports of six NEI-assembled panels of experts in vision research are compiled in a document entitled, *Vision Research: Needs, Gaps, and Opportunities* (*http://www.nei.nih.gov/strategicplanning/*).

• *Phase II:* This *Challenge to Identify Audacious Goals in Vision Research and Blindness Rehabilitation* invites submissions of audacious goals. Winners of this challenge will present their goals at the NEI Audacious Goals Development Meeting of vision research stakeholders. The NEI and the National

Advisory Eye Council will then select the most compelling audacious goals for the national vision research agenda and to motivate funding agencies in the United States and worldwide to stimulate research efforts to address these goals. The NEI seeks broad and diverse input not only from vision researchers and other biomedical and scientific research communities, but also more widely from all interested individuals. Fresh ideas and approaches are expected to energize research efforts, increase public awareness of vision research, and make important contributions to planning that will enhance our effort to reduce the burden of ocular disorders and diseases worldwide. The creativity arising from a variety of new perspectives is expected to generate new research avenues and approaches.

• *Phase III:* NEI will develop an implementation plan that will outline how the NEI priorities, programs, and operations will address the needs, gaps and opportunities identified in Phase I of the strategic planning process and the newly identified audacious goals.

The following historical examples are presented to provide a sense of what is meant by ''audacious goals.'' These were, or would have been big, bold ideas at that time. Each of these examples required multiple components and advances in a variety of areas. The NEI mission encompasses a variety of areas including basic and clinical research, epidemiology, diagnostics, information dissemination, technology development, training, and education and awareness of the special health problems caused by visual impairment. We invite audacious goals that contribute to NEI's mission.

• An audacious goal in 1997 would have been to develop gene therapy to cure an inherited form of childhood blindness in less than 10 years. The first genetic mutations causing Lebers Congenital Amaurosis, a rare form of inherited childhood blindness, were identified in 1997. Multiple research groups then worked on developing gene therapy to treat this form of LCA, leading to the start of human clinical trials in 2007 and reports of success from three groups in 2008 (*http://www.nei.nih.gov/lca/backgrounder.asp*).

• An audacious goal in 1990 would have been to develop imaging techniques to view the microscopic structures of a living human eye to aid the diagnosis and treatment of disease.

Correcting telescope images for the blurring from turbulent atmosphere was first conceived in 1953 and applied successfully by the late 1980s. The technology was developed because the Department of Defense needed to view satellites from ground-based telescopes, but atmospheric turbulence distorted the images. Similarly, doctors could not see the microscopic structures in the back of the eye because their view was blurred by the optics of the patient's eye. The technology developed for astronomy was modified to view the back of the eye, and successful use of this approach allowed visualization of the main light-sensing cells in retina, the cone photoreceptors, in 1999 by Roorda and Williams.

• An audacious goal in 1986 was to sequence the entire human genome in 15 years.

The Department of Energy and the National Institutes of Health officially began the Human Genome Initiative in 1990. Important requirements at the time included enhancing sequencing and analytic technologies as well as computational resources to support future research and commercial applications, exploring gene function through mouse-human comparisons, studying human variation, and training future scientists in genomics. This required multiple approaches, labs, and expertise. A draft of the human genome was reported in 2000 and a complete genome was announced in 2003.

Contacting Challenge Winners and Displaying Winners' Information and Entry

Using information provided in the Audacious Goal Form, winners will be notified by email, telephone, or mail after the judging is completed. Winners' names, hometown, state, and their audacious goal description will also be posted on the Challenge Web site *www.nei.nih.gov/challenge.*

Intellectual Property Rights

By participating in this Challenge, each Contestant grants to NEI an irrevocable, paid-up, royalty-free, nonexclusive worldwide license to post, share, and publicly display the Contestant's audacious goal description on the Web, newsletters or pamphlets, and other informational products. Each Contestant understands and agrees that if his/her entry is selected as a winning entry, it will be discussed and refined at the NEI Audacious Goals Development Meeting early in 2013 and may ultimately assist NEI in its prioritization of research goals or funding for research funding.

General Conditions

NEI reserves the right to cancel, suspend, and/or modify the Competition for any reason, at NEI's sole discretion.

Dated: August 8, 2012.

Paul A. Sieving,

Director, National Eye Institute, National Institutes of Health.

[FR Doc. 2012–19801 Filed 8–10–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute Environmental Health Sciences; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Advisory Environmental Health Sciences Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Environmental Health Sciences Council.

Date: September 11, 2012.

Time: 8:30 a.m. to 12:00 p.m.

Agenda: Discussion of program policies and issues.

Place: Nat. Inst. of Environmental Health Sciences, Building 101, Rodbell Auditorium, 111 T. W. Alexander Drive, Research Triangle Park, NC 27709.

Open: 1:15 p.m. to 2:15 p.m.

Agenda: Discussion of program policies and issues.

Place: Nat. Inst. of Environmental Health Sciences, Building 101, Rodbell Auditorium, 111 T. W. Alexander Drive, Research Triangle Park, NC 27709.

Closed: 2:30 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Nat. Inst. of Environmental Health Sciences, Building 101, Rodbell Auditorium, 111 T. W. Alexander Drive, Research Triangle Park, NC 27709.

Contact Person: Gwen W. Collman, Ph.D., Director, Division of Extramural Research & Training, National Institute of Environmental Health Sciences, National Institutes of

Health, 615 Davis Dr., KEY615/3112, Research Triangle Park, NC 27709, (919) 541–4980, *collman@niehs.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *www.niehs.nih.gov/dert/c-agenda.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk Estimation-Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing, National Institutes of Health, HHS)

Dated: August 7, 2012.

Carolyn A. Baum,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–19715 Filed 8–10–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIAID Investigator Initiated Program Project Application (P01).

Date: September 6, 2012.

Time: 12:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Fernwood (Rockledge Campus), 10401 Fernwood Rd., Room 2C05, Bethesda, MD 20892, (Telephone Conference Call)

Contact Person: Kelly Y. Poe, Ph.D., Scientific Review Officer, Scientific Review Program, DEA/NIAID/NIH/DHHS, 6700–B Rockledge Drive, MDS–7616, Bethesda, MD 20892–7616, 301–451–2639, *poeky@niaid.nih.gov.*

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Clinical Trials in Organ Transplantation in Children.

Date: September 10–11, 2012.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel Bethesda, 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: James T. Snyder, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, DHHS/NIH/NIAID, 6700B Rockledge Drive, MSC 7616, Room # 3257, Bethesda, MD 20892, 301–435–1614, *james.snyder@nih.gov.*

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIAID Investigator Initiated Program Project Application (P01).

Date: September 12, 2012.

Time: 12:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Fernwood (Rockledge Campus), 10401 Fernwood Rd., Room 2C05, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Kelly Y. Poe, Ph.D., Scientific Review Officer, Scientific Review Program, DEA/NIAID/NIH/DHHS, 6700–B Rockledge Drive, MDS–7616, Bethesda, MD 20892–7616, 301–451–2639, *poeky@niaid.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: August 7, 2012.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–19716 Filed 8–10–12; 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 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: Center for Scientific Review Special Emphasis Panel; Integrative and Functional Neurobiology.

Date: September 5, 2012.

Time: 2:30 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Center for Scientific Review, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Wei-Qin Zhao, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5181 MSC 7846, Bethesda, MD 20892–7846, 301–435–1236, *zhaow@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: August 7, 2012.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–19717 Filed 8–10–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2012–0044]

Cooperative Research and Development Agreement (CRADA) Opportunity With the Department of Homeland Security for the Efficacy Testing of Vaporous Hydrogen Peroxide (VHP) and Chlorine Dioxide (ClO_2) Against Foot and Mouth Disease Virus (FMDV) and African Swine Fever Virus (ASFV)

AGENCY: Science and Technology Directorate, Plum Island Animal Disease Center, Department of Homeland Security.

ACTION: Notice of intent.

SUMMARY: The Department of Homeland Security Science and Technology Directorate (DHS S&T), through its Plum Island Animal Disease Center (PIADC), is seeking collaborators to aid DHS S&T in conducting validation testing on the ability of VHP and ClO_2 to achieve sufficient biological load reduction against live FMDV and ASFV. PIADC operates a Biosafety Level 3 (BSL–3) facility working primarily with high consequence foreign animal diseases. The nature of this work makes it

paramount to ensure the effective and thorough decontamination of all material exiting the bio containment area within the facility. Rising health concerns and process efficiency/turn-around time with the use of formaldehyde gas (the current fumigation method used against FMDV and ASFV) are key driving factors in validating an alternative fumigation method. The fumigation method(s) will ultimately be used to decontaminate sensitive equipment and electronics, other material within the bio containment area, sealed portions of the facility, biological safety cabinets and perform in-place decontamination of heating, ventilation, and cooling (HVAC) HEPA filtration systems. The role of the collaborator(s) in this CRADA will be to provide PIADC with the materials, equipment, and technological expertise to support accurate and reliable efficacy testing using VHP and ClO_2. DHS S&T is seeking CRADA collaborators that own the technological components for, have the technological expertise in, and have proven track records of success in the fields of VHP and ClO_2 decontamination validation studies. The proposed term of the CRADA can be up to eighteen (18) months.

DATES: Submit comments on or before September 14, 2012.

ADDRESSES: Mail comments and requests to participate to Doug Ports, (PO Box 848, Greenport, NY 11944). Submit electronic comments and other data to *Douglas.Ports@hq.dhs.gov.*

FOR FURTHER INFORMATION CONTACT: *Information on DHS CRADAs:* Marlene Owens, (202) 254–6671. *Information on proposed technical effort:* Doug Ports, (631) 323–3210.

SUPPLEMENTARY INFORMATION:

Efficacy Testing Plan

The target agents (FMDV and ASFV) and test microorganisms (*Bacillus subtilis,* Vaccinia Virus, *Geobacillius stearothermophilus,* and potentially other commercially available spore strips) will be used to test the efficacy of VHP and ClO_2 on various surfaces including balsa wood, stainless steel, glass, and paper. Phase I of the testing is set to take place at a federal laboratory facility against the test microorganisms, requiring successful results prior to moving on to Phase II. Phase II testing will take place at PIADC (*Plum Island, NY*) against both the test microorganisms and target agents. Phase I and Phase II efficacy testing will not require the VHP or ClO_2 generators to enter the bio containment area; however, components or probes that do enter the bio containment area will need to be decontaminated using a validated method prior to removal. Testing and decontamination validation will take place using pre-approved methods agreed upon between federal and non-federal personnel. Mutual benefits to both federal and non-federal collaborators include the opportunity to support the Homeland Security Enterprise in protecting the United States from internal and external foreign animal disease threats and response capabilities. Specifically, DHS S&T is interested in validated alternatives to formaldehyde fumigation with respect to outbreak control, infection control, and decontamination for FMDV and AFSV releases. The collaborators will also have the opportunity to test their decontamination methods directly against live FMDV and ASFV at the only laboratory in the United States, and one of few in the world, that works with live FMDV. Efficacy testing data and results may be published in scientific journals by or under the guidance of federal personnel.

Period of Performance

Once CRADA collaborators have been selected, finalized Phase I testing is expected to take approximately 3 months. Contingent on Phase I testing results, Phase II testing is expected to take an additional 6 months and data consolidation, analysis, and results finalization is expected to take another 3 months following.

Selection Criteria

The Plum Island Animal Disease Center (PIADC) reserves the right to select CRADA collaborators for all, some, or none of the proposals in response to this notice. PIADC will provide no funding for reimbursement of proposal development costs. Proposals (or any other material) submitted in response to this notice will not be returned. Proposals submitted are expected to be unclassified.

PIADC will select proposals at its sole discretion on the basis of:

i. How well the proposal communicates the collaborators' understanding of and ability to meet the CRADAs goals and proposed timeline

ii. How well the proposal addresses the following criteria:

a. Capability of the collaborator to provide equipment and materials for proposed Phase I and Phase II efficacy testing.

b. Capability of the collaborator to provide on-site and remote technological expertise, within a reasonable time period and for a reasonable duration, for Phase I and Phase II efficacy testing.

Participation in this CRADA does not imply the future purchase of any materials, equipment or services from the collaborating entities; however, non-Federal CRADA participants will not be excluded from any future PIADC procurements based solely on their participation in this CRADA.

Authority: CRADAs are authorized by the Federal Technology Transfer Act of 1986, as amended and codified by 15 U.S.C. 3710a. DHS, as an executive agency under 5 U.S.C. 105, is a Federal agency for the purposes of 15 U.S.C. 3710a and may enter into a CRADA. DHS delegated the authority to conduct CRADAs to the Science and Technology Directorate and its laboratories.

Dated: August 7, 2012

James Johnson,

Director, Office of National Laboratories.

[FR Doc. 2012–19723 Filed 8–10–12; 8:45 am]

BILLING CODE 9110–9F–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4067–DR; Docket ID FEMA–2012–0002]

Colorado; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Colorado (FEMA–4067–DR), dated June 28, 2012, and related determinations.

DATES: *Effective Date:* August 6, 2012.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Colorado is hereby amended to include the Hazard Mitigation Grant Program for the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of June 28, 2012.

All counties in the State of Colorado are eligible to apply for assistance under the Hazard Mitigation Grant Program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora

Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2012–19714 Filed 8–10–12; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF THE INTERIOR

Geological Survey

[GR12RB00CMFRM00]

Agency Information Collection Activities: Proposed Information Collection; Evaluating the Effectiveness of Yellowstone National Park Bear Safety Information

AGENCY: United States Geological Survey (USGS), Interior.

ACTION: Notice; request for comments.

SUMMARY: We (U.S. Geological Survey) will ask the Office of Management and Budget (OMB) to approve the information collection (IC) described below. As required by the Paperwork Reduction Act of 1995 (PRA), and as a part of our continuing efforts to reduce paperwork and respondent burden, we invite the general public and other Federal agencies to take this opportunity to comment on this IC. As a federal agency, we may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

DATES: To ensure your comments on this IC are considered, we must receive them on or before October 12, 2012.

ADDRESSES: Send your comments to the IC to the USGS Information Collection Clearance Officer, U.S. Geological Survey, 807 National Center, Reston, VA 20192 (mail); or *smbaloch@usgs.gov* (email). Please reference Information Collection 1028–New: Yellowstone Bears.

FOR FURTHER INFORMATION CONTACT: Leslie Richardson at U.S. Geological Survey, 2150 Centre Avenue, Bldg. C, Fort Collins, CO 80525 (mail), or at (970) 226–9181 (phone).

SUPPLEMENTARY INFORMATION:

I. Abstract

In 2011, two fatalities were caused by grizzly bears in Yellowstone National Park (YNP); the first bear-caused fatalities to occur within park boundaries in 25 years. As a result of these events, park managers are reviewing the effectiveness of bear safety messaging and its message delivery media to backcountry visitors. USGS social scientists and a NPS bear management biologist will use their combined expertise to conduct a social survey of backcountry visitors to YNP to help park managers achieve this review. The survey will identify the effectiveness of various bear safety information and education messages; the results will be used to direct future bear safety information and education efforts in YNP. No such prior analysis has been conducted in YNP.

II. Data

OMB Control Number: 1028–NEW.

Title: Evaluating the effectiveness of Yellowstone National Park bear safety information.

Type of Request: New collection.

Respondent's Obligation: Voluntary.

Frequency of Collection: One time only.

Estimated Number and Description of Respondents: 1500 backcountry visitors to YNP.

Estimated Total Annual Responses: 1500.

Estimated Time per Response: 30 minutes.

Estimated Total Annual Burden Hours: 750.

III. Request for Comments

We invite comments concerning this information collection on: (1) Whether or not the collection of information is necessary, including whether or not the information will have practical utility; (2) the accuracy of our estimate of the burden for this collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Please note that the comments submitted in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee we will be able to do so.

Dated: August 7, 2012.

David J. Newman,

Federal Register Liasion.

[FR Doc. 2012–19711 Filed 8–10–12; 8:45 am]

BILLING CODE 4311–AM–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Approved Tribal—State Class III Gaming Compact; Indian Gaming

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of Approved Tribal—State Class III Gaming Compact.

SUMMARY: This notice publishes an approval of the gaming compact between the Eastern Band of Cherokee Indians and the State of North Carolina.

DATES: *Effective Date:* August 13, 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, 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 Compact permits the Tribe to conduct live table gaming in a zone of geographic exclusivity that extends to all parts of North Carolina west of the Interstate Highway 26. In addition to the exclusive right to operate live table games, the Tribe is also the only entity permitted to operate slot machines, dice, or wheel games in the State.

Dated: August 3, 2012.

Michael S. Black,

Acting Assistant Secretary—Indian Affairs.

[FR Doc. 2012–19726 Filed 8–10–12; 8:45 am]

BILLING CODE 4310–4N–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLIDT000000.L11200000.DD0000.241A.00]

Call for Nominations for the Twin Falls District Resource Advisory Council

AGENCY: Bureau of Land Management, Interior.

ACTION: Call for Nominations, Twin Falls District Resource Advisory Council

SUMMARY: This notice requests public nominations to fill one position on the Twin Falls District Resource Advisory Council (RAC) in category three (representatives of State, county, or local elected office; employees of a State agency responsible for management of natural resources; representatives of Tribes within or adjacent to the area for which the council is organized; representatives of academia who are employed in natural sciences; or the public-at-large).

DATES: All nominations must be received no later than September 12, 2012.

ADDRESSES: Nominations should be sent to Heather Tiel-Nelson, Public Affairs Specialist, Twin Falls District Office, Bureau of Land Management, 2536 Kimberly Road, Twin Falls, ID 83301

FOR FURTHER INFORMATION CONTACT: Heather Tiel-Nelson, 208–736–2352; *hnelson@blm.gov*.

Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, seven days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The Federal Land Policy and Management Act (FLPMA) directs the Secretary of the Interior to involve the public in planning and issues related to management of lands administered by the Bureau of Land Management (BLM). Section 309 of FLPMA directs the Secretary to establish 10- to 15-member citizen-based advisory councils that conform to the requirements of the Federal Advisory Committee Act (FACA). RAC membership must be balanced and representative of the various interests concerned with the land use planning and/or management of the public lands.

The BLM Twin Falls District RAC is calling for nominations to fill a vacancy in category three (description addressed in the SUMMARY above, (43 CFR 1784.6–1(c)(3)). Upon appointment, the individual selected will fill the position until November 18, 2013. Nominees must be residents of Idaho. The BLM will evaluate nominees based on their education, training, experience, and their knowledge of the geographical area. Nominees should demonstrate a commitment to collaborative resource decision-making.

The Obama Administration prohibits individuals who are currently Federally registered lobbyists from being appointed or re-appointed to FACA and non-FACA boards, committees, or councils.

The following must accompany all nominations:

—Letters of reference from represented interests or organizations;

—A completed background information nomination form; and,

—Any other information that addresses the nominee's qualifications.

Simultaneous with this notice, the Twin Falls District Office will issue a news release providing information for submitting nominations.

Dated: June 29, 2012.

Jenifer Arnold,

Acting District Manager.

[FR Doc. 2012–19794 Filed 8–10–12; 8:45 am]

BILLING CODE 4310–GG–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCAD09000.L14300000.ES0000; CACA–051457]

Correction for Notice of Realty Action; Recreation and Public Purposes Act Classification; California

AGENCY: Bureau of Land Management, Interior.

ACTION: Correction

SUMMARY: This notice corrects a Notice of Realty Action published in the **Federal Register** on February 10, 2010, which listed an incorrect legal land description for the Joint Port of Entry (JPOE) inspection facility on Interstate 15 (I–15), near the California/Nevada state line.

ADDRESSES: Bureau of Land Management, Needles Field Office, 1303 South U.S. Highway 95, Needles, California 92363.

FOR FURTHER INFORMATION CONTACT: Jose M. Najar, Realty Specialist, BLM Needles Field Office, 951–697–5387, or email: *jnajar@blm.gov*. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The notice of realty action was published in the **Federal Register** on February 10, 2012 (75 FR 6702), The erroneous legal land description is on page 6703, 1st column, line 5 through 11. The legal land description is corrected to read:

San Bernardino Meridian, California

Township 16 North, Range 14 East
Sec. 11, Lot 1;
Sec. 12, Lots 2, 4, 6, 9, 11, and 14;
Sec. 13, Lot 2;
Sec. 14, Lots 1, 4, 7, 11 and 12;
Sec. 23, Lots 3, 6, 9 and 11.

The area described contains 133.19 acres, more or less, in San Bernardino County, California.

Authority: 43 CFR 2741.5.

Tom Pogacnik,

Deputy State Director, Natural Resources.

[FR Doc. 2012–19808 Filed 8–10–12; 8:45 am]

BILLING CODE 4310–40–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–921 (Second Review)]

Folding Gift Boxes From China; Postponement of Release of Staff Report and Date for Final Comments

AGENCY: United States International Trade Commission.

ACTION: Notice.

DATES: *Effective Date:* August 7, 2012.

FOR FURTHER INFORMATION CONTACT: Angela Newell (202–708–5409), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*http://www.usitc.gov*). The public record for this review may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

SUPPLEMENTARY INFORMATION: On July 6, 2012, the Commission established a schedule for this expedited review (77 FR 42762, July 20, 2012). On July 31, 2012 (77 FR 45337), the Department of Commerce published a notice extending its time limits for issuing preliminary and final results in the second five-year review of the antidumping duty order on Folding Gift Boxes from China. Given this extension by Commerce, the date for the Commission's final determination is also extended pursuant to 19 U.S.C. 1675(c)(5)(B). Accordingly, the Commission is postponing the release of its staff report and final comment date until after Commerce's preliminary determination scheduled for October 19, 2012. At that time, the Commission will establish revised dates for the release of the report and the submission of final comments.

For further information concerning this review see the Commission's notice cited above and the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and C (19 CFR part 207).

Authority: This review is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.21 of the Commission's rules.

Issued: August 8, 2012.

By order of the Commission.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2012–19792 Filed 8–10–12; 8:45 am]

BILLING CODE P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 332–532; Investigation No. 332–536]

The Information Technology Agreement: Advice and Information on the Proposed Expansion: Part 1; The Information Technology Agreement: Advice and Information on the Proposed Expansion: Part 2

AGENCY: United States International Trade Commission.

ACTION: Institution of investigations, opportunity to provide written submissions, and scheduling of public hearing in investigation No. 332–536.

SUMMARY: Following receipt of a request on July 31, 2012, from the United States Trade Representative (USTR) under section 115 of the Uruguay Round Agreements Act (19 U.S.C. 3524) and section 332(g) of the Tariff Act of 1930 (19 U.S.C. 1332(g)), the U.S. International Trade Commission (Commission) instituted two investigations for the purpose of providing the requested advice and information: investigation No. 332–532, *The Information Technology Agreement: Advice and Information on the Proposed Expansion: Part 1,* and investigation No. 332–536, *The Information Technology Agreement: Advice and Information on the Proposed Expansion: Part 2.*

DATES:

Investigation No. 332–532

September 6, 2012: Deadline for filing written submissions from interested parties.

October 24, 2012: Transmittal of Commission's report to USTR.

Investigation No. 332–536

October 31, 2012: Deadline for filing requests to appear at the public hearing.

November 2, 2012: Deadline for filing pre-hearing briefs and statements.

November 8, 2012: Public hearing.

November 20, 2012: Deadline for filing post-hearing briefs and written submissions from interested parties.

February 15, 2013: Transmittal of the Commission's report to USTR.

ADDRESSES: All Commission offices, including the Commission's hearing rooms, are located in the United States International Trade Commission Building, 500 E Street SW., Washington, DC. All written submissions should be addressed to the Secretary, United States International Trade Commission, 500 E Street SW., Washington, DC 20436. The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov/edis3-internal/app.*

FOR FURTHER INFORMATION CONTACT: Project Leader Shannon Gaffney (202–205–3316 or *Shannon.Gaffney@usitc.gov*) or Deputy Project Leaders Heidi Colby-Oizumi (202–205–3391 or *Heidi.Colby@usitc.gov*) or Jeanette Leary (202–205–2043 or *Jeanette.Leary@usitc.gov*) for information specific to these investigations. For information on the legal aspect of these investigations, contact William Gearhart of the Commission's Office of the General Counsel (202–205–3091 or *william.gearhart@usitc.gov*). The media should contact Margaret O'Laughlin, Office of External Relations (202–205–1819 or *margaret.olaughlin@usitc.gov*). Hearing-impaired individuals may obtain information on this matter by contacting the Commission's TDD terminal at 202–205–1810. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000.

Background: In his letter the USTR said that a number of participants in the Information Technology Agreement (ITA) have prepared a draft list of products that could be considered for addition to ITA product coverage, and that a more formal negotiating process is expected to begin in September 2012. The USTR furnished the Commission with a list of the products, which can be found at *http://www.usitc.gov/research_and_analysis/ongoing/documents/Request_letter_332-532.pdf* or *http://www.usitc.gov/research_and_analysis/ongoing/documents/Request_letter_332-536.pdf.* Section 115 of the URAA requires the President to obtain the advice of the Commission in connection with any modifications in duty that are subject to the consultation and layover requirements of section 115.

The USTR has asked the Commission to provide advice and information in two reports and the Commission has instituted two separate investigations for the purpose of preparing these reports.

Investigation No. 332–532, The Information Technology Agreement: Advice and Information on the Proposed Expansion: Part 1

In its first report (investigation No. 332–352), the Commission will, as requested by the USTR and to the extent practicable, based on available information and information furnished by interested parties in response to this notice, (1) indicate both the information and communications technology (ICT) purposes and non-ICT purposes for which each product on the list is used, and (2) identify the products that U.S. industry and other interested parties view as import-sensitive. The Commission will provide this report to the USTR by October 24, 2012.

Investigation No. 332–536, The Information Technology Agreement: Advice and Information on the Proposed Expansion: Part 2

In its second report (investigation No. 332–356), the Commission will, as requested by the USTR and to the extent practicable, identify for each of the listed products: (1) Tariffs in major markets; (2) major producing countries; (3) leading U.S. export markets; and (4) leading sources of U.S. imports. The Commission will also provide an overview of selected key subsectors, and to the extent practicable, examine benefits to the U.S. industry of ITA

expansion, including information on increased market access and export opportunities for products in these subsectors. The Commission will provide this report to the USTR by February 15, 2013.

Public Hearing: A public hearing in connection with investigation No. 332–536 will be held at the U.S. International Trade Commission Building, 500 E Street SW., Washington, DC, beginning at 9:30 a.m. on November 8, 2012. Requests to appear at the public hearing should be filed with the Secretary no later than 5:15 p.m., October 31, 2012. All pre-hearing briefs and statements should be filed no later than 5:15 p.m. November 2, 2012; and all post-hearing briefs and statements should be filed no later than 5:15 p.m. November 20, 2012. All such briefs and statements should otherwise comply with the filing requirements in the ''Submissions'' section below. In the event that, as of the close of business on October 31, 2012, no witnesses are scheduled to appear at the hearing, the hearing will be canceled. Any person interested in attending the hearing as an observer or nonparticipant should contact the Office of the Secretary at 202–205–2000 after October 31, 2012, for information concerning whether the hearing will be held.

Written Submissions: Interested parties are invited to file written submissions concerning both investigations. For investigation No. 332–532, interested parties are asked to provide information on (1) the ICT and non-ICT purposes for which products on the attached list are used, and (2) indicate which products they view as import-sensitive. Written submissions relating to investigation No. 332–532 should be received not later than 5:15 p.m., September 6, 2012. Written submission relating to investigation No. 332–536 should be received not later than 5:15 p.m., November 20, 2012.

Written submissions filed in connection with the respective investigations should focus on providing information of the kind described above that is relevant to the respective investigations and reports. All written submissions should be addressed to the Secretary. All written submissions must conform to the provisions of section 201.8 of the Commission's *Rules of Practice and Procedure* (19 CFR 201.8). Section 201.8 and the Commission's Handbook on Filing Procedures require that interested parties file documents electronically on or before the filing deadline and submit eight (8) true paper copies by 12:00 noon eastern time on the next business day. In the event that confidential treatment of a document is requested, interested parties must file, at the same time as the eight paper copies, at least four (4) additional true paper copies in which the confidential information must be deleted (see the following paragraph for further information regarding confidential business information). Persons with questions regarding electronic filing should contact the Secretary (202–205–2000).

Any submissions that contain confidential business information must also conform to the requirements of section 201.6 of the Commission's *Rules of Practice and Procedure* (19 CFR 201.6). Section 201.6 of the rules requires that the cover of the document and the individual pages be clearly marked as to whether they are the ''confidential'' or ''non-confidential'' version, and that the confidential business information be clearly identified by means of brackets. All written submissions, except for confidential business information, will be made available for inspection by interested parties.

In his request letter the USTR said that it is the intent of his office to make the Commission's reports available to the public in their entirety, and asked that the Commission not include any confidential business information. Accordingly, any confidential business information received by the Commission in these investigations and used in preparing the respective reports will not be included in the reports that the Commission sends to the USTR and will not be published in a manner that would reveal the operations of the firm supplying the information.

Issued: August 8, 2012.

By order of the Commission.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2012–19791 Filed 8–10–12; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–12–024]

Government in the Sunshine Act Meeting Notice

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: August 21, 2012 at 9:30 a.m.

PLACE: Room 101, 500 E Street SW., Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agendas for future meetings: None.
2. Minutes.
3. Ratification List.
4. Vote in Inv. No. 731–TA–709 (Third Review) (Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from Germany). The Commission is currently scheduled to transmit its determination and Commissioners'' opinions to the Secretary of Commerce on or before August 30, 2012.
5. Outstanding action jackets: None.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

Issued: August 8, 2012.

By order of the Commission.

William R. Bishop,

Hearings and Meetings Coordinator.

[FR Doc. 2012–19850 Filed 8–9–12; 11:15 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Pursuant to Comprehensive Environmental Response, Compensation, and Liability Act

Notice is hereby given that on August 6, 2012, a proposed Consent Decree in *United States of America* v. *The Gillette Company, et al.,* Civil Action No. 1:12–cv–01247–MAD–TWD, was lodged with the United States District Court for the Northern District of New York.

The proposed Consent Decree is between Plaintiff the United States of America, and the following Defendants: The Gillette Company; KeySpan Gas East Corporation (d/b/a National Grid); Energizer Battery Manufacturing, Inc.; Union Carbide Corporation; Spectrum Brands, Inc.; Brambles Environmental, Inc.; Clean Harbors Environmental Services, Inc.; Qwest Communications International, Inc.; Verizon New York, Inc.; 26 Railroad Ave., Inc.; A.P. Pharma, Inc.; Ajinomoto North America, Inc.; Allegheny Ludlum, LLC; Amresco, LLC; Arizona Chemical Company, LLC; Atmos Energy Corporation; Battery Broker Environmental Services, Inc.; Buffalo Optical Co.; Cameron International Corp; Chemtron Corp.; City of Lakeland; City of North Tonawanda; City of Richmond; Dukane Corp.; East Side Jersey Dairy, Inc.; FirstEnergy Corp.; Glit, Division of CCP, LLC; Harding Metals, Inc.; Honeywell International, Inc.; Johnson Controls, Inc.; Los Angeles Unified School District; MDI, Inc.; Memphis Light, Gas & Water Division; Metalor Technologies

USA Corp.; Orange Water and Sewer Authority; Orlando Utilities Commission; Osram Sylvania, Inc.; Partlow West Corporation; Pioneer Natural Resources USA, Inc.; Potomac Electric Power Company; Rutland Regional Medical Center; Scana Corp.; Southern Union Company; Space Systems/Loral, Inc.; Taylor School District; The M&P Lab, Inc.; The Scripps Research Institute; TRW Automotive US, LLC; Union College; University Hospital of Cleveland; Virginia Natural Gas; and York International Corp. (collectively, the ''Settling Defendants''). The Consent Decree resolves the United States' claims against the Settling Defendants under Sections 106 and 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (''CERCLA''), 42 U.S.C. 9606, 9607(a), and resolves threatened claims for contribution from federal agencies (the ''Settling Federal Agencies'') with alleged liability.

Pursuant to the Consent Decree, five Settling Defendants, referred to in the Consent Decree as ''Appendix A–1 Settling Defendants,'' will finance and perform the selected soil, sediment and groundwater remedies at the Site, estimated to cost $9.3 million. In addition, 26 Railroad Avenue, Inc., the Site owner, will perform certain work in accordance with Appendix H of the Consent Decree. Further, the Appendix A–1 Settling Defendants will reimburse the United States for its future response costs in excess of $1 million. The remaining Settling Defendants, and the Settling Federal Agencies, will make a financial contribution toward the Site cleanup. The Consent Decree includes covenants not to sue the Defendants by the United States under Sections 106 and 107(a) of CERCLA, 42 U.S.C. 9606, 9607(a), and a covenant by EPA not to take administrative action against the Settling Federal Agencies pursuant to Sections 106 and 107(a) of CERCLA, relating to the Site.

The Department of Justice will receive comments relating to the proposed Consent Decree for a period of thirty (30) days from the date of this publication. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either emailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States of America* v. *The Gillette Company, et al.,* Civil Action No. 1:12–cv–01247–MAD–TWD, D.J. Ref. 90–11–2–07742/7.

During the public comment period, the proposed Consent Decree may be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the proposed Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or emailing a request to ''Consent Decree Copy'' (*EESCDCopy.ENRD@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–5271. If requesting a copy by mail from the Consent Decree Library, please enclose a check in the amount of $89.75 ($0.25 per page reproduction cost) payable to the United States Treasury or, if requesting by email or fax, forward a check in that amount to the Consent Decree Library at the stated address. If requesting a copy exclusive of appendices and the parties' signature pages, please enclose a check in the amount of $14.25 ($0.25 per page reproduction cost) payable to the United States Treasury.

Maureen Katz,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2012–19710 Filed 8–10–12; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF LABOR

Employment and Training Administration

Comment Request for Information Collection for State Administration of Applications and Grants for the Self-Employment Assistance (SEA) Program, Extension Without Revisions

AGENCY: Employment and Training Administration (ETA), Labor.

ACTION: Notice.

SUMMARY: The Department of Labor (Department), as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 [44 U.S.C. 3506(c)(2)(A)]. This program helps ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

ETA is soliciting comments concerning the continuation of the collection of data for state administration of applications and grants for SEA beyond the current expiration date of 11/30/2012.

DATES: Written comments must be submitted to the office listed in the addresses section below on or before October 12, 2012.

ADDRESSES: Submit written comments to Scott Gibbons, Office of Unemployment Insurance, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210. Telephone number: 202–693–3008 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–877–889–5627 (TTY/TDD). Email: *gibbons.scott@dol.gov*. A copy of the proposed information collection request (ICR) can be obtained by contacting Mr. Gibbons.

SUPPLEMENTARY INFORMATION:

I. Background

On February 22, 2012, the President signed into law the Middle Class Tax Relief and Job Creation Act (MCTRJC) of 2012 (Pub. L. 112–96). In recognition of the importance of supporting entrepreneurship, Subtitle E of Public Law 112–96 (hereinafter referred to as Subtitle E) amended the Federal Unemployment Compensation (UC) Act to extend the SEA program to the long-term unemployed who are receiving benefits under the Emergency Unemployment Compensation (EUC) and Extended Benefits (EB) programs. This is a further expansion of the SEA program, which began in 1993.

Prior to the enactment of the North American Free Trade Agreement (NAFTA) Implementation Act (Pub. L. 103–182) in 1993, withdrawals for the purpose of paying self-employment allowances would have been prohibited as the ''withdrawal standard'' of Section 3304(a)(4) of the Federal Unemployment Tax Act (FUTA) and Section 303(a)(5), Social Security Act (SSA), limits withdrawals (with specified exceptions not relevant here) from a state's unemployment fund to payments of ''compensation.'' The term ''compensation'' is defined in Section 3306(h), FUTA, as ''cash benefits payable to individuals with respect to their unemployment.'' Because payment must be made with respect to ''unemployment,'' the withdrawal standard prohibits states from using unemployment funds to help

individuals establish themselves in self-employment. After NAFTA was enacted, states had the option of operating, for a five-year period, an SEA program permitting certain individuals to receive payments from the state's unemployment fund in lieu of regular compensation to help them establish businesses to become self-employed. Subsequently, on October 28, 1998, the Noncitizen Benefit Clarification and Other Technical Amendments Act of 1998, (Pub. L. 105–306) permanently authorized the SEA program. Participation in the state SEA programs under NAFTA (as amended by Pub. L. 105–306) was voluntary by both the state and the unemployed individual. Individuals were encouraged to become reemployed by starting their own businesses while collecting a self-employment allowance in lieu of regular UC, and to support continued economic growth through developing businesses. Over the last 15 years, small businesses have created two out of every three jobs, and over half of all working Americans own or work in a small business.

SEA provides unemployed individuals, volunteering to enter the SEA program, financial support while they access the resources, information, and training they need to get a business established. Individuals enrolled in an SEA program receive a weekly allowance in the same amount as the individual's regular UC weekly benefit amount would have been. The definition of an SEA program under section 3306(t), FUTA requires an individual to be:

a. Eligible to receive regular UC under the state's law, except that the individuals are not required to meet the state's requirements related to:

- Availability for work;
- Active work search;
- Refusal to accept work; and
- Disqualifying income with respect to income earned from self-employment;

b. Identified under a state worker profiling system as likely to exhaust regular UC;

c. Participating in self-employment activities including entrepreneurial training, business counseling, and technical assistance that are approved by the state UC agency; and

d. Actively engaged on a full-time basis in activities (which may include training) relating to the establishment of a business and becoming self-employed.

Section 3306(t), FUTA, also provides that the aggregate number of individuals receiving SEA allowances may at no time exceed five percent of the number of individuals receiving regular UC. In addition, the SEA program may not result in any cost to the Unemployment Trust Fund (UTF) in excess of the cost that would be incurred by the state and charged to the UTF had the individual(s) not participated in the SEA program. The ''regular'' SEA program remains unchanged except that Publuc Law 112–96 has created a requirement for additional reporting requirements.

II. Review Focus

The Department is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

III. Current Actions

Type of Review: Extension without changes.

Title: State Administration of Applications and Grants for the Self-Employment Assistance (SEA) Program.

OMB Number: 1205–0496.

Affected Public: State Workforce Agencies.

Form(s): Unemployment Insurance Program Letter No. 20–12.

Total Annual Burden Cost for Respondents: There are no burden costs.

Category and instruments	Respondents	Hours per response	Annualized responses	Annualized hours	Annualized value of respondent time
Grant Application: Attachments III, IV	26	125	1	3,250	$133,217.50
Review of Operating Instructions	26	10	1	260	10,657.40
Review of Model Language	26	10	1	260	10,657.40
Quarterly Monitoring Instrument	26	40	104	4,160	170,518.40
Unduplicated Totals	26			7,930	325,051.70

Comments submitted in response to this comment request will be summarized and/or included in the request for OMB approval of the ICR; they will also become a matter of public record.

Dated: Signed in Washington, DC, on this 6th day of August, 2012.

Jane Oates,

Assistant Secretary for Employment and Training, Labor.

[FR Doc. 2012–19703 Filed 8–10–12; 8:45 am]

BILLING CODE 4510–FW–P

DEPARTMENT OF LABOR

Employment and Training Administration

Comment Request for Information Collection for the Reemployment and Eligibility Assessments (REA) Reports, Extension Without Revisions

AGENCY: Employment and Training Administration (ETA), Labor.

ACTION: Notice.

SUMMARY: The Department of Labor (Department), as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 [44 U.S.C. 3506(c)(2)(A)]. This program helps ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

Currently, ETA is soliciting comments concerning the continuation of the collection of data about the reemployment and eligibility assessments report beyond the current expiration date of 10/31/2012.

DATES: Written comments must be submitted to the office listed in the addresses section below on or before October 12, 2012.

ADDRESSES: Submit written comments to Diane Wood, U.S. Department of Labor, Employment and Training Administration, Office of Workforce Security, 200 Constitution Avenue NW., Frances Perkins Bldg. Room S–4524, Washington, DC 20210, telephone number (202) 693–3212 (this is not a toll-free number) or by email: *wood.diane@dol.gov.* Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–877–889–5627. A copy of the proposed information collection request (ICR) can be obtained by contacting the office listed above.

SUPPLEMENTARY INFORMATION:

I. Background

The REA program addresses the reemployment needs of UI claimants and is used to detect and prevent improper payments in the Unemployment Insurance (UI) program, both of which are high priorities for ETA. The REA program connects UI claimants with reemployment and training services through the workforce investment system by linking them to services in American Job Centers. The REA program brings claimants into American Job Centers where they are provided a full array of available services, and ensures that claimants meet and comply with all UI eligibility requirements. For many individuals, the UI program provides an entry point into this reemployment service delivery system. Individuals filing UI claims are active job seekers who, through the state's REA program, are made aware of the variety of available reemployment services and referred to those that are appropriate for them. In FY 2012, forty-two states are participating in the REA program for claimants filing for regular UI claims and all states are providing an REA for claimants in the Emergency Unemployment Compensation program.

The Department is seeking to extend an information collection concerning state activities and results around the Reemployment and Eligibility Assessments program. The information collected from these REAs is used to evaluate state performance in terms of service delivery, to better understand program dynamics, and to gather data to report on REAs, including the number of scheduled in-person reemployment and eligibility assessments, the number of individuals who failed to appear for scheduled assessments, actions taken as a result of individuals not appearing for an assessment (e.g., benefits terminated), results of assessments (e.g., referred to reemployment services, found in compliance with program requirements), estimated savings resulting from cessation of benefits, and estimated savings as a result of accelerated reemployment.

II. Review Focus

The Department is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

III. Current Actions

Type of Review: Extension without changes.

Title: Reemployment and Eligibility Assessments.

OMB Number: 1205–0456.

Affected Public: State Workforce Agencies.

Form(s): ETA 9128U, ETA9128 and ETA 9129.

Data collection activity	Number of respondents	Frequency	Total responses	Average time per response (hours)	Burden hours
9128	42	Quarterly	168	0.5	84
9129	42	Quarterly	168	0.5	84
9128U	53	Quarterly	212	0.5	106
Unduplicated totals	53		548		274

Total Annual Burden Cost for Respondents: There are no annualized costs to respondents.

Comments submitted in response to this comment request will be summarized and/or included in the request for OMB approval of the ICR; they will also become a matter of public record.

Dated: Signed in Washington, DC, on this 6th day of August, 2012.

Jane Oates,

Assistant Secretary for Employment and Training, Labor.

[FR Doc. 2012–19704 Filed 8–10–12; 8:45 am]

BILLING CODE 4510–FW–P

DEPARTMENT OF LABOR

Employment and Training Administration

Comment Request for Information Collection for Monitoring Implementation of Changes to State Unemployment Insurance (UI) Programs, Extension Without Revisions

AGENCY: Employment and Training Administration (ETA), Labor.

ACTION: Notice.

SUMMARY: The U.S. Department of Labor (Department), as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 [44 U.S.C. 3506(c)(2)(A)]. This program helps ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and

the impact of collection requirements on respondents can be properly assessed.

ETA is soliciting comments concerning the continuation of the collection of data to support monitoring of implementation of changes to State UI Programs beyond the current expiration date of 12/31/2012.

DATES: Written comments must be submitted to the office listed in the addresses section below on or before October 12, 2012.

ADDRESSES: Submit written comments to Scott Gibbons, Office of Unemployment Insurance, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210. Telephone number: 202–693–3008 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–877–889–5627 (TTY/TDD). Email: *gibbons.scott@dol.gov.* A copy of the proposed information collection request (ICR) can be obtained by contacting Mr. Gibbons.

SUPPLEMENTARY INFORMATION:

I. Background

The Department has responsibility for ensuring that states implement the extension and modifications to the Emergency Unemployment Compensation (EUC) program, including Reemployment Services and Reemployment and Eligibility Assessment Activities (REA) for recipients of EUC, herein referred to as EUC RES/REA, and the Work Search Audit requirement in accordance with the Middle Class Job Creation and Tax Relief Act of 2012 (Act), Title II, Subtitle C, and USDOL operating instructions.

ETA is responsible for conducting EUC reviews, Work Search Audit, and EUC RES/REA program reviews. Given the lack of resources available for detailed monitoring, ETA intends to use a questionnaire as a monitoring tool to establish which states are most in need of technical assistance. The goal of this questionnaire is to ensure that states have plans to properly implement and administer the EUC modifications, Work Search Audit, and EUC RES/REA requirements. This collection provides ETA with information pointing to key areas in which technical assistance to states is necessary.

II. Review Focus

The Department is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

III. Current Actions

Type of Review: Extension without changes.

Title: Monitoring Implementation of Changes to State Unemployment Insurance (UI) Programs.

OMB Number: 1205–0500.

Affected Public: State Workforce Agencies.

Form(s): Questionnaire for State Workforce Agencies.

Total Annual Respondents: 53.

Annual Frequency: One-time collection.

Total Annual Responses: 1.

Average Time per Response: 30 hours.

Estimated Total Annual Burden Hours: 1,590 hours.

Total Annual Burden Cost for Respondents: There are no burden costs.

Comments submitted in response to this comment request will be summarized and/or included in the request for OMB approval of the ICR; they will also become a matter of public record.

Dated: Signed in Washington, DC, on this 6th day of August, 2012.

Jane Oates,

Assistant Secretary for Employment and Training, Labor.

[FR Doc. 2012–19706 Filed 8–10–12; 8:45 am]

BILLING CODE 4510–FW–P

DEPARTMENT OF LABOR

Employment and Training Administration

Comment Request for Information Collection for the ETA 203, Characteristics of the Insured Unemployed, Extension Without Revisions

AGENCY: Employment and Training Administration (ETA), Labor.

ACTION: Notice.

SUMMARY: The Department of Labor (Department), as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 [44 U.S.C. 3506(c)(2)(A)]. This program helps ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

Currently, ETA is soliciting comments concerning the continuation of the collection of data on characteristics of the insured unemployed beyond the current expiration date of 11/30/2012.

DATES: Written comments must be submitted to the office listed in the addresses section below on or before October 12, 2012.

ADDRESSES: Submit written comments to Scott Gibbons, Office of Unemployment Insurance, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210. Telephone number: 202–693–3008 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–877–889–5627 (TTY/TDD). Email: *gibbons.scott@dol.gov*. A copy of the proposed information collection request (ICR) can be obtained by contacting Mr. Gibbons.

SUPPLEMENTARY INFORMATION:

I. Background

The ETA 203, Characteristics of the Insured Unemployed, is a monthly snapshot of the demographic composition of the claimant population in the Unemployment Insurance system. It is based on those who file a claim in the week containing the 19th day of the month, which reflects unemployment during the week containing the 12th day of the month. This corresponds with the sample frame used by the Bureau of Labor Statistics for the production of labor force statistics they produce. This report serves a variety of socio-economic needs because it provides aggregate data reflecting unemployment insurance claimants' sex, race/ethnic group, age, industry, and occupation.

II. Review Focus

The Department is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

III. Current Actions

Type of Review: Extension without changes.

Title: Characteristics of the Insured Unemployed.

OMB Number: 1205–0009.

Affected Public: State Workforce Agencies.

Form(s): ETA 203.

Total Annual Respondents: 53.

Annual Frequency: Monthly.

Total Annual Responses: 636.

Average Time per Response: 20 minutes (0.33 hours).

Estimated Total Annual Burden Hours: 212 Hours.

Total Annual Burden Cost for Respondents: There is no burden cost.

Comments submitted in response to this comment request will be summarized and/or included in the request for OMB approval of the ICR; they will also become a matter of public record.

Dated: Signed at Washington, DC, on this 6th day of August, 2012.

Jane Oates,

Assistant Secretary for Employment and Training, Labor.

[FR Doc. 2012–19708 Filed 8–10–12; 8:45 am]

BILLING CODE 4510–FW–P

DEPARTMENT OF LABOR

Employment and Training Administration

Comment Request for Information Collection for Applications, Grants and Administration of Short Time Compensation (STC) Provisions, Extension Without Revisions

AGENCY: Employment and Training Administration (ETA), Labor.

ACTION: Notice.

SUMMARY: The Department of Labor (Department), as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 [44 U.S.C. 3506(c)(2)(A)]. This program helps ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

ETA is soliciting comments concerning the continuation of the collection of data concerning administration of recent changes and grants for the expansion of STC beyond the current expiration date of 12/31/2012.

DATES: Written comments must be submitted to the office listed in the addresses section below on or before October 12, 2012.

ADDRESSES: Submit written comments to Scott Gibbons, Office of Unemployment Insurance, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210. Telephone number: 202–693–3008 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–877–889–5627 (TTY/TDD). Email: *gibbons.scott@dol.gov*. A copy of the proposed information collection request (ICR) can be obtained by contacting Mr. Gibbons.

SUPPLEMENTARY INFORMATION:

I. Background

The recent enactment of Public Law 112–96 (The Middle Class Tax Relief and Job Creation Act of 2012, referred to hereafter as ''MCTRJC'' or ''the act'') contains Subtitle D, Short-Time Compensation Program, also known as the ''Layoff Prevention Act of 2012''. The sections of the law under this subtitle concern states that currently participate in, or wish to initiate a new program in, a layoff aversion program known as short time compensation (STC) or work sharing.

Section 2161 establishes the operational rules for the STC program and Section 2162 covers the temporary financing of STC payments by the Federal Government to states with programs currently in their law. Section 2163 establishes the temporary financing of STC payments by the Federal Government to states operating an STC program under an agreement with the Secretary of Labor and Section 2164 covers grants the Federal Government can provide to state applicants whose STC laws conform to the requirements of Section 2161 for the purpose of implementation or improved administration of an STC program, or for promotion and enrollment in the program.

Each of these sections of the law requires, to varying extents, applications, new administrative processes, monitoring and reporting of data between the state workforce agencies (SWAs) and ETA. ETA has principal oversight responsibility for the Unemployment Insurance (UI) program that SWAs operate. As a result of the many changes to the funding and administration of the UI system introduced in Public Law 112–96, ETA needs to allow for additional reporting and data collection for proper oversight of state STC programs.

II. Review Focus

The Department is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

III. Current Actions

Type of Review: Extension without changes.

Title: Applications, Grants and Administration of Short Time Compensation (STC) Provisions.

OMB Number: 1205–0499.

Affected Public: State Workforce Agencies.

Total Annual Burden Cost for Respondents: There are no burden costs.

Category (BOLD) and instruments	Respondents	Hours per response	Annualized responses	Annualized hours
States Coming Into Conformity With New Federal STC Law				
General STC UIPL: Attachment II—Text of Agreement	53	5	n/a	265
General STC UIPL: Addendum to FY2012 Annual Funding Agreement for UI Program	53	5	n/a	265
States With STC Programs Applying for Grants To Enhance or Promote Their Current Programs				
UIPL on state STC grants: Attachment 1—STC Proposal Outline for STC Applications	25	80	n/a	2,000
UIPL on state STC grants: Attachment 2—STC Application Checklist	25	80	n/a	2,000
UIPL on state STC grants: Attachment 3—Quarterly Narrative Progress Report	25	25	88	2,200
UIPL on state STC grants: Attachment 5—STC Grant Agreement	25	5	n/a	125
States Without STC Programs Applying To Operate a Federal STC Program				
Attachment 1—Implementing and Operating Instructions for Federal STC Agreement	28	80	n/a	2,240
Attachment 2—Federal-state Agreement (Draft)	28	5	n/a	140
UIPL on Federal STC: Attachment 3—Federal-state Agreement (Draft)	28	5	n/a	140
Unduplicated Totals	53			9,375

Comments submitted in response to this comment request will be summarized and/or included in the request for OMB approval of the ICR; they will also become a matter of public record.

Dated: Signed in Washington, DC, on this 6th day of August, 2012.

Jane Oates,

Assistant Secretary for Employment and Training, Labor.

[FR Doc. 2012–19707 Filed 8–10–12; 8:45 am]

BILLING CODE 4510–FW–P

DEPARTMENT OF LABOR

Employment and Training Administration

Comment Request for Information Collection for Reemployment Services and Outcomes for Unemployment Insurance (UI) Claimants in Federal Programs, Extension Without Revisions

AGENCY: Employment and Training Administration (ETA), Labor.

ACTION: Notice.

SUMMARY: The Department of Labor (Department), as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 [44 U.S.C. 3506(c)(2)(A)]. This program helps ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

ETA is soliciting comments concerning the continuation of the collection of data about reemployment services and outcomes for UI claimants in Federal programs beyond the current expiration date of 10/31/2012.

DATES: Written comments must be submitted to the office listed in the addresses section below on or before October 12, 2012.

ADDRESSES: Submit written comments to Scott Gibbons, Office of Unemployment Insurance, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210. Telephone number: 202–693–3008 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–877–889–5627 (TTY/TDD). Email: *gibbons.scott@dol.gov*. A copy of the proposed information collection request (ICR) can be obtained by contacting Mr. Gibbons.

SUPPLEMENTARY INFORMATION:

I. Background

ETA is seeking to renew a collection of information for the purposes of describing reemployment activities for UI claimants in Federal programs. The basic report format is very similar to the existing ETA 9002 report (Office of Management and Budget number 1205–0240) that covers quarterly performance data for Wagner-Peyser Act funded public labor exchange. ETA has well established reporting instructions, reporting software, reporting formats and reporting logic that is used for existing reemployment service delivery reporting for UI claimants, and ETA uses this existing structure to serve UI claimants in Federal programs, as required by Section 2142 of the Middle Class Tax Relief and Job Creation Act of 2012 (Pub. L. 112–96). ETA believes that the use of an existing standard in reporting for reemployment service delivery minimizes the burden on states as they seek to rapidly implement the requirements of Public Law 112–96. ETA believes that adapting an existing, approved reporting structure that is extensively used, well tested and well understood presents the best, and possibly only option, for collecting meaningful performance and evaluation data on this program.

II. Review Focus

The Department is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary

for the proper performance of the functions of the agency, including whether the information will have practical utility;

• Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

• Enhance the quality, utility, and clarity of the information to be collected; and

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

III. Current Actions

Type of Review: Extension without changes.

Title: Reemployment Services and Outcomes for UI Claimants in Federal Programs.

OMB Number: 1205–0493.

Affected Public: State Workforce Agencies.

Form(s): ETA 9002 EUC.

Respondent type	Respondents	Hours per response	Annualized responses	Annualized hours
Job Seeker Collection Burden	3,500,000	0.0333	1 per claimant.	116,667
Quarterly Reporting Burden for SWAs	53	80	4	16,960
Unduplicated Totals	3,500,053			133,627

Total Annual Burden Cost for Respondents: There is no burden cost.

Comments submitted in response to this comment request will be summarized and/or included in the request for OMB approval of the ICR; they will also become a matter of public record.

Dated: Signed in Washington, DC, on this 6th day of August, 2012.

Jane Oates,

Assistant Secretary for Employment and Training, Labor.

[FR Doc. 2012–19705 Filed 8–10–12; 8:45 am]

BILLING CODE 4510–FW–P

NATIONAL SCIENCE FOUNDATION

National Science Board; Sunshine Act Meetings; Notice

The National Science Board, pursuant to NSF regulations (45 CFR part 614), the National Science Foundation Act, as amended (42 U.S.C. 1862n-5), and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of a teleconference meeting of the Committee on Programs and Plans (CPP) for the transaction of National Science Board business.

AGENCY HOLDING MEETING: National Science Board.

DATE AND TIME: Thursday, August 16, 2012 from 1:00–2:00 p.m.

SUBJECT MATTER: Chairman's remarks and a proposal for approval of revisions to the Advanced Laser Interferometer Gravity Wave Observatory (AdvLIGO).

STATUS: Closed.

PLACE: This meeting will be held by teleconference originating at the National Science Board Office, National Science Foundation, 4201Wilson Blvd., Arlington, VA 22230.

UPDATES: Please refer to the National Science Board Web site *www.nsf.gov/nsb* for additional information. Meeting information and schedule updates (time, place, subject matter or status of meeting) may be found at *http://www.nsf.gov/nsb/notices/*.

AGENCY CONTACT: Jacqueline Meszaros, *jmeszaro@nsf.gov*, (703) 292–7000.

Ann Bushmiller,

NSB Senior Legal Counsel.

[FR Doc. 2012–19921 Filed 8–9–12; 4:15 pm]

BILLING CODE 7555–01–P

NATIONAL TRANSPORTATION SAFETY BOARD

Sunshine Act Meeting

TIME AND DATE: 9:30 a.m., Monday, August 27, 2012.

PLACE: NTSB Conference Center, 429 L'Enfant Plaza SW., Washington, DC 20594.

STATUS: The ONE item is open to the public.

MATTER TO BE CONSIDERED: 8349C Aviation Accident Brief—WPR11MA454: North American P–51D, N79111, Race 177, ''The Galloping Ghost,'' Reno, Nevada, September 16, 2011.

NEWS MEDIA CONTACT: Telephone: (202) 314–6100.

The press and public may enter the NTSB Conference Center one hour prior to the meeting for set up and seating.

Individuals requesting specific accommodations should contact Rochelle Hall at (202) 314–6305 by Friday, August 24, 2012.

The public may view the meeting via a live or archived webcast by accessing a link under ''News & Events'' on the NTSB home page at *www.ntsb.gov.*

Schedule updates including weather-related cancellations are also available at *www.ntsb.gov.*

FOR MORE INFORMATION CONTACT: Candi Bing, (202) 314–6403 or by email at *bingc@ntsb.gov.*

FOR MEDIA INFORMATION CONTACT: Terry Williams (202) 314–3126 or by email at *williat@ntsb.gov.*

Dated: Thursday, August 9, 2012.

Candi R. Bing,

Federal Register Liaison Officer.

[FR Doc. 2012–19882 Filed 8–9–12; 4:15 pm]

BILLING CODE 7533–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2012–0159]

Fuel Oil Systems for Emergency Power Supplies

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft regulatory guide; extension of comment period.

SUMMARY: On July 5, 2012 (77 FR 39745), the U.S. Nuclear Regulatory Commission (NRC or the Commission) issued Draft Regulatory Guide, DG–1282, ''Fuel Oil Systems for Emergency Power Supplies,'' in the **Federal Register** for a 60 day public comment period. The NRC is extending the public comment period for DG–1282 from August 31, 2012 to September 28, 2012. This guide describes a method that the NRC staff considers acceptable for use in complying with the Commission's

requirements regarding fuel oil systems for safety-related emergency diesel generators and oil-fueled gas turbine generators, including assurance of adequate fuel oil quality.

DATES: Submit comments by September 28, 2012. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date. Although a time limit is given, comments and suggestions in connection with items for inclusion in guides currently being developed or improvements in all published guides are encouraged at any time.

ADDRESSES: You may access information and comment submissions related to this document, which the NRC possesses and is publicly available, by searching on *http://www.regulations.gov* under Docket ID NRC–2012–0159. You may submit comments by any of the following methods:

- *Federal Rulemaking Web Site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0159. Address questions about NRC dockets to Carol Gallagher; telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov*.
- *Mail comments to:* Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, Mail Stop: TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.
- *Fax comments to:* RADB at 301–492–3446.

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: Mark Orr, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–251–7495; email: *Mark.Orr@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Accessing Information and Submitting Comments

A. Accessing Information

Please refer to Docket ID NRC–2012–0159 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 are publicly available, by any of the following methods:

- *Federal Rulemaking Web Site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0159.
- *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 draft regulatory guide is available electronically under ADAMS Accession Number ML121090447. The regulatory analysis is also available under ADAMS Accession Number ML121090459.
- *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–2012–0159 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 in comment submissions that you do not want to be publicly disclosed. The NRC posts all comment submissions at *http://www.regulations.gov* as well as enters the comment submissions into ADAMS. The NRC does not 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 in their comment submissions that they do not want to be publicly disclosed. Your request should state that the NRC will not edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment submissions into ADAMS.

II. Background

On July 5, 2012 (77 FR 39745), the NRC published a notice of issuance and availability of DG–1282. By email dated July 27, 2012, the Nuclear Energy Institute (ADAMS Accession No. ML12214A372) requested an extension of the stated comment period for the purpose of providing sufficient review to ensure that the changes incorporated in the draft guidance adequately reflect the contemporary practices it purports to address. It is the desire of the NRC to receive comments of a high quality from all stakeholders. Several factors have been considered in granting an extension. The requested comment period extension is reasonable and does not affect NRC deadlines. The additional time will allow stakeholders to discuss the proposed guide during related meetings. Therefore the comment submittal period is extended from the original date of August 31, 2012 to September 28, 2012.

Dated at Rockville, Maryland, this 3rd day of August, 2012.

For the Nuclear Regulatory Commission.

Thomas H. Boyce,

Chief, Regulatory Guide development Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. 2012–19770 Filed 8–10–12; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2012–37 and CP2012–45; Order No. 1423]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recently-filed Postal Service request to add Priority Mail Contract 39 the competitive product list. This notice addresses procedural steps associated with this filing.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov*. Commenters who cannot submit their views electronically should contact the person identified in **FOR FURTHER INFORMATION CONTACT** by telephone for advice on alternatives to electronic filing.

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

SUPPLEMENTARY INFORMATION:

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I. Introduction
II. Background
III. Ordering Paragraphs

I. Introduction

In accordance with 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.,* the Postal Service filed a formal request and associated supporting information to add Priority Mail Contract 39 to the competitive product list.[1] The Postal

[1] Request of the United States Postal Service To Add Priority Mail Contract 39 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision Contract, and Supporting Data, August 3, 2012 (Request).

Service asserts that Priority Mail Contract 39 is a competitive product ''not of general applicability'' within the meaning of 39 U.S.C. 3632(b)(3). Request at 1. The Request has been assigned Docket No. MC2012–37.

The Postal Service contemporaneously filed a redacted contract related to the proposed new product under 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5. *Id.* Attachment B. The instant contract has been assigned Docket No. CP2012–45.

Request. To support its Request, the Postal Service filed six attachments as follows:

- Attachment A—a redacted copy of Governors' Decision No. 11–6, authorizing the new product;
- Attachment B—a redacted copy of the contract;
- Attachment C—proposed changes to the Mail Classification Schedule competitive product list with the addition underlined;
- Attachment D—a Statement of Supporting Justification as required by 39 CFR 3020.32;
- Attachment E—a certification of compliance with 39 U.S.C. 3633(a); and
- Attachment F—an application for non-public treatment of materials to maintain redacted portions of the contract and related financial information under seal.

In the Statement of Supporting Justification, Dennis R. Nicoski, Manager, Field Sales Strategy and Contracts, asserts that the contract will cover its attributable costs, make a positive contribution to covering institutional costs, and increase contribution toward the requisite 5.5 percent of the Postal Service's total institutional costs. *Id.* Attachment D at 1. Mr. Nicoski contends that there will be no issue of market dominant products subsidizing competitive products as a result of this contract. *Id.*

Related contract. The Postal Service included a redacted version of the related contract with the Request. *Id.* Attachment B. The contract is scheduled to become effective on the business day after the Commission issues all necessary regulatory approvals. *Id.* at 4. The contract will expire 3 years from the effective date unless, among other things, either party terminates the agreement upon 30 days' written notice to the other party. *Id.* The Postal Service represents that the contract is consistent with 39 U.S.C. 3633(a). *Id.* Attachment D.

The Postal Service filed much of the supporting materials, including the related contract, under seal. *Id.* Attachment F. It maintains that the redacted portions of the contract, customer-identifying information, and related financial information, should remain confidential. *Id.* at 3. This information includes the price structure, underlying costs and assumptions, pricing formulas, information relevant to the customer's mailing profile, and cost coverage projections. *Id.* The Postal Service asks the Commission to protect customer-identifying information from public disclosure indefinitely. *Id.* at 7.

II. Notice of Filings

The Commission establishes Docket Nos. MC2012–37 and CP2012–45 to consider the Request pertaining to the proposed Priority Mail Contract 39 product and the related contract, respectively.

Interested persons may submit comments on whether the Postal Service's filings in the captioned dockets are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642, 39 CFR 3015.5, and 39 CFR part 3020, subpart B. Comments are due no later than August 14, 2012. The public portions of these filings can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints Natalie Rea Ward to serve as Public Representative in these dockets.

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket Nos. MC2012–37 and CP2012–45 to consider the matters raised in each docket.

2. Pursuant to 39 U.S.C. 505, Natalie Rea Ward is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.

3. Comments by interested persons in these proceedings are due no later than August 14, 2012.

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

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2012–19709 Filed 8–10–12; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service.™

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* August 13, 2012.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on August 3, 2012, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service To Add Priority Mail Contract 39 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2012–37, CP2012–45.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2012–19722 Filed 8–10–12; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Express Mail Negotiated Service Agreement

AGENCY: Postal Service.™

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* August 13, 2012.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on August 3, 2012, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service To Add Express Mail Contract 12 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2012–36, CP2012–44.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2012–19724 Filed 8–10–12; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67606; File No. SR–ISE–2012–69]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Expose Non-Customer Orders Subject to Automatic Rejection to Its Members for Potential Execution at the NBBO or Better

August 7, 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 July 30, 2012, the International Securities Exchange, LLC (the ''Exchange'' or the ''ISE'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which items have been prepared by the 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 provide an opportunity for Non-Customer orders to be exposed for execution on the Exchange before being rejected when execution of the order would trade through a better price on another exchange or placing the order on the book would lock or cross another market. The text of the proposed rule change is available on the Exchange's Web site (*http://www.ise.com*), at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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.

[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

Under the intermarket linkage rules, the ISE cannot execute orders at a price that is inferior to the national best bid or offer (''NBBO''), nor can the Exchange place an order on its book that would cause the ISE best bid or offer to lock or cross another exchange's quote.[3] How the Exchange handles orders in these circumstances depends on whether they are Public Customer Orders (*i.e.,* orders for the account of a person that is not a broker-dealer) [4] or Non-Customer Orders (*i.e.,* orders for the account of a broker-dealer).[5] Non-Customer Orders are rejected automatically upon receipt, whereas Public Customer Orders are handled by the Primary Market Maker,[6] which has the responsibility of either executing the Public Customer Order at a price that at least matches the NBBO or obtaining better prices from the away market(s) by sending one or more intermarket sweep orders (''ISOs'') on the Public Customer's behalf.[7] Before the Primary Market Maker sends ISOs to other exchanges in these circumstances, Public Customer Orders are exposed to all ISE Members for up to one second to give them an opportunity to execute the Public Customer Order at the NBBO price or better.[8]

Under the proposed rule change, the Exchange seeks to provide Non-Customer Orders an opportunity to be executed on the ISE before automatically rejecting the order, similar to the process used to expose Public Customer Orders before ISOs orders are sent to other exchanges. Specifically, instead of automatically rejecting a Non-Customer Order in the circumstances described above, the Exchange proposes to expose Non-Customer Orders to all members for up to one second. The Exchange will reject any unexecuted balance of the Non-Customer Order at the end of the exposure period unless it can be placed on the ISE book without locking or crossing another exchange's quotes.[9] While the default under the proposal is for Non-Customer Orders to be exposed, members may instruct the Exchange not to expose Non-Customer Orders.[10] As a result, this proposed change will have no impact on Non-Customers that prefer to have their orders rejected immediately upon entry as they are currently.

The Exchange anticipates implementing the new system functionality for the proposed rule change in August 2012. Prior to implementation, the Exchange will issue a circular to all members informing them of the date on which the new functionality will become available.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act [11] in general, and furthers the objectives of Section 6(b)(5) of the Act [12] in particular, in that it is designed to promote just and equitable principles of trade, 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. The proposed rule change will provide Non-Customer Orders a greater opportunity to receive an execution on the ISE at the NBBO or better. Due to differences in execution fees among the options exchanges, the Exchange believes that some Non-Customers would prefer to have their orders executed on the ISE if possible. However, the Exchange also believes that some Non-Customers prefer not to have their orders delayed in any manner. Accordingly, the proposed rule change allows members to choose whether Non-Customers Orders should be rejected upon entry as they are currently, or whether they should be exposed on the Exchange before being rejected. Thus, the Exchange believes the proposed rule change will benefit Non-Customers by giving them greater control over the processing of their orders.

[3] ISE Rule 1901 and 1902.

[4] ISE Rule 100(a)(39).

[5] ISE Rule 100(a)(28).

[6] ISE Rule 714(a).

[7] ISE Rule 803(c)(2).

[8] Supplementary Material .02 to Rule 803. The exposure period for Public Customer Orders currently is 150 milliseconds.

[9] The Exchange proposes to amend Supplementary Material .02 to Rule 803 to provide for the exposure of Non-Customer Orders. The proposed changes differentiate the handling of Non-Customer Orders from Public Customer Orders, as Primary Market Makers are not responsible for providing NBBO price protection to Non-Customer Orders. Primary Market Makers will not handle Non-Customer Orders under the proposed exposure process for Non-Customer Orders.

[10] The Commission has previously approved the exposure of Non-Customer Orders when an exchange is not at the NBBO. CBOE Rule 6.14A(a) (providing that the CBOE may designate eligible order origin code, including non-market maker broker-dealer, and class in which HAL2 is activated).

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

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 for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [13] and Rule 19b–4(f)(6) thereunder.[14] 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–ISE–2012–69 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–ISE–2012–69.* 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–ISE–2012–69 and should be submitted on or before September 4, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–19739 Filed 8–10–12; 8:45 am]

BILLING CODE 8011–01–P

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(6). As required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67616; File No. SR–NYSEArca-2012–66]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To List and Trade Shares of iShares Copper Trust Pursuant to NYSE Arca Equities Rule 8.201

August 8, 2012.

I. Introduction

On June 19, 2012, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares (''Shares'') of iShares Copper Trust (''Trust'') pursuant to NYSE Arca Equities Rule 8.201. The proposed rule change was published for comment in the **Federal Register** on June 27, 2012.[3] The Commission received one comment letter on the proposed rule change.[4]

This order institutes proceedings under Section 19(b)(2)(B) of the Act to determine whether to approve or disapprove the proposed rule change. The institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved, nor does it mean that the Commission will ultimately disapprove the proposed rule change. Rather, as described in greater detail below, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

II. Description of the Proposal

The Exchange proposes to list and trade the Shares under NYSE Arca Equities Rule 8.201, which governs the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 67237 (June 22, 2012), 77 FR 38351 (''Notice'').

[4] *See* letter from Robert B. Bernstein, Vandenberg & Feliu, LLP (''V&F''), to Elizabeth M. Murphy, Secretary, Commission, dated July 18 2012 (''July 18 V&F Letter''). The July 18 V&F Letter is available at *http://www.sec.gov/comments/sr-nysearca-2012-66/nysearca201266-1.pdf.* V&F identified itself as a U.S. law firm that represents RK Capital LLC, an international copper merchant, and four end-users of copper: Southwire Company, Encore Wire Corporation, Luvata, and AmRod. V&F states that these companies collectively comprise about 50% of the copper fabricating capacity of the United States. *See* July 18 V&F Letter at 1.

listing and trading of commodity-based trust shares. BlackRock Asset Management International Inc. is the sponsor of the Trust (''Sponsor''). The Bank of New York Mellon is the trustee of the Trust (''Trustee''). Metro International Trade Services LLC is the custodian of the Trust (''Custodian'').

The Trust's investment objective is for the value of the Shares to reflect, at any given time, the value of the copper owned by the Trust at that time, less the Trust's expenses and liabilities at that time. The Trust would not be actively managed and would not engage in any activities designed to obtain a profit from, or to prevent losses caused by, changes in the price of copper.

The Trust will create Shares only in exchange for copper that: (1) Meets the requirements to be delivered in settlement of copper futures contracts traded on the LME; and (2) is eligible to be placed on London Metal Exchange (''LME'') warrant at the time it is delivered to the Trust.[5] The Trust expects to create and redeem Shares on a continuous basis but only with authorized participants in blocks of five or more baskets of 2,500 Shares each.[6] Unless otherwise instructed by the Trustee, no copper held by the Custodian on behalf of the Trust may be on LME warrant.[7] The Custodian may keep the Trust's copper at locations within or outside the United States that are agreed from time to time by the Custodian and the Trustee. As of the date of the Registration Statement,[8] the Custodian is authorized to hold copper owned by the Trust at warehouses located in: East Chicago, Indiana; Mobile, Alabama; New Orleans, Louisiana; Saint Louis, Missouri; Hull, England; Liverpool, England; Rotterdam, Netherlands; and Antwerp, Belgium (collectively, ''Approved Warehouses''). Unless otherwise agreed in writing by the Trustee, each of the warehouses where the Trust's copper will be stored must be LME-approved at the time copper is delivered to the Custodian for storage in such warehouse.

The net asset value (''NAV'') of the Trust will be calculated as promptly as practicable after 4:00 p.m. EST on each business day. The Trustee will value the Trust's copper at that day's announced LME Bid Price.[9] If there is no announced LME Bid Price on a business day, the Trustee will be authorized to use the most recently announced LME Bid Price unless the Sponsor determines that such price is inappropriate as a basis for valuation.[10]

NYSE Arca indicates that it will require that a minimum of 100,000 Shares be outstanding at the start of trading,[11] which represents 1,000 metric tons of copper. The Trust seeks to register 12,120,000 Shares,[12] which represents 121,200 metric tons of copper.

The Exchange states that it intends to utilize appropriate surveillance procedures applicable to derivative products, including commodity-based trust shares, to monitor trading in the Shares, and represents that such procedures will be adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.[13] The Exchange further represents that all trading in the Shares will be subject to applicable surveillance procedures.[14] In discussing its ability to obtain information relevant to trading of the Shares on its facilities, the Exchange states that it is able to obtain information: (1) Regarding trading in physical copper, the Shares, and other copper derivatives by ETP Holders acting as registered market makers, pursuant to NYSE Arca Equities Rule 8.201(g); (2) from the LME, with which the Exchange has a comprehensive surveillance sharing agreement that applies with respect to trading in copper and copper derivatives; and (3) via the Intermarket Surveillance Group (''ISG'') from other exchanges who are members of the ISG, of which CME Group, Inc., which includes Commodity Exchange, Inc. (''COMEX''), is a member.[15]

The Notice and the Registration Statement include additional information regarding: The Trust; the Shares; the Trust's investment objectives, strategies, policies, and restrictions; fees and expenses; creation and redemption of Shares; the physical copper market; availability of information; trading rules and halts; and surveillance procedures.[16]

III. Summary of V&F's Comments

V&F opposes the proposed rule change.[17] As discussed in greater detail below, V&F states its belief that the issuance by the Trust of all of the Shares covered by the Registration Statement within a short period of time would result in: (1) A material reduction in the immediately available supply of global copper; (2) increased volatility in the price of copper, which would in turn significantly harm the U.S. economy; and (3) a destabilization of the physical copper market that would make it more susceptible to manipulation.

A. Adverse Copper Market Impact

1. Impact on Supply of Copper Available for Immediate Delivery

V&F states that almost all of the refined copper produced annually worldwide is subject to long-term delivery contracts with copper fabricating companies, and that at any given time, there is only a limited supply of copper available for immediately delivery.[18] In particular, according to V&F, most American copper fabricators enter into long-term supply contracts for ''about 85% of their annual requirements.'' [19] V&F states that U.S. copper fabricators depend on the market for copper available for immediate delivery to ''protect against the risk of reductions in demand for product without having to incur the added expense of storing inventory they cannot use.'' [20]

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[5] *See* Notice, *supra* note 3, 77 FR at 38356.

[6] *See id.*

[7] *See id.*

[8] Pre-Effective Amendment No. 4 to Form S–1 for iShares Copper Trust, filed with the Commission on September 2, 2011 (No. 333–170131) (''Registration Statement'').

[9] The ''LME Bid Price'' is announced by the LME at 1:20 p.m. London Time and represents the price that a buyer is willing to pay to receive a warrant in any warehouse within the LME system. *See* Notice, *supra* note 3, 77 FR at 38356 n. 25.

[10] *See id.* at 38358.

[11] *See id.* at 38359.

[12] *See* Registration Statement, *supra* note 8.

[13] *See* Notice, *supra* note 3, 77 FR at 38360.

[14] *See id.*

[15] *See id.*

[16] *See* Notice and Registration Statement, *supra* notes 3 and 8, respectively.

[17] The Commenter also opposes a separate pending proposed rule change by NYSE Arca to list and trade shares of the JPM Copper Trust (''JPM Copper Trust Proposal''). *See generally* Securities Exchange Act Release No. 67470 (July 19, 2012), 77 FR 43620 (July 25, 2012). In the July 18 V&F Letter, V&F incorporated by reference a letter it submitted in opposition to the JPM Copper Trust Proposal, which was received by the Commission on May 9, 2012 (''May 9 V&F Letter''). *See* July 18 V&F Letter, *supra* note 4, at 5. The May 9 V&F Letter is available at *http://www.sec.gov/comments/sr-nysearca-2012-28/nysearca201228.shtml.* V&F also attached to the July 18 V&F Letter (1) another letter dated July 13, 2012 that it submitted in opposition to the JPM Copper Trust Proposal (''July 13 V&F Letter''); and (2) a letter from U.S. Senator Carl Levin dated July 16, 2012 submitted in opposition to the JPM Copper Trust Proposal (''Senator Levin Letter''). *See id.* The July 13 V&F Letter and the Senator Levin Letter are available, along with the July 18 V&F Letter, at *http://www.sec.gov/comments/sr-nysearca-2012-66/nysearca201266-1.pdf.* Additionally, the July 13 V&F Letter and the Senator Levin Letter are available at *http://www.sec.gov/comments/sr-nysearca-2012-28/nysearca201228-5.pdf* and *http://www.sec.gov/comments/sr-nysearca-2012-28/nysearca201228-6.pdf,* respectively.

[18] *See* July 18 V&F Letter, *supra* note 4, at 1.

[19] *Id.* at 4.

[20] *Id.* at 4–5. Additionally, V&F states that copper stored at LME warehouses usually is deposited there by producers with excess supply or by copper merchants looking for purchasers and is sold to traders seeking to close out short positions or to

V&F believes that the only refined copper generally available for immediate delivery is the copper in LME and COMEX warehouses.[21] V&F states that, at present, there is only approximately 240,000 metric tons of copper in LME warehouses worldwide, and an additional 60,000 metric tons of copper in COMEX warehouses in the United States, or about 290,000 total metric tons of copper available for immediate delivery.[22] V&F states that as much as 121,200 metric tons of immediately available copper would be removed from the market if the Trust sells all of the Shares it seeks to register pursuant to the Registration Statement.[23] Taking into account the sale of all of the shares of the JPM Copper Trust, another proposed commodity-based exchange traded product (''CB–ETP'') that would hold physical copper,[24] V&F states that as much as 183,000 metric tons, or 63%, of immediately available copper would be removed from the market.[25]

V&F also expects that much of the copper used to fund the Trust will come from the immediately available supply in the U.S., stating:

> What is more, these effects are, as a practical matter, most likely to be felt most directly in the United States. The reason is that, as with the JPM offering, the copper that is cheapest to acquire will most likely be copper on warrant in United States warehouses. This is because, for the most part, the cheapest location premiums for copper on warrant is from copper in LME warehouses in the United States. The ''Authorized Participants,'' like Goldman Sachs, who will be authorized to acquire copper for the BlackRock Trust will want to acquire copper at the cheapest location premiums possible in order for the price of ETF shares to be issued in exchange for the copper to mirror as closely as possible, the price per metric ton of copper on the LME. Thus, depletion of copper from the LME warehouses will most likely be felt the hardest in the United States and, once copper from the LME warehouses is depleted, copper from the Comex warehouses will be depleted as well, as copper there is moved to LME warehouses in order to take advantage of higher prices.[26]

V&F further states that the collective effect of the Copper Trusts would be ''far-reaching and potentially devastating to the U.S. and world economies,'' and could cause ''shortages of copper, higher prices to consumers, and increased volatility.'' [27]

V&F asserts that the supply of copper generally is inelastic and that supply, therefore, will not increase fast enough to account for the increased demand from the creation and growth of the Trust.[28] V&F further states that U.S. producers do not have surplus product to deliver and therefore asserts that, once copper stored in warehouses disappears, it likely will not be replenished any time soon.[29]

V&F states that the Registration Statement ''tries to convey the false impression that because there is copper tonnage outside of LME and Comex warehouses, such copper must therefore be available for [the Trust] to acquire.''[30] V&F states that the only copper eligible for Share creation is copper already under LME warrant or stored in COMEX warehouses,[31] and that all other eligible copper is unavailable because it is: (1) Already part of the supply chain and subject to long-term contracts between producers and consumers; (2) held in bonded warehouses in China and destined for the Chinese market; [32] or (3) held as strategic reserves by the governments of China and South Korea.[33]

V&F also believes that investors' ability to redeem Shares for the Trust's physical copper would not mitigate the impact of removing substantial quantities of copper from the market.[34] According to V&F, most investors in a copper-backed CB–ETP would not have any real economic incentive to redeem their Shares because: (1) They would benefit from a rise in the price of copper; and (2) investors seeking to recognize their profits likely would sell their Shares rather than redeeming them because redeeming them would require assuming delivery risk.[35]

2. Impact on Copper Prices

According to V&F, removing large amounts of copper from LME and COMEX warehouses would disrupt the supply of copper available for immediate delivery and thereby cause a substantial rise in near-term copper prices.[36] V&F argues that this also would cause an immediate spike in the cash-to-three-month spread price of copper, as near-term prices for delivery accelerate compared to prices for delivery later in time.[37] V&F is concerned that manufacturers and fabricators that rely on the supply of copper available in LME warehouses would be forced to pay substantially higher prices in the short term, and, in turn, manufacturers and fabricators would pass these price increases on to their customers.[38]

According to V&F, price increases both for copper and copper products will be especially dramatic in the U.S., where copper currently is relatively

fabricators in sudden need of additional supply. *See* May 9 V&F Letter, *supra* note 17, at 3.

[21] *See* July 18 V&F Letter, *supra* note 4, at 1.

[22] *See id.*

[23] *See id.*

[24] *See supra* note 17. *See also* Securities and Exchange Act Release No. 66816 (April 16, 2012), 77 FR 23772 (April 20, 2012) (SR–NYSEArca–2012–28) (notice of the JPM Copper Trust Proposal) (''JPM Notice''). Recently, the Commission instituted proceedings to determine whether to approve or disapprove the JPM Copper Trust Proposal. *See* Securities and Exchange Act Release No. 67470, *supra* note 17. The Trust and the JPM Copper Trust are referred to collectively as the ''Copper Trusts.''

[25] *See* July 18 V&F Letter, *supra* note 4, at 1. The Senator Levin Letter, which V&F attached to the July 18 V&F Letter, states that, if the Commission approves the listing and trading of the shares of the Copper Trusts, the trusts would hold approximately 34% of the copper stocks available for immediate delivery and would remove from the U.S. market over 55% of the available copper. *See* Senator Levin Letter, *supra* note 17, at 5–6.

[26] *See* July 18 V&F Letter, *supra* note 4, at 4.

[27] May 9 V&F Letter, *supra* note 17, at 10. The Senator Levin Letter, which V&F attached to the July 18 V&F Letter, asserts that there is ample evidence that the potentially smaller JPM Copper Trust would disrupt the supply of copper by removing from the market a substantial percentage of the copper available for immediate delivery. *See* Senator Levin Letter, *supra* note 17, at 1.

[28] *See* May 9 V&F Letter, *supra* note 17, at 5 (''[I]t is difficult for copper producers to increase supply, sometimes taking 15 years or longer before a new mine is opened up, and even in areas where copper is considered plentiful, political instability can keep a mine from producing''). Further, V&F states that the consensus among experts is that copper is in deficit, has been in deficit for the past three years, and is expected to remain in deficit for at least the next couple of years. *See id.* at 3. The Senator Levin Letter, which V&F attached to the July 18 V&F Letter, also states that the copper market is inelastic. *See* Senator Levin Letter, *supra* note 17, at 3.

[29] May 9 V&F Letter, *supra* note 17, at 5.

[30] July 18 V&F Letter, *supra* note 4, at 2.

[31] *See id. See also* Senator Levin Letter, *supra* note 17, at 5 (''[I]t appears that most of the remaining copper stocks available for immediate delivery are on the LME and [COMEX]'').

[32] V&F asserts such copper is delivered only rarely to LME warehouses in Asia. *See* July 18 V&F Letter, *supra* note 4, at 2.

[33] *See id.*

[34] *See* May 9 V&F Letter, *supra* note 17, at 5.

[35] *See id.* V&F believes that it is unlikely that fabricators would use Shares to manage their inventory because doing so: (1) Would add cost and risk to fabricators who otherwise would simply purchase available stocks from LME warehouses; (2) may not have any appreciable effect on price or supply in a rising market with tight supply; and (3) would be an inefficient and perhaps impracticable way of obtaining copper because the copper delivered by the Trust may be warehoused in an unhelpful location (*e.g.,* a fabricator in Alabama may need copper in New Orleans, not Shanghai) or of an unacceptable brand or quality. *See id.* at 5–6.

[36] *See id.* at 5.

[37] *See id.*

[38] *See id. See also* July 18 V&F Letter, *supra* note 4, at 4 (''The principal victims will in the first instance be United States consumers who typically rely on supplies of copper for immediate delivery to augment their long-term supply. These fabricators will not only be forced to pay higher prices, and incur the risk of price volatility once prices collapse, but there may be periods of time when those who can least afford it will be unable to get supply.'')

inexpensive.[39] V&F states that U.S. copper fabricators will be forced to pay more for copper and in some instances may not be able to purchase the copper they need.[40] According to V&F:

> [m]anufacturers and fabricators will have to pass these increases in price on to their customers, and because it is the U.S. supplies that will be hit the hardest, it will be U.S. consumers that will be hit the hardest. Everything that requires copper, including copper pipes in new homes, to copper wiring for electricity, to the copper used in the air conditioning units and also in automotive wiring, will all increase in price.'' [41]

V&F believes that the ''chief beneficiary'' of a tighter copper supply in the U.S. will likely be competitors in China, because Chinese manufacturers will have the copper feedstock on hand to produce copper rod, tubing, and wire, while at least some of their American counterparts will not.[42]

V&F quotes several statements from the Registration Statement to support its conclusion about the Trust's impact on copper prices, including the following statement that:

> a very enthusiastic reception of the Shares by the market, or the proliferation of similar investment vehicles that issue shares backed by physical copper, would result in purchases of copper for deposit into the trust or such similar investment vehicles that could be large enough to result in an increase in the price of physical copper. If that were the case, the price of the Shares would be expected to reflect that increase.[43]

V&F also states that, because the potential size of the Trust is large relative to the size of the market for copper available for immediate delivery, even modest investor demand for the Shares could place upward pressure on the price of copper.[44]

V&F characterizes the current physical copper market as volatile, and believes that the successful creation and growth of the Trust would create a bubble, and the bursting of the bubble would result in increased price volatility in the physical copper market.[45] V&F states that investors in a copper CB–ETP would benefit immediately from any increase in the price of copper because the more copper removed from the market to satisfy the demand for the copper CB–ETP, the higher the price not only of copper, but of the copper CB–ETP itself.[46] V&F further believes that investors in the Trust would be able to measure how much impact their collective removal of copper from the supply available for immediate delivery would have on copper prices each day, and could adjust their purchasing strategies accordingly.[47]

V&F states that the copper bubble will be no different than others, predicting that, as investor demand for this product wanes, the bubble will burst, leaving in its wake a glut of physical copper that the Trust will be forced to dump on the market, causing prices to plummet, and leaving in its wake unsuspecting investors who will have lost the value of their investment.[48] In describing why the bubble it predicts will burst, V&F states that, with

> the risk of an ETF removing indefinitely all or substantially all of the copper available for immediate delivery, the risk of price volatility becomes enormous. This is because the greater amount of copper artificially kept off-the-market, the greater the chance that investors will eventually no longer keep propping up the price with further purchases, and the greater the likelihood that the bubble will burst, thus flooding the market with surplus copper, and severely depressing the price.[49]

3. Increased Likelihood of Copper Market Manipulation

V&F asserts generally that the tightened supply of copper it believes would be caused by fully funding the Trust would render the physical copper market more susceptible to manipulation.[50] V&F also states that copper CB–ETPs such as the Copper Trusts ''risk endangering the price discovery functions of the LME and Comex'' because they would drawdown and remove from the market of most of the copper in LME and COMEX warehouses.[51]

According to V&F, the Trust ''is unlike any other metal ETF currently listed on the Exchange and would allow speculators in the guise of purchasers of shares to create a squeeze on the market.''[52] Therefore, V&F concludes that the ''proposed rule change is therefore inconsistent with Section 6(b)(5) of the Securities Exchange Act of 1934, which requires that rules be designed to prevent manipulative acts and protect investors and the public interest.''[53]

Finally, V&F questions whether NYSE Arca's surveillance procedures are adequate to prevent fraudulent and manipulative trading in shares of the JPM Trust.[54]

B. Comparison to Other Commodity-Based Trusts

According to V&F, no ETF backed by a base metal used exclusively for industrial purposes has ever before been listed and sold on any nationally recognized exchange in the United States.[55] V&F states that gold, silver, platinum, and palladium are all precious metals that have traditionally been held for investment purposes and are currently used as currency, and, as a result, there were ample stored sources available to back physical CB–ETPs holding precious metals, such that the introduction of those CB–ETPs had virtually no impact on the available supply.[56] In contrast, V&F states that

[39] *See supra* note 26 and accompanying text.

[40] *See* July 18 V&F Letter, *supra* note 4, at 4–5.

[41] *See* May 9 V&F Letter, *supra* note 17, at 5.

[42] *See* July 18 V&F Letter, *supra* note 4, at 5. V&F also states that the launch of a copper-backed ETF is likely to upset the delicate balance of copper supplied to the United States, with potentially devastating consequences economically across a wide spectrum of industries. *See* May 9 V&F Letter, *supra* note 17, at 3.

[43] *See* July 18 V&F Letter, *supra* note 4, at 3–4.

[44] *See* July 13 V&F Letter, *supra* note 17, at 8–9.

[45] *See* May 9 V&F Letter, *supra* note 17, at 2, 9.

[46] *See id.* at 5.

[47] *See id.* at 9. V&F therefore questions whether the increased market transparency that the Exchange asserts will result from the formation and operation of the Trust (*see* Notice, *supra* note 3, 77 FR at 38361) will be in the public interest. *See* May 9 V&F Letter, *supra* note *17,* at 10.

[48] *See* May 9 V&F Letter, *supra* note *17,* at 2.

[49] *Id.* at 5. The Senator Levin Letter, which V&F attached to the July 18 V&F Letter, also makes statements about the potential effect of the JPM Copper Trust, stating that the ''supply disruption is likely to affect the cash and futures market for copper, increasing volatility and driving up [the share] price to create a bubble and burst cycle.'' *See* Senator Levin Letter, *supra* note 17, at 1.

[50] *See* May 9 V&F Letter, *supra* note 17, at 1, 10.

[51] July 18 V&F Letter, *supra* note 4, at 4.

[52] *Id.* at 5.

[53] *See id.* The Senator Levin Letter, which V&F attached to the July 18 V&F Letter, also states that the JPM Copper Trust may encourage manipulative acts by allowing ''speculators to squeeze or corner the market in copper.'' Senator Levin Letter, *supra* note 17, at 7. According to Senator Levin, market participants could use the shares to remove copper from the available supply with the intent to artificially inflate the price of copper, and this activity would go undetected by the LME because CB–ETPs currently are not subject to any form of commodity regulations. *Id.* Senator Levin states that, by holding physical copper rather than LME warrants, the Trust can control more of the available supply of copper without triggering LME reporting rules. *Id.* Senator Levin further believes that creating this market condition would be inconsistent with the requirements in Section 6(b)(5) of the Act that exchange rules be designed to prevent manipulative acts and protect investors and the public interest. *Id.*

[54] *See* May 9 V&F Letter, *supra* note 17, at 10. According to V&F, NYSE Arca's surveillance procedures are not adequate because they are the kind of garden-variety measures that are always in place to prevent collusion and other forms of manipulation by traders. *See id.*

[55] July 18 V&F Letter, *supra* note 4, at 2.

[56] *See* May 9 V&F Letter, *supra* note 17, at 2. V&F states that, unlike copper, there is enough of a supply of platinum and palladium (which are used for both industrial and investment purposes) available in storage and being produced that the introduction of CB–ETPs backed by these metals did not cause the kind of disruption to the market that a copper-backed CB–ETPs would cause. *See* July 13 V&F Letter, *supra* note 17, at 11. Specifically, V&F states that: (1) In recent years, there has been a surplus in palladium due to the

copper generally is not held as an investment, but rather is used exclusively for industrial purposes,[57] with the annual demand generally exceeding the available supply.[58]

IV. Proceedings To Determine Whether To Approve or Disapprove SR–NYSEArca–2012–66 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act [59] to determine whether this proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. As noted above, the institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described in greater detail below, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[60] the Commission is providing notice of the grounds for disapproval under consideration. The Commission believes that questions remain about whether the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act,[61] which requires that the rules of an exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

As discussed above, the Commission received one comment letter opposing the proposed rule change. V&F asserts that the successful creation of the Trust would materially reduce the supply of copper available for immediate delivery, which would increase the price of copper and volatility in the copper market, and, in turn, would harm the U.S. economy.[62] In addition, V&F argues that, by decreasing the amount of copper available for immediate delivery, the Trust will make the copper market more susceptible to manipulation.[63] V&F further believes the Exchange's surveillance procedures are inadequate to prevent fraudulent and manipulative trading in the Shares.[64]

In light of the comments received, the Commission is soliciting further comments on the proposed rule change, including comments regarding the issues already commented upon.

V. Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the concerns identified above, as well as any others they may have regarding the proposed rule change. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change is consistent with Section 6(b)(5) or any other provision of the Act, or the rules and regulations thereunder. The Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[65]

Interested persons are invited to submit written data, views and arguments regarding whether the proposed rule change should be disapproved by September 12, 2012. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by September 27, 2012.

The Commission asks that commenters address the sufficiency and merit of the proposed rule change and the comments received, in addition to any other comments they may wish to submit about the proposed rule change. The Commission requests that commenters support their responses to the questions below with empirical data sufficient to inform the Commission's decision making. In particular, the Commission seeks comment on the following:

1. In light of the comments received, the Commission is soliciting further comments regarding copper usage and supply trends. For example:

○ What was the world mine production capacity in each of the past 10 years? What data is available regarding projected world mine production over the next 3 to 5 years? What factors impact the ability to increase or decrease mine production?

○ What was the refined production in each of the past 10 years? How much of the refined production was from primary and secondary sources? What was the world refinery capacity in each of the past 10 years? What data is available regarding projected refined production over the next 3 to 5 years? What factors impact the ability to increase or decrease refinery production?

○ What was the world refined usage in each of the past 10 years? What data is available regarding projected usage over the next 3 to 5 years?

○ How much copper has been held for investment purposes over the past 10 years? How much of this copper was taken off LME warrant? How much of this copper has been eligible to be placed on LME warrant?

2. According to the International Copper Study Group (''ICSG'), world refined usage of copper exceeded world refined production by approximately 417,000 tons in 2010 and 231,000 tons in 2011, and world refined stocks decreased by 161,000 tons in 2010 and increased by 13,000 tons in 2011.[66] What factors account for refined stocks decreasing less than the deficit amount (or even increasing) in 2010 and 2011?

there is about a year's supply of platinum reserves above ground; and (3) there is only a 1–2 week supply of copper available on the LME. *See id.* Similarly, the Senator Levin Letter, which V&F attached to the July 18 V&F Letter, also states that gold, silver, platinum, and palladium are substantially different than copper because these four metals are the only precious metals that are currently treated as world currencies and commonly held for investment purposes, and as a result there are substantial existing supplies of these metals that could be acquired to back an CB–ETPs without affecting the world market price in these metals. *See* Senator Levin Letter, *supra* note 17, at 6–7.

[57] The Senator Levin Letter, which V&F attached to the July 18 V&F Letter, states that copper is not currently held for investment purposes because it is very expensive to store and difficult to transport, and there is not the same existing supply of copper for the Trust to acquire to back its CB–ETP, and concludes that holding copper for investment purposes will have a significantly greater impact on the copper market than CB–ETPs holding platinum, palladium, silver, or gold had on their respective markets and the broader economy. *See* Senator Levin Letter, *supra* note 17, at 7.

[58] *See* May 9 V&F Letter, *supra* note 17, at 2–3.

[59] 15 U.S.C. 78s(b)(2)(B). Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. *Id.* The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding. *Id.*

[60] *Id.*

[61] 15 U.S.C. 78f(b)(5).

[62] *See supra* Section III.A.1–2.

[63] *See supra* Section III.A.3.

[64] *See supra* note 54 and accompanying text.

[65] Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Public Law 94–29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[66] Press Release, ICSG, Copper: Preliminary Data for February 2012 (June 20, 2012), available at *http://www.icsg.org/index.php?option=com_content&task=view&id=63&Itemid=64.*

Are there any factors with respect to the supply of copper available for immediate delivery that the Commission should consider in evaluating the market's ability to meet demand for copper? When a deficit occurs, are copper fabricators and other end users able to access copper to meet excess demand? If so, what are the sources of that copper? How much copper is available for immediate delivery that is not on LME warrant?

3. V&F states that the Trust and the proposed JPM Copper Trust,[67] collectively, will remove from the market a substantial percentage of the copper available for immediate delivery.[68] According to V&F, the Copper Trusts would remove 63% of the copper currently held in LME and COMEX warehouses.[69] V&F states that the collective effect of the Copper Trusts would be ''far-reaching and potentially devastating to the U.S. and world economies,'' including ''shortages of copper, higher prices to consumers, and increased volatility.'' [70] Do commenters agree or disagree with these statements? If so, why or why not? For example:

○ Do commenters believe creation of the Trust will have an impact on the supply of copper? If so, what will that impact be? If not, why not?

○ How does a change in the supply of copper impact the price of copper? To what extent do copper stocks need to be reduced or increased to impact the price of copper?

○ To what extent is the LME Bid Price affected by the amount of copper on LME warrant? To what extent must copper on LME warrant be reduced to impact the LME Bid Price? To what extent, if at all, is the LME Bid Price affected by the supply of copper ineligible to be placed on LME warrant?

○ How does a change in the supply of copper impact volatility in the physical copper and copper derivatives markets?

○ Is there empirical evidence that creation of the Trust will impact copper prices and volatility? What impact, if any, will creation of the Trust have on the US economy?

4. V&F states that Shares would be created by removing copper from LME and COMEX warehouses in the United States,[71] thus driving up the cost of copper particularly in the United States.[72] According to V&F, correspondingly:

> The principal victims will * * * be United States consumers who typically rely on supplies of copper for immediate delivery to augment their long-term supply. These fabricators will not only be forced to pay higher prices, and incur the risk of price volatility once prices collapse, but there may be periods of time when those who can least afford it will be unable to get supply.[73]

Do commenters agree or disagree with these concerns? Why or why not? Additionally, what mechanisms (if any) exist to allow market participants in need of copper in a specific location to trade an LME warrant or warehouse receipt for copper at another location?

5. V&F states that the only copper eligible for Share creation is copper: (1) Already under LME warrant; (2) stored in COMEX warehouses; (3) already part of the supply chain, subject to long-term contracts between producers and consumers; (4) held in bonded warehouses in China and destined for the Chinese market, which V&F asserts is only rarely delivered to LME warehouses in Asia; or (5) held as strategic reserves by the governments of China and South Korea.[74] The Commission is soliciting further comments regarding physical copper stocks. For example:

○ How much copper is currently held in LME warehouses? How much of the copper currently held in LME warehouses is on warrant? How much copper in LME warehouses is available for investment purposes?

○ How much copper is held in COMEX, Shanghai Futures Exchange (''SHFE''), and Multi Commodity Exchange of India (''MCX'') warehouses? How much copper held in COMEX, SHFE, and MCX warehouses is eligible to be placed on LME warrant (*i.e.,* is of a brand registered with the LME)? How much of this LME warrant-eligible copper is available for investment purposes? Where is this copper located?

○ What quantity of copper stock, if any, is held in other locations that would be eligible to be placed on LME warrant (if it were located at an LME warehouse)?

○ How accessible are stocks of copper eligible to be placed on warrant that are not held in LME warehouses?

○ Are commenters aware of any activities involving the stockpiling of copper? If so, how much copper has been stockpiled? Where is such copper located? How accessible is such copper? How much of this stock was taken off LME warrant? How much of this copper is eligible to be placed on LME warrant?

6. The Custodian will store the Trust's copper in Approved Warehouses around the world.[75] What is the locational premium at each of the Approved Warehouses? What impact would changes in locational premia have on supply and demand for copper at each of the Approved Warehouses? How much copper is held at each of the Approved Warehouses? How much of the copper held at each of the Approved Warehouses is on LME warrant? How much is eligible to be placed on LME warrant? How much copper eligible for LME warrant is available for investment purposes? How much is not eligible to be placed on LME warrant?

7. The Trustee generally will value the Trust's copper at that day's announced LME Bid Price,[76] which represents the price that a buyer is willing to pay to receive a warrant in any warehouse within the LME system.[77] Given the Trust's copper will be held off LME warrant, will the LME Bid Price accurately reflect the value of the Trust's copper? Why or why not?

8. When valuing the Trust's copper, the Trustee will not take into account the location(s) of the copper. In contrast, to support the JPM Copper Proposal, NYSE Arca states that the value of copper depends in part on its location, *i.e.,* copper stored in a location that is low in supply and high in demand carries a higher premium than copper that is stored in a location where supply is high and demand is low.[78]

○ Does the value of the Trust's copper depend on its location? If so, how?

○ If so, does the LME Bid Price account for the locational premia/

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[67] *See supra* note 17. *See also* JPM Notice, *supra* note 24.

[68] The Senator Levin Letter, which V&F attached to the July 18 V&F Letter, states that the Copper Trusts would hold approximately 34% of the copper stocks available for immediate delivery and would remove from the U.S. market over 55% of the available copper. *See* Senator Levin Letter, *supra* note 17, at 5–6.

[69] *See* July 18 V&F Letter, *supra* note 4, at 1.

[70] *See* July 13 V&F Letter, *supra* note 17, at 10.

[71] V&F believes this to be true because it states that the copper that is cheapest to deliver to the Trust will most likely be on warrant in United States warehouses. *See* July 18 V&F Letter, *supra* note 4, at 4.

[72] *See id.* (''[D]epletion of copper from the LME warehouses will most likely be felt the hardest in the United States and, once copper from the LME warehouses is depleted, copper from the Comex warehouses will be depleted as well, as copper there is moved to LME warehouses in order to take advantage of higher prices'').

[73] *See id.*

[74] *See* July 18 V&F Letter, *supra* note 4, at 2. *See also* May 9 V&F Letter, *supra* note 17, at 3; July 13 V&F Letter, *supra* note 17, at 3, 5.

[75] *See* Notice, *supra* note 3, 77 FR at 38356 n.23 (as of the date of the Registration Statement, the Custodian is authorized to hold copper owned by the Trust at warehouses located in: East Chicago, Indiana; Mobile, Alabama; New Orleans, Louisiana; Saint Louis, Missouri; Hull, England; Liverpool, England; Rotterdam, Netherlands; and Antwerp, Belgium).

[76] *See id.* at 38358.

[77] *See id.* at 38356 n.25.

[78] *See* JPM Notice, *supra* note 24, 77 FR at 23779.

discounts of the Trust's copper held in various locations?

9. V&F states: ''the most obvious and freely available source'' of copper eligible to create Shares ''is copper on warrant in LME warehouses today.'' [79] V&F further states that taking copper off LME warrant would involve little or no cost if the LME warrants purchased are for copper that is stored at the Approved Warehouses.[80]

○ What costs are involved in taking copper off LME warrant? What costs are involved in putting copper on LME warrant?

○ How long does it take to take copper off LME warrant? How long does it take to put copper on LME warrant?

○ How does the cost and time required to take copper off warrant compare to the cost and time to ship copper to an Approved Warehouse?

10. The Commission understands that ETFS Physical Copper securities currently trade on the London Stock Exchange. How much copper did ETFS Physical Copper hold following the initial creation? How much copper does ETFS Physical Copper currently hold? What change, if any, was there in the price of copper following creation of ETFS Physical Copper? Did the creation of ETFS Physical Copper result in an observable impact on the copper market? Has ETFS Physical Copper engaged in the lending of copper?

11. The Commission has previously approved listing on the Exchange under NYSE Arca Equities Rule 8.201 of other issues of CB–ETPs backed by gold, silver, platinum, and palladium (collectively ''precious metals''). While these precious metals are often held for investment purposes, the Commission understands they are also used for various industrial purposes. V&F asserts that copper is used exclusively for industrial purposes and is not generally held for investment.[81] The Commission requests information regarding the production and use of precious metals. How much gold, silver, platinum, and palladium has been produced in each of the last 10 years? How much gold, silver, platinum, and palladium has been used for investment purposes in each of the last 10 years? How much gold, silver, platinum, and palladium has been used for industrial purposes in each of the last 10 years? Are there any other uses of gold, silver, platinum, and palladium relevant to understanding utilization of these precious metals? What are the current and historic stocks of gold, silver, platinum, and palladium? Is there any empirical evidence that the listing of CB–ETPs backed by gold, silver, platinum, or palladium impacted prices in these markets?

12. V&F states that creation of the Trust could result in the immediate removal of up to 121,200 metric tons of copper from the market.[82] What is the likelihood that the Trust will sell all registered Shares initially? What is the likelihood that the Trust will sell all registered Shares in the three months after the registration goes effective? How quickly did the CB–ETPs backed by gold, silver, platinum, and palladium sell the shares registered in the first registration statement?

13. V&F argues that, by decreasing the amount of copper available for immediate delivery, the Trust will make the copper market more susceptible to manipulation.[83] Specifically, V&F states that ''the drawing down of stocks in LME and Comex warehouses'' resulting from the listing and trading of the Shares ''will make it much easier and cheaper for [copper market] speculators to engage in temporary market squeezes and corners.'' [84] The Commission requests comment on these concerns, as well as whether commenters agree or disagree with the comments and why or why not. For example:

○ Will creation of the Trust impact the ability to manipulate the physical copper or copper derivatives markets? If so, how? If not, why not?

○ Has there been any increased manipulative behavior due to the reduction of copper available for immediate delivery that resulted from the prior years' deficits in copper production versus copper consumption?

○ Are there any structural aspects of the copper market that render it more or less susceptible to manipulation?

○ Is there empirical evidence that the creation of CB–ETPs backed by gold, silver, platinum, and palladium has led to manipulation of the physical markets for those precious metals? If so, please describe.

14. V&F states the listing and trading of shares of copper CB–ETPs like those ''being proposed by BlackRock and JPM—and the consequent drawdown and removal from the market of most of the copper in LME and Comex warehouses—risk endangering the price discovery functions of the LME and Comex.'' [85] V&F also states that such potential impacts of a copper CB–ETP on the copper market in turn could affect the Shares, stating:

> the risk of an ETF removing indefinitely all or substantially all of the copper available for immediate delivery, the risk of price volatility becomes enormous. This is because the greater amount of copper artificially kept off-the-market, the greater the chance that investors will eventually no longer keep propping up the price with further purchases, and the greater the likelihood that the bubble will burst, thus flooding the market with surplus copper, and severely depressing the price.[86]

V&F further states that investors in a copper CB–ETP would benefit immediately from any increase in the price of copper because the more copper removed from the market to satisfy the demand for the copper CB–ETP, the higher the price not only of copper, but of the copper CB–ETP itself.[87] According to V&F, like all bubbles, as investor demand for this product wanes, the bubble will burst, leaving in its wake a glut of physical copper that the Trust will be forced to dump on the market, causing prices to plummet, and leaving in its wake unsuspecting investors who will have lost the value of their investment.[88] Do commenters agree or disagree with these comments? If so, why or why not?

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–NYSEArca–2012–66 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.

[79] *See* July 18 V&F Letter, *supra* note 4, at 2.

[80] *See* July 13 V&F Letter, *supra* note 17, at 6.

[81] *See* May 9 V&F Letter, *supra* note 17, at 2–3.

[82] *See* July 18 V&F Letter, *supra* note 4, at 1.

[83] *See* May 9 V&F Letter, *supra* note 17, at 1, 10. *See also* July 18 V&F Letter, *supra* note 4, at 5 (''In short, the proposed ETF * * * would allow speculators in the guise of purchasers of shares to create a squeeze on the market'').

[84] May 9 V&F Letter, *supra* note 17, at 9. The Senator Levin Letter, which V&F attached to the July 18 V&F Letter, also argues that approval of the proposed rule change would make the copper market more susceptible to squeezes and corners by speculators. *See* Senator Levin Letter, *supra* note 17, at 7.

[85] July 18 V&F Letter, *supra* note 4, at 4.

[86] May 9 V&F Letter, *supra* note 17, at 5. *See also* July 18 V&F Letter, *supra* note 4, at 4 (asserting that BlackRock admits that the boom may bust, and quoting from the Registration Statement).

[87] *See* May 9 V&F Letter, *supra* note 17, at 5.

[88] *See id.* at 2. The Senator Levin Letter, which V&F attached to the July 18 V&F Letter, states that the supply disruption caused by the listing and trading of a copper CB–ETP ''is likely to affect the cash and futures market for copper, increasing volatility and driving up its price to create a bubble and burst cycle.'' *See* Senator Levin Letter, *supra* note 17, at 1.

All submissions should refer to File Number SR–NYSEArca–2012–66. These file numbers 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 filings also will be available for inspection and copying at the principal office of the Exchanges. 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–NYSEArca–2012–66 and should be submitted on or before September 12, 2012. Rebuttal comments should be submitted by September 27, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[89]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–19790 Filed 8–10–12; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67607; File No. SR–EDGA–2012–35]

Self-Regulatory Organizations; EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendments to the EDGA Exchange, Inc. Fee Schedule

August 7, 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 August 1, 2012 the EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA'') 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 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 amend its fees and rebates applicable to Members [3] of the Exchange pursuant to EDGA Rule 15.1(a) and (c). All of the changes described herein are applicable to EDGA Members. The text of the proposed rule change is available on the Exchange's Internet Web site at *http://www.directedge.com,* at the Exchange's principal office, and at the Public Reference Room of 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 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to append Footnote 18 to its standard rebate of $0.0003 per share for adding liquidity on the EDGA fee schedule to add the Step Up Tier. The Exchange also proposes to append Footnote 18 to Flags B, V, Y, 3, and 4 to signify a potential rate change should the Member meet the criteria of the Step Up Tier. Members may qualify for a rebate of $0.0005 per share on their displayed shares (Flags B, V, Y, 3, and 4) for adding liquidity to EDGA if the Member, on a daily basis, measured monthly, posts 0.10% of the Total Consolidated Volume (''TCV'') [4] in Average Daily Volume (''ADV'') more than their July 2012 ADV added to EDGA.

Because the Exchange can now differentiate non-displayed orders that add liquidity using the Mid Point Discretionary Order type [5] (Flag DM) from non-displayed orders that remove liquidity using the Mid Point Discretionary Order type (Flag DT),[6] the Exchange proposes to count the volume generated from Flags DM and DT toward the volume threshold in Footnote 2 since Flags DM and DT represent a non-displayed order type. Therefore, where a Member adds or removes liquidity using non-displayed (hidden) orders, a Member is charged a rate of $0.0010 per share for Flags HA or HR, contingent upon a Member adding or removing greater than 1,000,000 shares hidden on a daily basis, measured monthly (where the volume generated from Flags HA, HR, DM and DT count towards this tier) or a Member posting greater than 8,000,000 shares on a daily basis, measured monthly. Members not meeting either minimum will be charged $0.0030 per share for Flags HA or HR. The Exchange proposes to make conforming amendments to the text of Footnote 2. The Exchange notes that it will continue to charge Members a rate of $0.0005 per share for non-displayed orders that add liquidity using Mid Point Discretionary Orders that yield Flag DM and $0.0005 per share for non-displayed orders that remove liquidity using Mid Point Discretionary Orders that yield Flag DT.

The Exchange proposes to delete Footnote 4 that is appended to Flag HA in order to clarify for Members that the volume from Flag HA counts towards achieving the tiered pricing in Footnote 4 and the rate for Flag HA does not change where a Member achieves the thresholds outlined in Footnote 4. The Exchange notes that these proposed changes do not modify the Exchanges existing treatment of Flag HA. This amendment supports the Exchange's

[89] 17 CFR 200.30–3(a)(57).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] A Member is any registered broker or dealer, or any person associated with a registered broker or dealer, that has been admitted to membership in the Exchange.

[4] TCV is defined as volume reported by all exchanges and trade reporting facilities to the consolidated transaction reporting plans for Tapes A, B and C securities for the month prior to the month in which the fees are calculated.

[5] *See* Securities Exchange Act Release No. 67226 (June 20, 2012), 77 FR 38113 (June 26, 2012) (SR–EDGA–2012–22).

[6] *See* Securities and Exchange Act Release No. 67380 (July 10, 2012), 77 FR 41847 (July 16, 2012) (SR–EDGA–2012–29) (where the Exchange provided additional transparency to Members by bifurcating then existing Flag DM into two flags: Flag DM (adds liquidity in the discretionary range) and Flag DT (removes liquidity in the discretionary range)).

efforts to annotate flags with footnotes to signify a potential rate change, rather than annotating every flag to denote which flags contribute towards the volume threshold and/or conditions necessary to achieve a potential rate change. Accordingly, the Exchange also proposes to add conforming language to Footnote 4 that indicates to Members that the rebate of $0.0004 per share applies to Flags B, V, Y, 3 and 4, which is already indicated on the fee schedule by the Exchange having appended Footnote 4 to these flags.

In SR–EDGA–2012–29, the Exchange proposed to pass-through the rates for routing orders to the Nasdaq OMX PSX (the ''PSX'') on Flags K and RS.[7] Accordingly, in response to the proposed pricing changes in the PSX's pending filing with the Securities and Exchange Commission, which is effective August 1, 2012, the Exchange proposes to amend the fees for Flags K and RS in response to the PSX's proposed fee changes.[8] The Exchange proposes to increase the rate for Flag K from $0.0005 per share to $0.0027 per share. The Exchange also proposes to change the rate for Flag RS from a charge of $0.0005 per share to a rebate of $0.0016 per share.

The Exchange proposes to implement these amendments to its fee schedule on August 1, 2012.

2. Statutory Basis

The Exchange believes that the proposed rule changes are consistent with the objectives of Section 6 of the Act,[9] in general, and furthers the objectives of Section 6(b)(4),[10] in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities.

The Exchange proposes to append Footnote 18 to its standard rebate of $0.0003 per share for adding liquidity on the EDGA fee schedule and Flags B, V, Y, 3, and 4 to add the Step Up Tier where Members may qualify for a rebate of $0.0005 per share on their displayed shares (Flags B, V, Y, 3, and 4) for liquidity added to EDGA if the Member on a daily basis, measured monthly, posts at least 0.10% of the TCV in ADV more than their July 2012 ADV added to EDGA. The Exchange believes a rebate of $0.0005 per share for adding liquidity versus the default rebate of $0.0003 per share represents an equitable allocation of reasonable dues, fees, and other charges since higher rebates reward higher liquidity provision commitments by Members. For example, in order for a Member to qualify for the Step Up Tier rebate of $0.0005 per share, the Member must add on a daily basis, measured monthly, 0.10% of the TCV in ADV more than their July 2012 ADV. The Exchange created a baseline of July 2012 ADV in order to reward a Member's growth pattern in providing liquidity beyond a designated benchmark. The Exchange believes that offering Members a higher rebate will incentivize liquidity. Such increased volumes increase potential revenue to the Exchange, and allows the Exchange to spread its administrative and infrastructure costs over a greater number of shares, which results in lower per share costs. The Exchange may then pass on these savings to Members in the form of higher rebates. The increased liquidity also benefits all investors by deepening EDGA's liquidity pool, offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, promoting market transparency and improving investor protection. Volume-based rebates such as the Step Up Tier have been widely adopted in the cash equities markets,[11] and are equitable because volume-based rebates are open to all Members on an equal basis and provide discounts that are reasonably related to the value to an exchange's market quality associated with higher levels of market activity, such as higher levels of liquidity provision and introduction of higher volumes of orders into the price and volume discovery process. Lastly, the Exchange believes that the proposed amendment is non-discriminatory because it applies uniformly to all Members.

In Footnote 4 of the fee schedule, the Exchange notes that it currently offers a $0.0004 per share rebate for Members that, on a daily basis, measured monthly, posts more than 1% of the TCV in average daily volume on EDGA, including non-displayed orders that add liquidity. Secondly, a Member, on a daily basis, measured monthly, that posts more than .25% of the TCV on EDGA, including non-displayed orders that add liquidity, and removes more than .25% of TCV in average daily volume, will also qualify for the rebate of $0.0004 per share in Footnote 4. The Exchange believes that the $0.0005 per share rebate in the Step Up assigns a higher value to and rewards a Member's growth pattern over a designated benchmark in a way that attracts new liquidity to the market and is distinctly different from the volume-based tier in Footnote 4. Such increased volume from a Member's growth over said designated benchmark and the resulting liquidity to the market increases potential revenue to the Exchange, and would allow the Exchange to spread its administrative and infrastructure costs over a greater number of shares, leading to lower per share costs. These lower per share costs would allow the Exchange to pass on the savings to Members in the form of higher rebates. The increased liquidity also benefits all investors by deepening EDGA's liquidity pool, offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, promoting market transparency and improving investor protection. Offering rebates that reward growth patterns such as the ones proposed herein have been widely adopted in the cash equities markets, and are equitable because they are open to all Members on an equal basis and provide discounts that are reasonably related to the value to an exchange's market quality associated with higher levels of market activity, such as higher levels of liquidity provision and introduction of higher volumes of orders into the price and volume discovery processes.

In SR–EDGA–2012–29, the Exchange bifurcated Flag DM into Flags DM and DT to promote market transparency and improve investor protection by adding additional transparency to its fee schedule in order to more precisely delineate for Members whether they were ''adders of liquidity'' or ''removers of liquidity'' for purposes of Members' non-displayed orders using the Mid Point Discretionary order type. Similarly, the Exchange believes that counting the volume generated from Flags DM and DT toward the volume threshold in Footnote 2 is reasonable and equitable given that the Exchange can now differentiate between non-displayed orders that add liquidity in the discretionary range from non-displayed orders that remove liquidity in the discretionary range, as explained above. Including Flags DM and DT in Footnote 2 allows their associated

[7] *See* Securities and Exchange Act Release No. 67380 (July 10, 2012), 77 FR 41847 (July 16, 2012) (SR–EDGA–2012–29).

[8] *See* NASDAQ OMX PSX, Price List—Trading and Connectivity, *http://www.nasdaqtrader.com/Trader.aspx?id=PSX_pricing.*

[9] 15 U.S.C. 78f.

[10] 15 U.S.C. 78f(b)(4).

[11] *See* Nasdaq's Investor Support Program where Nasdaq rewards a member's growth pattern in tiers 1, 2 and 3 based on a defined benchmark. *See* NASDAQ, Price List—Trading and Connectivity, *http://www.nasdaqtrader.com/Trader.aspx?id=PriceListTrading2. See also* NYSE Arca's Step Up tier where NYSE Arca rewards a member's growth pattern based on a defined benchmark. *See* NYSE Arca, NYSE Arca Equities Trading Fees, *http://usequities.nyx.com/markets/nyse-arca-equities/trading-fees.*

volume to be tracked by the Exchange in the appropriate tier(s), which may incent Members to increase use of the volume tiers in the fee schedule. Such volume will increase potential revenue to the Exchange, and would allow the Exchange to spread its administrative and infrastructure costs over a greater number of shares, leading to lower per share costs. These lower per share costs would allow the Exchange to pass on the savings to Members in the form of higher rebates/lower costs. The increased liquidity also benefits all investors by deepening EDGA's liquidity pool, offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, promoting market transparency and improving investor protection. The Exchange also believes that the proposed change is non-discriminatory because it applies uniformly to all Members.

The Exchange proposes to delete Footnote 4 that is appended to Flag HA because the volume from Flag HA counts towards achieving the tiered pricing in Footnote 4 and the rate for Flag HA does not change where a Member achieves the thresholds outlined in Footnote 4. The Exchange believes this amendment to Flag HA supports the Exchange's effort to achieve consistent application among the flags on the fee schedule and provide transparency for its Members. In addition, this amendment supports the Exchange's efforts to annotate flags with footnotes to signify a potential rate change, rather than annotating every flag to denote which flags contribute towards the volume threshold and/or conditions necessary to achieve a potential rate change. Accordingly, the Exchange also proposed to add conforming language to Footnote 4 that indicates to Members that the rebate of $0.0004 per share applies to Flags B, V, Y, 3 and 4, as was already indicated by appending Footnote 4 to these flags on the fee schedule. The Exchange also believes that these proposed amendments are non-discriminatory because they apply to all Members.

The Exchange proposes to amend the fees for Flags K and RS in response to the proposed pricing changes in the PSX's pending filing with the Securities and Exchange Commission, which is effective August 1, 2012, where the PSX proposed a range of fees and rebates for Tape A and Tapes B and C securities. At this time, the PSX passes through applicable fees and/or rebates to DE Route, which, in turn, passes through the applicable fees and/or rebates to the Exchange. In response to the PSX's pending filing, the Exchange proposes to increase the rate for Flag K from $0.0005 per share to $0.0027 per share, and the rate for Flag RS from a charge of $0.0005 per share to a rebate of $0.0016 per share. Because the Exchange's fee schedule currently does not differentiate between Tape A and Tapes B and C securities that are routed to the PSX in Flags K and RS and the Exchange cannot mirror the new PSX fees associated with each tape, the Exchange proposes assessing its Members the highest fee and the lowest rebate associated with the PSX's pending filing for all tapes for ease of administration and to prevent potential arbitrage. The Exchange also notes that routing through DE Route is voluntary. The Exchange believes this represents an equitable allocation of reasonable dues, fees and other charges since it reflects the pass-through of these fees from the PSX. In addition, the Exchange believes that it is reasonable and equitable to pass-through certain fees to its Members. The Exchange also believes that the proposed pass-through of fees is non-discriminatory because it applies to all Members.

The Exchange also notes that it operates in a highly-competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. The proposed rule change reflects a competitive pricing structure designed to incent market participants to direct their order flow to the Exchange. The Exchange believes that the proposed rates are equitable and non-discriminatory in that they apply uniformly to all Members. The Exchange believes the fees and credits remain competitive with those charged by other venues and therefore continue to be reasonable and equitably allocated to Members.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not 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

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

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) of the Act [12] and Rule 19b–4(f)(2) [13] thereunder. 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–EDGA–2012–35 *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–EDGA–2012–35. 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

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 19b–4(f)(2).

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–EDGA–2012–35 and should be submitted on or before September 4, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–19740 Filed 8–10–12; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67608; File No. SR–EDGX–2012–34]

Self-Regulatory Organizations; EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendments to the EDGX Exchange, Inc. Fee Schedule

August 7, 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 August 1, 2012 the EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') 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 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 amend its fees and rebates applicable to Members [3] of the Exchange pursuant to EDGX Rule 15.1(a) and (c). All of the changes described herein are applicable to EDGX Members. The text of the proposed rule change is available on the Exchange's Internet Web site at *http://www.directedge.com,* at the Exchange's principal office, and at the Public Reference Room of 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 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

In SR–EDGX–2012–26, the Exchange proposed to pass-through the rates for routing orders to the Nasdaq OMX PSX (the ''PSX'') on Flags K and RS.[4] Accordingly, in response to the proposed pricing changes in the PSX's pending filing with the Securities and Exchange Commission, which is effective August 1, 2012, the Exchange proposes to amend the fees for Flags K and RS in response to the PSX's proposed fee changes.[5] The Exchange proposes to increase the rate for Flag K from $0.0005 per share to $0.0027 per share. The Exchange also proposes to change the rate for Flag RS from a charge of $0.0005 per share to a rebate of $0.0016 per share.

The Exchange proposes to implement these amendments to its fee schedule on August 1, 2012.

2. Statutory Basis

The Exchange believes that the proposed rule changes are consistent with the objectives of Section 6 of the Act,[6] in general, and furthers the objectives of Section 6(b)(4),[7] in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities.

The Exchange proposes to amend the fees for Flags K and RS in response to the proposed pricing changes in the PSX's pending filing with the Securities and Exchange Commission, which is effective August 1, 2012, where the PSX proposed a range of fees and rebates for Tape A and Tapes B and C securities. At this time, the PSX passes through applicable fees and/or rebates to DE Route, which, in turn, passes through the applicable fees and/or rebates to the Exchange. In response to the PSX's pending filing, the Exchange proposes to increase the rate for Flag K from $0.0005 per share to $0.0027 per share, and the rate for Flag RS from a charge of $0.0005 per share to a rebate of $0.0016 per share. Because the Exchange's fee schedule currently does not differentiate between Tape A and Tapes B and C securities that are routed to the PSX in Flags K and RS and the Exchange cannot mirror the new PSX fees associated with each tape, the Exchange proposes assessing its Members the highest fee and the lowest rebate associated with the PSX's pending filing for all tapes for ease of administration and to prevent potential arbitrage. The Exchange also notes that routing through DE Route is voluntary. The Exchange believes this represents an equitable allocation of reasonable dues, fees and other charges since it reflects the pass-through of these fees from the PSX. In addition, the Exchange believes that it is reasonable and equitable to pass-through certain fees to its Members. The Exchange also believes that the proposed pass-through of fees is non-discriminatory because it applies to all Members.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not 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

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

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) of

[14] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] A Member is any registered broker or dealer, or any person associated with a registered broker or dealer, that has been admitted to membership in the Exchange.

[4] *See* Securities and Exchange Act Release No. 67379 (July 10, 2012), 77 FR 41864 (July 16, 2012) (SR–EDGX–2012–26).

[5] *See* NASDAQ OMX PSX, Price List—Trading and Connectivity, *http://www.nasdaqtrader.com/Trader.aspx?id=PSX_pricing.*

[6] 15 U.S.C. 78f.

[7] 15 U.S.C. 78f(b)(4).

the Act[8] and Rule 19b–4(f)(2)[9] thereunder. 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–EDGX–2012–34 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–EDGX–2012–34. 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–EDGX–2012–34 and should be submitted on or before September 4, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–19741 Filed 8–10–12; 8:45 am]

BILLING CODE 8011–01–P

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 19b–4(f)(2).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67610; File No. SR–CME–2012–28]

Self-Regulatory Organizations; Chicago Mercantile Exchange, Inc.; Notice of Filing of Proposed Rule Change Related to the Liquidity Factor of Its Credit Default Swap Margin Methodology

August 7, 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 July 25, 2012, the Chicago Mercantile Exchange, Inc. (''CME'') filed with the Securities and Exchange Commission (''Commission'') the proposed change as described in Items I, II and III below, which Items have been prepared primarily by CME. The Commission is publishing this notice to solicit comments on the proposed change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CME proposes to make an adjustment to one particular component of its current credit default swap (''CDS'') margin model. The adjustment would apply only to non-customer positions.[3]

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CME 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. CME has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

CME's currently approved credit default swap margin methodology utilizes a ''multi-factor'' portfolio model to determine margin requirements for credit default swap (''CDS'') instruments. The model incorporates risk-based factors that are designed to represent the different risks inherent to CDS products. The factors are aggregated to determine the total amount of margin required to protect a portfolio against exposures resulting from daily changes in CDS spreads. For both total and minimum margin calculations, CME evaluates each CDS contract held within a portfolio. These positions are distinguished by the single name of the underlying entity, the CDS tenor, the notional amount of the position, and the fixed spread or coupon rate. For consistency, margins for CDS indexes in a portfolio are handled based on the required margin for each of the underlying components of the index.

CME proposes to make an adjustment to one particular component of its current CDS margin model. The liquidity margin component of the CME CDS margin model is designed to capture the risk associated with bid/ask spreads and concentration inherent in the process of liquidating a portfolio of a CDS Clearing Member. The current methodology for the liquidity factor is a function of a portfolio's gross notional value, the current bid/ask of the 5 year tenor of the ''on the run'' contract, the Duration/Series/Tenor (''DST'') factor, and a concentration factor based upon the gross notional for each of the CDX IG and CDX HY contracts. The total liquidity margin for a portfolio is the sum of the liquidity margins of the CDX IG and CDX HY CDS Contracts in the CDS Clearing Member portfolio.

The specific proposed change that is the subject of this filing relates only to the methodology used for the DST factor of the CDX IG and HY families. Under current methods, every DST calculation is calibrated separately for each index family. Further, the maximum DST value is used. The proposal is to change the DST factor so that it will apply to the specific series and tenor for each CDX IG and CDX HY CDS contract in a

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Telephone conference between Timothy Elliott, Director and Associate General Counsel, CME, and Marta Chaffee, Assistant Director, and Gena Lai, Senior Special Counsel, Securities and Exchange Commission, Division of Trading and Markets, on July 30, 2012.

portfolio. The revision is designed to more closely align the DST factor with the liquidity profile of the CDS contracts in a portfolio.

The proposed adjustment does not require any changes to rule text in the CME rulebook and does not necessitate any changes to CME's CDS Manual of Operations. The change will be announced to CDS market participants in an advisory notice that will be issued prior to implementation but after approval for the change is obtained from the Commission.

The CME believes the proposed rule changes are consistent with the requirements of the Exchange Act including Section 17A of the Exchange Act. The enhancements to CME's current margin methodology will facilitate the prompt and accurate settlement of security-based swaps and contribute to the safeguarding of securities and funds associated with security-based swap transactions. The proposed rule changes accomplish those objectives because the changes are designed to better align the margin methodology with the liquidity profile of the instruments in the portfolio.

(B) Self-Regulatory Organization's Statement on Burden on Competition

CME does not believe that the proposed rule change would impose any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

CME has not solicited, and does not intend to solicit, comments regarding this proposed rule change. CME has not received any unsolicited written comments from interested parties.

III. 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 up to 90 days (i) as the Commission may designate 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 the 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 Commissions Internet comment form (*http://www.sec.gov/rules/sro.shtml*) or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CME–2012–28 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–CME–2012–28. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Section, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of CME and on CME's Web site at *http://www.cmegroup.com/market-regulation/files/SEC_19B-4_12-28.pdf.*

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CME–2012–28 and should be submitted on or before September 4, 2012.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[4]

Kevin M. O'Neill,

Deputy Secretary .

[FR Doc. 2012–19743 Filed 8–10–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67609; File No. SR–NYSEMKT–2012–35]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Implementing Amendments to the NYSE MKT LLC Price List To Establish Pricing for the Retail Liquidity Program

August 7, 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 July 31, 2012, NYSE MKT LLC (''NYSE MKT'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes implementing amendments to the NYSE MKT LLC Price List to Establish Pricing for the Retail Liquidity Program. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, on the Commission's Web site at *www.sec.gov,* 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,

[4] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C.78s(b)(1).

[2] 17 CFR 240.19b–4.

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 its Price List to establish pricing for the Retail Liquidity Program, which has been approved by the Commission to operate for one year as a pilot program.[3] The Exchange proposes to implement the fee changes on August 1, 2012. The Retail Liquidity Program is designed to attract additional retail order flow to the Exchange for NYSE MKT Equities-traded securities[4] while also providing the potential for price improvement to such order flow.

Two new classes of market participants were created under the Retail Liquidity Program: (1) Retail Member Organizations (''RMOs''),[5] which are eligible to submit certain retail order flow (''Retail Orders'')[6] to the Exchange, and (2) Retail Liquidity Providers (''RLPs''),[7] which are required to provide potential price improvement for Retail Orders in the form of non-displayed interest (''Retail Price Improvement Orders'' or ''RPIs'')[8] that is better than the best protected bid (''PBB'') or the best protected offer (''PBO'') (together, the ''PBBO'').[9] Member organizations other than RLPs are also permitted, but not required, to submit RPIs.

In proposing the Retail Liquidity Program, the Exchange stated that it would submit a separate proposal to amend its Price List in connection with the Retail Liquidity Program.[10] Accordingly, the Exchange proposes to adopt the following pricing:[11]

• RPIs of RLPs will be free if executed against Retail Orders. The Exchange notes that, as provided under Rule 107C(f)(3)—Equities, the percentage requirement provided under Rule 107C(f)(1)—Equities is not applicable in the first two calendar months that a member organization operates as an RLP. Instead, the percentage requirement takes effect on the first day of the third consecutive calendar month that the member organization operates as an RLP. The Exchange proposes that, during the first two calendar months that a member organization operates as an RLP, the RLP's RPIs will be free if executed against Retail Orders, regardless of the percentage of the trading day at which the RLP maintains an RPI that is priced better than the PBBO. Thereafter, this proposed rate would only be applicable if the RLP satisfies the percentage requirement of Rule 107C(f)(1)—Equities. An RLP that does not satisfy the percentage requirement of Rule 107C(f)(1)—Equities would be charged the $0.0003 per share rate described below for non-RLP member organizations.[12]

• RPIs of non-RLP member organizations will be charged $0.0003 per share if executed against Retail Orders; provided, however, that RPIs of non-RLP member organizations that execute an average daily volume (''ADV'')[13] during the month of at least 10,000 shares of RPIs will be free if executed against Retail Orders.[14]

• Retail Orders of RMOs will receive a credit of $0.0005 per share if executed against RPIs of RLPs and other member organizations. The Exchange notes that an RMO submitting a Retail Order could choose one of three ways for the Retail Order to interact with available contra-side interest. First, a Type 1-designated Retail Order could interact only with available contra-side RPIs. These Type 1-designated Retail Orders would not interact with other available contra-side interest in Exchange systems or route to other markets. Portions of a Type 1-designated Retail Order that are not executed would be cancelled. Second, a Type 2-designated Retail Order could interact first with available contra-side RPIs and any remaining portion would be executed as a non-routable Regulation NMS-compliant Immediate or Cancel Order, which would sweep the Exchange's Book without being routed to other markets, and any remaining portion would be cancelled. Finally, a Type 3-designated Retail Order could interact first with available contra-side RPIs and any remaining portion would be executed as a routable Exchange Immediate or Cancel Order, which would sweep the Exchange's Book and be routed to other markets, and any remaining portion would be cancelled. A Retail Order that executes against the Book will be charged according to the standard rate applicable to non-Retail Orders, which is currently $0.0028 per share (or $0.0030 for NASDAQ securities traded pursuant to unlisted trading privileges). Also, the standard routing fee (i.e., $0.0030 per share) would apply to a Retail Order that is routed away from the Exchange and executed on another market.

The Exchange proposes that the pricing described herein be applicable, unless otherwise amended at a later date, for so long as the Retail Liquidity Program is in effect. Because the Retail Liquidity Program has been approved to

[3] *See* Securities Exchange Act Release No. 67347 (July 3, 2012), 77 FR 40673 (July 10, 2012) (SR–NYSEAmex–2011–84).

[4] ''NYSE MKT Equities-traded securities'' refers to all securities available to be traded on the Exchange, including, but not limited to, NYSE MKT-listed securities as well as those listed on the NASDAQ Stock Market LLC (''NASDAQ'') traded pursuant to unlisted trading privileges. *See, e.g.,* Securities Exchange Act Release No. 62479 (July 9, 2010), 75 FR 41264 (July 15, 2010) (SR–NYSEAmex–2010–31).

[5] ''RMO'' is defined in Rule 107C(a)(2)—Equities as a member organization (or a division thereof) that has been approved by the Exchange to submit Retail Orders.

[6] ''Retail Order'' is defined in Rule 107C(a)(3)—Equities as an agency order that originates from a natural person and is submitted to the Exchange by an RMO, provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology. A Retail Order is an Immediate or Cancel Order and must operate in accordance with Rule 107C(k)—Equities. A Retail Order may be an odd lot, round lot or a partial round lot (''PRL'').

[7] ''RLP'' is defined in Rule 107C(a)(1)—Equities as a member organization that is approved by the Exchange to act as such and that is required to submit Retail Price Improvement in accordance with Rule 107C—Equities.

[8] ''RPI'' is defined in Rule 107C(a)(4)—Equities and consists of non-displayed interest in NYSE MKT Equities-traded securities that is priced better than the PBB or PBO, as such terms are defined in Regulation NMS Rule 600(b)(57), by at least $0.001 and that is identified as such. Exchange systems will monitor whether RPI buy or sell interest, adjusted by any offset and subject to the ceiling or floor price, is eligible to interact with incoming Retail Orders. An RPI remains non-displayed in its entirety (the buy or sell interest, the offset, and the ceiling or floor). An RLP may only enter an RPI for securities to which it is assigned as RLP. An RPI may be an odd lot, round lot or a PRL.

[9] The terms ''protected bid'' and ''protected offer'' have the same meaning as defined in Regulation NMS Rule 600(b)(57). The PBB is the best-priced protected bid and the PBO is the best-priced protected offer. Generally, the PBB and PBO and the national best bid (''NBB'') and national best offer (''NBO''), respectively, will be the same. However, a market center is not required to route to the NBB or NBO if that market center is subject to an exception under Regulation NMS Rule 611(b)(1) or if such NBB or NBO is otherwise not available for an automatic execution. In such case, the PBB or PBO would be the best-priced protected bid or offer to which a market center must route interest pursuant to Regulation NMS Rule 611.

[10] *See* Securities Exchange Act Release No. 65671 (November 2, 2011), 76 FR 69774 (November 9, 2011) (SR–NYSEAmex–2011–84).

[11] The Exchange notes that participation in the Retail Liquidity Program is optional and, accordingly, the pricing proposed herein would not apply to a member organization that does not choose to participate.

[12] The Exchange notes that the RPI executions of a member organization disqualified from acting as an RLP would thereafter be subject to the transaction pricing applicable to non-RLP member organizations.

[13] ADV calculations exclude early closing days.

[14] The proposed 10,000 share threshold would include executions of all NYSE MKT Equities-traded securities, including, but not limited to, executions of NYSE MKT-listed securities as well as those listed on NASDAQ traded pursuant to unlisted trading privileges.

operate as a one-year pilot program, the Exchange anticipates that it will periodically review this pricing to seek to ensure that it contributes to the goal of the Retail Liquidity Program, which is designed to attract additional retail order flow to the Exchange for NYSE MKT Equities-traded securities while also providing the potential for price improvement to such order flow.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[15] in general, and furthers the objectives of Section 6(b)(4) of the Act,[16] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that the proposed rule change is reasonable, equitable and not unfairly discriminatory because it would establish pricing designed to increase competition among execution venues, encourage additional liquidity and offer the potential for price improvement to retail investors. The Exchange notes that a significant percentage of the orders of individual investors are executed over-the-counter.[17]

The Exchange believes that the $0.0005 credit proposed herein for executions of RMOs against RPIs is reasonable, equitable and not unfairly discriminatory because it will create a financial incentive to bring additional retail order flow to a public market. The Exchange also believes applying standard non-Retail Order rates to Retail Orders that execute against the Book or that are routed away from the Exchange and executed on another market is reasonable, equitable and not unfairly discriminatory because these are the rates that would apply to such orders, but for the Retail Order designation.

The Exchange believes that not charging RLPs that satisfy the percentage requirement of Rule 107C(f)(1)—Equities for their executions of RPIs is reasonable, equitable and not unfairly discriminatory because it will incentivize member organizations to become RLPs and therefore could result in greater price improvement for Retail Orders. Similarly, the Exchange believes that not charging non-RLP member organizations that execute an ADV of at least 10,000 shares of RPIs during the month for their executions of RPIs is reasonable, equitable and not unfairly discriminatory because it will incentivize such non-RLPs to submit RPIs for interaction with Retail Orders.[18] Conversely, the Exchange believes that charging RLPs and non-RLP member organizations that do not satisfy the percentage requirements of Rule 107C(f)(1)—Equities and the 10,000-share ADV threshold, respectively, is reasonable, equitable and not unfairly discriminatory because it will incentivize RLPs and non-RLPs to submit RPIs and, therefore, contribute to robust amounts of RPI liquidity being available for interaction with the Retail Orders submitted by RMOs.

The Exchange believes that it is reasonable, equitable and not unfairly discriminatory to not charge an RLP for its executions of RPIs against a Retail Order during the first two calendar months of operation as an RLP, but to charge a non-RLP member organization for such executions unless it satisfies the 10,000-share ADV threshold. Specifically, while the Exchange believes that member organizations that elect to become RLPs will promptly endeavor to satisfy the applicable percentage requirement provided under Rule 107C(f)(1)—Equities, the Exchange anticipates that RLPs will require a reasonable period of time to adjust their systems and trading to the Retail Liquidity Program. In this regard, the Exchange notes that non-RLP member organizations will not need to make such adjustments, as they are not subject to the percentage requirements of Rule 107C(f)—Equities. Also, whereas an RLP may only enter an RPI for securities to which it is assigned, non-RLP member organizations may submit RPIs in all NYSE MKT Equities-traded securities. Accordingly, while non-RLP member organization executions of RPIs for all NYSE MKT Equities-traded securities would count toward satisfying the 10,000-share ADV threshold, only RLP executions of RPIs in assigned securities would count toward satisfying the percentage requirements of Rule 107C(f)(1)—Equities.[19]

While the Exchange believes that markets and price discovery optimally function through the interactions of diverse flow types, it also believes that growth in internalization has required differentiation of retail order flow from other order flow types. The pricing proposed herein, like the Retail Liquidity Program itself, is not designed to permit unfair discrimination, but instead to promote a competitive process around retail executions such that retail investors would receive better prices than they currently do through bilateral internalization arrangements. The Exchange believes that the transparency and competitiveness of operating a program such as the Retail Liquidity Program on an exchange market, and the pricing related thereto, would result in better prices for retail investors. Additionally, the Exchange notes that participation in the Retail Liquidity Program is optional and, accordingly, the pricing proposed herein would not apply to a member organization that does not choose to participate.

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 foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [20] of the Act and subparagraph (f)(2) of Rule 19b–4 [21]

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(4).

[17] *See* Concept Release on Equity Market Structure, Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594 (January 21, 2010) (noting that dark pools and internalizing broker-dealers executed approximately 25.4% of share volume in September 2009). *See also* Mary L. Schapiro, Strengthening Our Equity Market Structure (Speech at the Economic Club of New York, Sept. 7, 2010) (available on the Commission's Web site). In her speech, Chairman Schapiro noted that nearly 30 percent of volume in U.S.-listed equities was executed in venues that do not display their liquidity or make it generally available to the public and the percentage was increasing nearly every month.

[18] The Exchange believes that the 10,000-share ADV threshold is reasonable, equitable and not unfairly discriminatory because it is set at a level that, based on existing volume on the Exchange, the Exchange believes non-RLP member organizations would be reasonably able to satisfy. In this regard, the Exchange anticipates that it will assess non-RLP member organization RPI volume over time, and, to the extent the Exchange considers it reasonable and appropriate, may propose to modify the ADV threshold from the level proposed herein.

[19] The Exchange notes that not charging RLPs during the first two calendar months of operation as an RLP is similar to the treatment of Supplemental Liquidity Providers during their first month of operating in such capacity. *See* Rule 107B—Equities.

[20] 15 U.S.C. 78s(b)(3)(A).

[21] 17 CFR 240.19b–4(f)(2).

thereunder, because it establishes a due, fee, or other charge imposed by NYSE MKT.

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–NYSEMKT–2012–35 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–NYSEMKT–2012–35. 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 publicly available. All submissions should refer to File Number SR–NYSEMKT–2012–35 and should be submitted on or before September 4, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–19742 Filed 8–10–12; 8:45 am]

BILLING CODE 8011–01–P

[22] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #13174 and #13175]

Indiana Disaster #IN–00046

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of Indiana Dated 08/06/2012.

Incident: Severe storms and high winds.

Incident Period: 06/29/2012 through 07/03/2012.

DATES: *Effective Date:* 08/06/2012.

Physical Loan Application Deadline Date: 10/05/2012.

Economic Injury (EIDL) Loan Application Deadline Date: 05/06/2013.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Allen.

Contiguous Counties:

Indiana: Adams, De Kalb, Huntington, Noble, Wells, Whitley.

Ohio: Defiance, Paulding, Van Wert.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere	3.875
Homeowners Without Credit Available Elsewhere	1.938
Businesses With Credit Available Elsewhere	6.000
Businesses Without Credit Available Elsewhere	4.000
Non-Profit Organizations With Credit Available Elsewhere	3.125
Non-Profit Organizations Without Credit Available Elsewhere	3.000
For Economic Injury:	
Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere	4.000
Non-Profit Organizations Without Credit Available Elsewhere	3.000

The number assigned to this disaster for physical damage is 13174B and for economic injury is 131750.

The States which received an EIDL Declaration # are: Indiana, Ohio.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Dated: August 6, 2012.

Karen G. Mills,

Administrator.

[FR Doc. 2012–19733 Filed 8–10–12; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #13194 and #13195]

Wisconsin Disaster #WI–00036

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Wisconsin (FEMA–4076–DR), dated 08/02/2012.

Incident: Severe storms and flooding.

Incident Period: 06/19/2012 through 06/20/2012.

Effective Date: 08/02/2012.

Physical Loan Application Deadline Date: 10/01/2012.

Economic Injury (EIDL) Loan Application Deadline Date: 05/02/2013.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing And Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 08/02/2012, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Ashland, Bayfield, Douglas, and the Red Cliff Band of Lake Superior Chippewa.

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations With Credit Available Elsewhere	3.125
Non-Profit Organizations Without Credit Available Elsewhere	3.000
For Economic Injury:	
Non-Profit Organizations Without Credit Available Elsewhere	3.000

The number assigned to this disaster for physical damage is 13194B and for economic injury is 13195B.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2012–19736 Filed 8–10–12; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #13192 and #13193]

Maryland Disaster #MD–00021

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Maryland (FEMA–4075–DR), dated 08/02/2012.

Incident: Severe storms and straight-line winds.

Incident Period: 06/29/2012 through 07/08/2012.

Effective Date: 08/02/2012.

Physical Loan Application Deadline Date: 10/01/2012.

Economic Injury (EIDL) Loan Application Deadline Date: 05/02/2013.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 08/02/2012, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Baltimore City, Calvert, Charles, Kent, Montgomery, Saint Marys.

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations With Credit Available Elsewhere	3.125
Non-Profit Organizations Without Credit Available Elsewhere	3.000
For Economic Injury:	
Non-Profit Organizations Without Credit Available Elsewhere	3.000

The number assigned to this disaster for physical damage is 13192B and for economic injury is 13193B.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2012–19738 Filed 8–10–12; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #13190 and #13191]

Montana Disaster #MT–00066

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Montana (FEMA–4074–DR), dated 08/02/2012.

Incident: Wildfire.

Incident Period: 06/25/2012 through 07/10/2012.

Effective Date: 08/02/2012.

Physical Loan Application Deadline Date: 10/01/2012.

Economic Injury (EIDL) Loan Application Deadline Date: 05/02/2013.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 08/02/2012, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties:

Powder River, Rosebud, and the Northern Cheyenne Indian Reservation.

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations With Credit Available Elsewhere	3.125
Non-Profit Organizations Without Credit Available Elsewhere	3.000
For Economic Injury:	
Non-Profit Organizations Without Credit Available Elsewhere	3.000

The number assigned to this disaster for physical damage is 131905 and for economic injury is 131915.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2012–19737 Filed 8–10–12; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #13196 and #13197]

Colorado Disaster #CO–00046

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of Colorado dated 08/07/2012.

for the State of Colorado dated 08/07/2012.

Incident: Wildfires, subsequent flooding and mudslides.

Incident Period: 06/09/2012 and continuing.

Effective Date: 08/07/2012.

Physical Loan Application Deadline Date: 10/09/2012.

Economic Injury (EIDL) Loan Application Deadline Date: 05/07/2013.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: El Paso, Larimer.

Contiguous Counties:

Colorado: Boulder, Crowley, Douglas, Elbert, Fremont, Grand, Jackson, Lincoln, Pueblo, Teller, Weld.

Wyoming: Albany, Laramie.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners with Credit Available Elsewhere	3.875
Homeowners without Credit Available Elsewhere	1.938
Businesses with Credit Available Elsewhere	6.000
Businesses without Credit Available Elsewhere	4.000
Non-Profit Organizations with Credit Available Elsewhere	3.125
Non-Profit Organizations without Credit Available Elsewhere	3.000
For Economic Injury:	
Businesses & Small Agricultural Cooperatives without Credit Available Elsewhere	4.000
Non-Profit Organizations without Credit Available Elsewhere	3.000

The number assigned to this disaster for physical damage is 131965 and for economic injury is 131970.

The States which received an EIDL Declaration # are Colorado, Wyoming.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Dated: August 7, 2012.

Karen G. Mills,

Administrator.

[FR Doc. 2012–19735 Filed 8–10–12; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #13188 and #13189]

Montana Disaster #MT–00068

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of Montana dated 08/06/2012.

Incident: Dahl Fire.

Incident Period: 06/26/2012 through 07/06/2012.

Effective Date: 08/06/2012.

Physical Loan Application Deadline Date: 10/05/2012.

Economic Injury (EIDL) Loan Application Deadline Date: 05/06/2013.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Musselshell.

Contiguous Counties:

Montana: Fergus, Golden Valley, Petroleum, Rosebud, Yellowstone.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere	3.875
Homeowners Without Credit Available Elsewhere	1.938
Businesses With Credit Available Elsewhere	6.000
Businesses Without Credit Available Elsewhere	4.000
Non-Profit Organizations With Credit Available Elsewhere	3.125
Non-Profit Organizations Without Credit Available Elsewhere	3.000
For Economic Injury:	
Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere	4.000
Non-Profit Organizations Without Credit Available Elsewhere	3.000

The number assigned to this disaster for physical damage is 131885 and for economic injury is 131890.

The State which received an EIDL Declaration # is Montana.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Dated: August 6, 2012.

Karen G. Mills,

Administrator.

[FR Doc. 2012–19734 Filed 8–10–12; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[Public Notice 7977]

Culturally Significant Objects Imported for Exhibition Determinations: ''Faking It: Manipulated Photography Before Photoshop''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the objects to be included in the exhibition ''Faking It: Manipulated Photography Before Photoshop,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the Metropolitan Museum of Art, New York, New York, from on or about October 11, 2012, until on or about January 27, 2013, the National Gallery of Art, Washington, DC, from on or about February 17, 2013, until on or about May 5, 2013, the Museum of Fine Arts, Houston, Texas, from on or about June 2, 2013, until on or about August 25, 2013, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of

these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Paul W. Manning, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6469). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: August 6, 2012.

J. Adam Ereli,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2012–19800 Filed 8–10–12; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 7978]

Culturally Significant Objects Imported for Exhibition Determinations: ''Bernini: Sculpting in Clay''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the objects to be included in the exhibition ''Bernini: Sculpting in Clay,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the Metropolitan Museum of Art, New York, New York, from on or about October 3, 2012, until on or about January 6, 2013, the Kimbell Art Museum, Fort Worth, Texas, from on or about February 3, 2013, until on or about April 14, 2013, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Paul W. Manning, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6469). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: August 7, 2012.

J. Adam Ereli,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2012–19798 Filed 8–10–12; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 7979]

Privacy Act; System of Records: State-35, Information Access Programs Records

SUMMARY: Notice is hereby given that the Department of State proposes to amend an existing system of records, Information Access Programs Records, State-35, pursuant to the provisions of the Privacy Act of 1974, as amended (5 U.S.C. 552a) and Office of Management and Budget Circular No. A–130, Appendix I.

DATES: This system of records will be effective on September 24, 2012, unless we receive comments that will result in a contrary determination.

ADDRESSES: Any persons interested in commenting on the amended system of records may do so by writing to the Director; Office of Information Programs and Services, A/GIS/IPS; Department of State, SA–2; 515 22nd Street NW.; Washington, DC 20522–8001.

FOR FURTHER INFORMATION CONTACT: Director; Office of Information Programs and Services, A/GIS/IPS; Department of State, SA–2; 515 22nd Street NW.; Washington, DC 20522–8001.

SUPPLEMENTARY INFORMATION: The Department of State proposes that the current system retain the name ''Information Access Programs Records.'' The proposed system will include revisions to the following sections: Categories of individuals, Categories of records, Authorities, Purpose, Routine Uses, Safeguards, and other administrative updates. The following section has been added to the system of records, Information Access Programs Records, State-35, to ensure Privacy Act of 1974 compliance: Disclosure to Consumer Reporting Agencies.

The Department's report was filed with the Office of Management and Budget. The amended system description, ''Information Access Programs Records, State-35,'' will read as set forth below.

Dated: June 18, 2012.

Joyce A. Barr,

Assistant Secretary for Administration, U.S. Department of State.

STATE-35

SYSTEM NAME:

Information Access Programs Records.

SECURITY CLASSIFICATION:

Unclassified and Classified.

SYSTEM LOCATION:

Department of State; SA–2; 515 22nd Street NW.; Washington, DC 20522–8001.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals requesting access to Department of State records under the Freedom of Information Act, the Privacy Act, the Ethics in Government Act, the access provisions of Executive Order 13526 or a successor order on national security information, and Touhy regulations. Also covered are individuals and entities requesting access to Department of State records pursuant to certain other authorities for special document requests, discovery and litigation support requests.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records in the system include but are not limited to the request letters and Department responses, copies of responsive records (if applicable) and any other correspondence, memoranda, interrogatories and declarations related to the processing of the request from the initial receipt stage through to completion, amendment, appeal and litigation.

Hard copy records and electronic records may contain: the date of the request; requester's name and requester's mailing and email address; Social Security number (if provided by the requester) or other personal identifiers; place of birth, and/or date of birth in the form of scanned hardcopy documents or case tracking information entered into the system during the initial processing stage; type of case; case number; dates of acknowledgement letters; fee categories; search and review taskings; number of documents/pages found, reviewed and released or denied; date of response and, where applicable, the exemptions applied pursuant to the Freedom of Information Act or Privacy Act. These records may also contain names, addresses and phone numbers of attorneys, law firms, judges and U.S. attorneys involved with the processing or litigation of the case, as well as separate but related court decisions.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301 (Management of Executive Agencies); 5 U.S.C. 552 (Freedom of Information Act); 5 U.S.C. 552a (Privacy Act); 22 U.S.C. 2651a (Organization of the Department of State); 22 U.S.C. 3921 (Management of Foreign Service) and Executive Order 13526 (Classified National Security Information).

PURPOSE:

The information in this system supports the Department in the administration of its statutory responsibility for processing requests for access; amendments; appeals; special projects for Congress, the Government Accountability Office, and the Department of Justice in support of court orders and subpoenas; discovery, litigation support, and litigation pursuant to the Freedom of Information Act, the Privacy Act, Executive Order 13526 or a successor order on national security information, and Touhy regulations.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Information in this system may be disclosed to:

1. Government agencies that have custody of Department of State records or that share with the Department responsibility for granting access to certain categories of records, to coordinate decisions on access to records;

2. Government agencies for concurrence reviews in recommendations for access to classified or restricted material and in making appropriate arrangements for such access;

3. A Court or adjudicative body for a proceeding, when the agency, or any component thereof, or any employee of the agency in his or her official capacity, is a party to litigation or has an interest in such litigation, and the agency determines that use of such records is relevant and necessary to the litigation;

4. Department of Justice for the purpose of obtaining its advice on any aspect of the processing of requests for information under the access provisions of the laws or in connection with litigation;

5. Actual or potential party to litigation or the party's attorney for the purpose of negotiation or discussion on such matters as settlement of the case or matter, plea bargaining or in formal or informal discovery proceedings;

6. Office of Management and Budget, National Archives and Records Administration or the Interagency Security Oversight Office, for the purpose of obtaining advice regarding agency obligations under any access provisions or restrictions of law;

7. Interagency Security Classification Appeals Panel or member agencies for the purpose of obtaining advice regarding agency obligations under any access provisions or restrictions of law; and

8. In response to a properly issued subpoena.

9. To the National Archives and Records Administration, Office of Government Information Services (OGIS), to the extent necessary to fulfill its responsibilities in 5 U.S.C. 552(h), to review administrative agency policies, procedures, and compliance with the Freedom of Information Act, and to facilitate OGIS' offering of mediation services to resolve disputes between persons making FOIA requests and administrative agencies.

The Department of State periodically publishes in the **Federal Register** its standard routine uses which apply to all of its Privacy Act systems of records. These notices appear in the form of a Prefatory Statement. These standard routine uses apply to Information Access Programs Records, State-35.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Hard copy and electronic media.

RETRIEVABILITY:

Individual name, case number.

SAFEGUARDS:

All users are given cyber security awareness training which covers the procedures for handling Sensitive but Unclassified information, including personally identifiable information (PII). Annual refresher training is mandatory. In addition, all Foreign Service and Civil Service employees and those Locally Engaged Staff who handle PII are required to take the Foreign Service Institute distance learning course instructing employees on privacy and security requirements, including the rules of behavior for handling PII and the potential consequences if it is handled improperly.

Before being granted access to Information Access Programs Records, a user must first be granted access to the Department of State computer system.

All employees of the Department of State with authorized access have undergone a thorough background security investigation. Access to the Department of State, its annexes, and posts abroad is controlled by security guards and admission is limited to those individuals possessing a valid identification card or individuals under proper escort. All paper records containing personal information are maintained in secured file cabinets in restricted areas, access to which is limited to authorized personnel. Access to computerized files is password-protected and under the direct supervision of the system manager. In addition, all cases and user-accessible records containing PII are only accessible by cleared individuals whose login is contained on the Access Control List (ACL). If an individual is not listed on the ACL, he/she does not have any access to electronic records containing PII in the system. The system manager has the capability of printing audit trails of access from the computer media, thereby permitting regular and ad hoc monitoring of computer usage.

RETENTION AND DISPOSAL:

Records are retired and destroyed in accordance with published Department of State Records Disposition Schedules as approved by the National Archives and Records Administration (NARA). More specific information may be obtained by writing to the Director; Office of Information Programs and Services, A/GIS/IPS; SA–2, Department of State; 515 22nd Street NW.; Washington, DC 20522–8001.

SYSTEM MANAGER(S) AND ADDRESS:

Director, Office of Information Programs and Services, SA–2; Department of State; 515 22nd Street NW.; Washington, DC 20522–8001.

NOTIFICATION PROCEDURE:

Individuals who have reason to believe that the Office of Information Programs and Services might have records maintained under their name or personal identifier should write to the Director, Office of Information Programs and Services; SA–2; Department of State; 515 22nd Street NW.; Washington, DC 20522–8001. The individual must specify that he/she wishes the system to be checked. At a minimum, the individual must include: Name; date and place of birth; current mailing address and zip code; signature; case number if available; and other information helpful in identifying the record.

RECORD ACCESS PROCEDURES:

Individuals who wish to gain access to or amend records pertaining to

themselves should write to the Director, Office of Information Programs and Services (address above).

CONTESTING RECORD PROCEDURES:

(See above.)

RECORD SOURCE CATEGORIES:

These records may contain information obtained from the requester, attorneys representing the requester and others authorized to represent requesters, records systems searched, and officials of other government agencies who may have provided/referred information relative to the request including, but not limited to documents, advice, concurrence, recommendations and disclosure determinations.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

Pursuant to 5 U.S.C. 552a(j)(2), records in this system of records may be exempted from any part of the Privacy Act except 5 U.S.C. 552a(b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i).

Pursuant to 5 U.S.C. 552a(k)(1), (k)(2), (k)(3), (k)(4), (k)(5), (k)(6), and (k)(7), records in this system of records may be exempted from 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f).

When the Department of State is processing requests under the purpose of this system, exempt materials from other systems of records may become part of the records in this system. To the extent that copies of exempt records from other systems of records are entered into this system, the Department of State hereby claims the same exemptions for those records that are claimed for the original primary systems of records from which they originated.

[FR Doc. 2012–19796 Filed 8–10–12; 8:45 am]

BILLING CODE 4710–24–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Membership in the National Parks Overflights Advisory Group Aviation Rulemaking Committee

AGENCY: Federal Aviation Administration, Transportation.

ACTION: Notice.

SUMMARY: By **Federal Register** notice (See 77 FR 27835–27836; May 11, 2012) the National Park Service (NPS) and the Federal Aviation Administration (FAA) invited interested persons to apply to fill six upcoming openings on the National Parks Overflights Advisory Group (NPOAG) Aviation Rulemaking Committee (ARC). The notice invited interested persons to apply to fill six vacancies representing commercial air tour operators (2), general aviation (1), Native American tribal (1), and environmental (2) concerns due to the incumbent members' completion of three-year term appointments on October 9, 2012. This notice informs the public of the persons selected to fill five of the six vacancies on the NPOAG ARC. Vacancies filled include the two commercial tour operator openings, the general aviation opening, the tribal opening, and one of the environmental openings. Since the previous notice did not draw enough responses from individuals for the remaining environmental vacancy, NPS and FAA are also using this notice to invite other interested individuals to apply for the remaining environmental opening. If you responded to the initial notice for the environmental openings, you will still be under consideration and need not re-apply.

DATES: Persons interested in applying for the remaining NPOAG opening representing environmental concerns need to apply by September 12, 2012.

FOR FURTHER INFORMATION CONTACT: Barry Brayer, Special Programs Staff, Federal Aviation Administration, Western-Pacific Region Headquarters, P.O. Box 92007, Los Angeles, CA 90009–2007, telephone: (310) 725–3800, email: *Barry.Brayer@faa.gov*.

SUPPLEMENTARY INFORMATION:

Background

The National Parks Air Tour Management Act of 2000 (the Act) was enacted on April 5, 2000, as Public Law 106–181. The Act required the establishment of the advisory group within 1 year after its enactment. The NPOAG was established in March 2001. The advisory group is comprised of a balanced group of representatives of general aviation, commercial air tour operations, environmental concerns, and Native American tribes. The Administrator of the FAA and the Director of NPS (or their designees) serve as ex officio members of the group. Representatives of the Administrator and Director serve alternating 1-year terms as chairman of the advisory group.

In accordance with the Act, the advisory group provides ''advice, information, and recommendations to the Administrator and the Director—

(1) On the implementation of this title [the Act] and the amendments made by this title;

(2) On commonly accepted quiet aircraft technology for use in commercial air tour operations over a national park or tribal lands, which will receive preferential treatment in a given air tour management plan;

(3) On other measures that might be taken to accommodate the interests of visitors to national parks; and

(4) At the request of the Administrator and the Director, safety, environmental, and other issues related to commercial air tour operations over a national park or tribal lands.''

Membership

The current NPOAG ARC is made up of one member representing general aviation, three members representing the commercial air tour industry, four members representing environmental concerns, and two members representing Native American interests. Current members of the NPOAG ARC are as follows:

Heidi Williams representing general aviation; Alan Stephen, Elling Halvorson, and Matthew Zuccaro representing commercial air tour operators; Chip Dennerlein, Greg Miller, Kristen Brengel, and Dick Hingson representing environmental interests; and Rory Majenty and Ray Russell representing Native American tribes.

Selection

Selected to fill the air tour operator vacancies, for additional terms, are returning members Alan Stephen and Matthew Zuccaro. Selected to fill the general aviation vacancy is returning member Heidi Williams. Selected to fill the Native American opening is new member Martin Begaye. Selected to fill one of the environmental vacancies is returning member Greg Miller. These members' new or additional terms begin on October 10, 2012. The term of service for NPOAG ARC members is 3 years.

Additional Opening

In order to retain balance within the NPOAG ARC with one remaining opening, the FAA and NPS invite persons interested in representing environmental concerns on the ARC to contact Mr. Barry Brayer (contact information is written above in **FOR FURTHER INFORMATION CONTACT**).

Requests to serve on the ARC must be made to Mr. Brayer in writing and postmarked or emailed on or before September 12, 2012. The request should indicate whether or not you are a member of an association or group related to environmental issues or concerns or have another affiliation with issues relating to aircraft flights over national parks. The request should also state what expertise you would bring to the NPOAG ARC as related to

environmental concerns. The term of service for NPOAG ARC members is 3 years.

Issued in Hawthorne, CA, on July 30, 2012.

Barry Brayer,

Manager, Special Programs Staff, Western-Pacific Region.

[FR Doc. 2012–19471 Filed 8–10–12; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2012–32]

Petition for Exemption; Summary of Petition Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number involved and must be received on or before August 28, 2012.

ADDRESSES: You may send comments identified by Docket Number FAA–2012–0751 using any of the following methods:

• *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.

• *Mail:* Send comments to the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.

• *Fax:* Fax comments to the Docket Management Facility at 202–493–2251.

• *Hand Delivery:* Bring comments to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy: We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for 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: To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mark Forseth, ANM–113, (425) 227–2796, Federal Aviation Administration, 1601 Lind Avenue SW., Renton, WA 98057–3356, or Brenda Sexton, (202) 267–3664, Office of Rulemaking (ARM–1), Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on August 6, 2012.

Lirio Liu,

Acting Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2012–0751.

Petitioner: Airbus SAS.

Section of 14 CFR Affected: 14 CFR 26.21.

Description of Relief Sought: Airbus seeks relief from the requirement to develop a limit of validity of the engineering data that supports the structural-maintenance program for Airbus Model A300B2–1A airplanes, all of which are removed from 14 CFR 121 and 129 operation.

[FR Doc. 2012–19804 Filed 8–10–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2012–31]

Petition for Exemption; Summary of Petition Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before August 23, 2012.

ADDRESSES: You may send comments identified by Docket Number FAA–2012–0553 using any of the following methods:

• *Government-wide rulemaking web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.

• *Mail:* Send comments to the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.

• *Fax:* Fax comments to the Docket Management Facility at 202–493–2251.

• *Hand Delivery:* Bring comments to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy: We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for 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: To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mark Forseth, (425–227–2796), Standardization Branch, ANM–113, Federal Aviation Administration, 1601 Lind Avenue SW., Renton, WA 98057–3356, or Frances Shaver, (202) 267–4059, Office of Rulemaking, ARM–207, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on August 2, 2012.

Lirio Liu,

Acting Director, Office of Rulemaking.

Petitions for Exemption

Docket No.: FAA–2012–0553.
Petitioner: Gulfstream Aerospace LP.
Sections of 14 CFR Affected: § 25.901(b)(2), § 25.903(d)(2), § 25.939(a), § 25.1301(c) and (d), § 25.1305(c)(1), § 25.1322(a), and § 25.1309(c) and (d).
Description of Relief Sought: Gulfstream requests relief from certain engine installation, operational limitation and engine indication requirements which apply to the Gulfstream G280 airplane and installed Honeywell AS907–2–1G engines.

[FR Doc. 2012–19802 Filed 8–10–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Final Federal Agency Actions on Proposed Highway in North Carolina

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of Limitation on Claims for Judicial Review of Actions by FHWA and Other Federal Agencies.

SUMMARY: This notice announces actions taken by the FHWA and other Federal agencies that are final within the meaning of 23 U.S.C. 139 (I)(1). The actions relate to a proposed highway project, I–77 High Occupancy/Toll (HOT) lanes, from I–277 (Brookshire Freeway) to West Catawba Avenue (Exit 28), Mecklenburg County, North Carolina. Those actions grant licenses, permits, and approvals for the project.

DATES: By this notice, the FHWA is advising the public of final agency actions subject to 23 U.S.C. 139 (I)(1). A claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filled on or before February 11, 2013. If the Federal law that authorizes judicial review of a claim provides a time period of less than 180 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: Mr. Clarence W. Coleman, P. E., Preconstruction and Environment Director, Federal Highway Administration, 310 New Bern Avenue, Suite 410, Raleigh, North Carolina 27601–1418; Telephone: (919) 747–7014; email: *clarence.coleman@dot.gov*. FHWA North Carolina Division Office's normal business hours are 8 a.m. to 5 p.m. (Eastern Time). Mr. Gregory J. Thorpe, Ph.D., Project Development and Environmental Analysis Branch Manager, North Carolina Department of Transportation (NCDOT), 1548 Mail Service Center, Raleigh, North Carolina 27699–1548; Telephone (919) 707–6000, email: *gthorpe@dot.state.nc.us*. NCDOT—Project Development and Environmental Analysis Branch Office's normal business hours are 8 a.m. to 5 p.m. (Eastern Time).

SUPPLEMENTARY INFORMATION: Notice is hereby given that the FHWA and other Federal agencies have taken final agency actions by issuing licenses, permits, and approvals for the following highway project in the State of North Carolina: I–77 High Occupancy/Toll (HOT) lanes, Federal Aid No. NHF–077–1(209)9, from I–277 (Brookshire Freeway) to West Catawba Avenue (Exit 28) in the city and towns of Charlotte, Huntersville, and Cornelius, Mecklenburg County, North Carolina. The project is also known as State Transportation Improvement Program (STIP) Project I–5405. The project is approximately 17 miles long and includes the following actions:

(1) Conversion of the existing I–77 High Occupancy Vehicle (HOV) lanes to HOT lanes (southbound between Hambright Road and I–277 [Brookshire Freeway] and northbound from just north of I–85 to I–485).

(2) Extension of northbound and southbound HOT lanes from their northern terminus to West Catawba Avenue (Exit 28).

(3) Inclusion of a second HOT lane in each direction from just north of I–85 to West Catawba Avenue (Exit 28).

(4) Designation of HOT lanes as HOT 3+.

The actions by the Federal agencies, and the laws under which such actions were taken, are described in the Categorical Exclusion (CE) for the project, approved on July 31, 2012, and in other documents in the FHWA administrative record. The CE, and other documents in the FHWA administrative record file are available by contacting the FHWA or NCDOT at the addresses provided above.

This notice applies to all Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. *General:* National Environmental Policy Act (NEPA) [42 USC 4321–4351]; Federal-Aid Highway Act [23 U.S.C. 109].

2. *Air:* Clean Air Act [42 U.S.C. 7401–7671(q)].

3. *Land:* Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303]; Landscaping and Scenic Enhancement (Wildflowers) [23 U.S.C. 319].

4. *Wildlife:* Endangered Species Act [16 USC 1531–1544 and Section 1536], Marine Mammal Protection Act [16 U.S.C. 1361], Anadromous Fish Conservation Act [16 U.S.C. 757(a)-757(g)], Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d)], Migratory Bird Treaty Act [16 U.S.C. 703–712], Magnuson-Stevenson Fishery Conservation and Management Act of 1976, as amended [16 U.S.C. 1801 *et seq.*].

5. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(f) *et seq.*]; Archeological Resources Protection Act of 1977 [16 U.S.C. 470(aa)–11]; Archeological and Historic Preservation Act [16 U.S.C. 469–469(c)]; Native American Grave Protection and Repatriation Act (NAGPRA) [25 U.S.C. 3001–3013].

6. *Social and Economic:* Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)]; American Indian Religious Freedom Act [42 U.S.C. 1996]; Farmland Protection Policy Act (FPPA) [7 U.S.C. 4201–4209].

7. *Wetlands and Water Resources:* Clean Water Act [33 U.S.C. 1251–1377 (Section 404, Section 401, Section 319)]; Coastal Barrier Resources Act [16 U.S.C. 3501–3510]; Coastal Zone Management Act [16 U.S.C. 1451–1465]; Land and Water Conservation Fund (LWCF) [16 U.S.C. 4601–4604]; Safe Drinking Water Act (SDWA) [42 U.S.C. 300(f)–300(j)(6)]; Rivers and Harbors Act of 1899 [33 U.S.C. 401–406]; Wild and Scenic Rivers Act [16 U.S.C. 1271–1287]; Emergency Wetlands Resources Act [16 U.S.C. 3921, 3931]; TEA–21 Wetlands Mitigation [23 U.S.C. 103(b)(6)(m), 133(b)(11)]; Flood Disaster Protection Act [42 U.S.C. 4001–4128].

8. *Hazardous Materials:* Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) [42 U.S.C. 9601–9675]; Superfund Amendments and Reauthorization Act of 1986 (SARA); Resource Conservation and Recovery Act (RCRA) [42 U.S.C. 6901–6992(k)].

9. *Executive Orders:* E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 12898, Federal Actions To Address Environmental Justice in Minority Populations and Low Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13007 Indian Sacred Sites; E.O.

13287 Preserve America; E.O. 13175 Consultation and Coordination with Indian Tribal Governments; E.O. 11514 Protection and Enhancement of Environmental Quality; E.O. 13112 Invasive Species.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 139(I)(1).

Issued on: August 7, 2012.

Clarence W. Coleman, Jr.,

Preconstruction and Environment Director, Raleigh, North Carolina.

[FR Doc. 2012–19814 Filed 8–10–12; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2012–0064]

Notice of Application for Approval of Discontinuance or Modification of a Railroad Signal System

In accordance with Part 235 of Title 49 Code of Federal Regulations (CFR) and 49 U.S.C. 20502(a), this document provides the public notice that by a document dated July 16, 2012, the Union Pacific Railroad Company (UP) has petitioned the Federal Railroad Administration (FRA) seeking approval for the discontinuance or modification of a signal system. FRA assigned the petition docket number FRA–2012–0064.

Applicant: Union Pacific Railroad Company, Mr. Phillip A. Danner, AVP Engineering–Signal, 1400 Douglas Street, MS 0910, Omaha, Nebraska 68179.

UP seeks approval of the proposed discontinuance of the rail locks on the Atchafalaya River Bridge located at Milepost 610.8 on the UP Beaumont Subdivision in Louisiana. The rail locks would be removed in conjunction with the installation of CMI Promex Ridex miter rails. The reasons given for the proposed changes is that rail locks are not needed for safe operation of the bridge with Ridex miter rails installed.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov* and in person at the U.S. Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Ave. SE., W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by September 27, 2012 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or online at *www.dot.gov/privacy.html.*

Issued in Washington, DC, on August 6, 2012.

Ron Hynes,

Director, Office of Safety Assurance and Compliance.

[FR Doc. 2012–19765 Filed 8–10–12; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

[Docket ID: OCC–2012–0012]

Minority Depository Institution Advisory Committee

AGENCY: Office of the Comptroller of the Currency, Department of the Treasury.

ACTION: Notice.

SUMMARY: The Comptroller of the Currency has determined that the renewal of the Charter of the OCC Minority Depository Institution Advisory Committee (MDIAC) is necessary and in the public interest in order to provide advice and information about the current circumstances and future development of minority depository institutions, in accordance with the goals established by section 308 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Public Law 101–73, Title III, 103 Stat. 353, 12 U.S.C. 1463 note.

DATES: The Charter of the OCC MDIAC is renewed for a two-year period that began on July 30, 2012.

FOR FURTHER INFORMATION CONTACT: Beverly Cole, Designated Federal Official, (202) 874–5020, Office of the Comptroller of the Currency, 250 E Street SW., Washington, DC 20219.

SUPPLEMENTARY INFORMATION: Notice of the renewal of the MDIAC charter is hereby given under section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988), and with the approval of the Secretary of the Treasury. The Comptroller of the Currency has determined that the renewal of the MDIAC charter is necessary and in the public interest in order to provide advice and information about the current circumstances and future development of minority depository institutions, in accordance with the goals established by section 308 of FIRREA. The goals of section 308 are to preserve the present number of minority depository institutions, preserve the minority character of minority depository institutions in cases involving mergers or acquisitions, provide technical assistance, and encourage the creation of new minority depository institutions.

Dated: August 6, 2012.

By the Office of the Comptroller of the Currency.

Thomas J. Curry,

Comptroller of the Currency.

[FR Doc. 2012–19718 Filed 8–10–12; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Women Veterans, Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that the Advisory Committee on Women Veterans will meet on August 20–24, 2012, in the Dennis Auditorium, 2B–137, at the VA Maryland Health Care System (VAMHCS), 10 North Greene Street, Baltimore, MD, from 8:30 a.m. until 4:30 p.m. each day.

The purpose of the Committee is to advise the Secretary of Veterans Affairs regarding the needs of women Veterans with respect to health care, rehabilitation, compensation, outreach, and other programs and activities administered by VA designed to meet such needs. The Committee makes recommendations to the Secretary regarding such programs and activities.

On August 20, the agenda will include overview briefings on the VAMHCS and the VA Capitol Health Care Network (Veterans Integrated Service Network 5) facilities, programs, demographics and women Veterans programs. On August 21, the Committee will receive briefings from VAMHCS program offices on homeless, outreach, and mental health. The Committee will also receive a benefits briefing from the Baltimore Regional Office and a briefing by staff from the Baltimore Vet Center. On August 22, the Committee will receive in depth briefings on several VAMHCS programs on Operation Enduring Freedom, Operation Iraqi Freedom and Operation New Dawn as well as military sexual trauma, domiciliary, inpatient mental health, Million Veteran, caregiver support, telehealth, public and community relations. In the afternoon, the Committee will convene a closed session in order to protect patient privacy as the Committee tours the VA Medical Center and the Comprehensive Women's Health Care Clinic. In the morning of August 23, the Committee will convene a closed session to protect patient privacy as they tour the McVets Center. The Committee will reconvene in an open session as they tour the Baltimore National Cemetery. In the afternoon, the Committee will reconvene in a closed session to protect patient privacy as they tour the Loch Raven VA Community Living and Rehabilitation Center. Closing portions of the sessions are in accordance with 5 U.S.C. 552b(c)(6). On August 24, the Committee will convene in open session to meet with VAMHCS leadership, and conduct a town hall meeting with the women Veterans community and other stakeholders.

With the exception of the town hall meeting, there will be no time for public comment during the meeting. Members of the public may submit written statements for the Committee's review to Ms. Shannon L. Middleton at the Department of Veterans Affairs, Center for Women Veterans (00W), 810 Vermont Avenue NW., Washington, DC 20420, fax at (202) 273–7092, or email at *00W@mail.va.gov*. Any member of the public wishing to attend or seeking additional information should contact Ms. Middleton at (202) 273–7092.

Dated: August 7, 2012.

By Direction of the Secretary.

Vivian Drake,

Committee Management Officer.

[FR Doc. 2012–19725 Filed 8–10–12; 8:45 am]

BILLING CODE P

FEDERAL REGISTER

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No. 156 August 13, 2012

Part II

Commodity Futures Trading Commission
17 CFR Part 1

Securities and Exchange Commission

17 CFR Parts 230, 240 and 241

Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping; Final Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 1

RIN 3038–AD46

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 230, 240 and 241

[Release No. 33–9338; 34–67453; File No. S7–16–11]

RIN 3235–AK65

Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping

AGENCY: Commodity Futures Trading Commission; Securities and Exchange Commission.

ACTION: Joint final rule; interpretations; request for comment on an interpretation.

SUMMARY: In accordance with section 712(a)(8), section 712(d)(1), sections 712(d)(2)(B) and (C), sections 721(b) and (c), and section 761(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act''), the Commodity Futures Trading Commission (''CFTC'') and the Securities and Exchange Commission (''SEC'') (collectively, ''Commissions''), in consultation with the Board of Governors of the Federal Reserve System (''Board''), are jointly adopting new rules and interpretations under the Commodity Exchange Act (''CEA'') and the Securities Exchange Act of 1934 (''Exchange Act'') to further define the terms ''swap,'' ''security-based swap,'' and ''security-based swap agreement'' (collectively, ''Product Definitions''); regarding ''mixed swaps;'' and governing books and records with respect to ''security-based swap agreements.'' The CFTC requests comment on its interpretation concerning forwards with embedded volumetric optionality, contained in Section II.B.2.(b)(ii) of this release.

DATES: *Effective date:* October 12, 2012.

Compliance date: The applicable compliance dates are discussed in the section of the release titled ''IX. Effective Date and Implementation''.

Comment date: Comments on the interpretation regarding forwards with embedded volumetric optionality must be received on or before October 12, 2012.

ADDRESSES: You may submit comments, identified by RIN number 3038–AD46, by any of the following methods:

- *CFTC Web Site:* via its Comments Online process: *http://comments.cftc.gov*. Follow the instructions for submitting comments through the Web site.
- *Mail:* Address to David A. Stawick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581.
- *Hand Delivery/Courier:* Same as mail above.
- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.

All comments must be submitted in English or, if not, accompanied by an English translation. Comments will be posted as received to *http://www.cftc.gov*. You should submit only information that you wish to make available publicly. If you wish the CFTC to consider information that is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the CFTC's Regulations.[1]

The CFTC reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from *http://www.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the interpretation will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: CFTC: Julian E. Hammar, Assistant General Counsel, at 202–418–5118, *jhammar@cftc.gov*, Lee Ann Duffy, Assistant General Counsel, at 202–418–6763, *lduffy@cftc.gov*; Mark Fajfar, Assistant General Counsel, at 202–418–6636, *mfajfar@cftc.gov*, or David E. Aron, Counsel, at 202–418–6621, *daron@cftc.gov*, Office of General Counsel, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581; SEC: Donna M. Chambers, Special Counsel, at 202–551–5870, or John Guidroz, Attorney-Adviser, at 202–551–5870, Division of Trading and Markets, or Andrew Schoeffler, Special Counsel, at 202–551–3860, Office of Capital Markets Trends, Division of Corporation Finance, or Wenchi Hu, Senior Special Counsel, at 202–551–5870, Office of Compliance, Inspections and Examinations, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

[1] 17 CFR 145.9.

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I. Backbround

On July 21, 2010, President Obama signed the Dodd-Frank Act into law.[2] Title VII of the Dodd-Frank Act[3] (''Title VII'') established a comprehensive new regulatory framework for swaps and security-based swaps. The legislation was enacted, among other reasons, to reduce risk, increase transparency, and promote market integrity within the financial system, including by: (i) Providing for the registration and comprehensive regulation of swap dealers, security-based swap dealers, major swap participants, and major security-based swap participants; (ii) imposing clearing and trade execution requirements on swaps and security-based swaps, subject to certain exceptions; (iii) creating rigorous recordkeeping and real-time reporting regimes; and (iv) enhancing the rulemaking and enforcement authorities of the Commissions with respect to, among others, all registered entities and intermediaries subject to the Commissions' oversight.

Section 712(d)(1) of the Dodd-Frank Act provides that the Commissions, in consultation with the Board, shall jointly further define the terms ''swap,'' ''security-based swap,'' and ''security-based swap agreement'' (''SBSA'').[4] Section 712(a)(8) of the Dodd-Frank Act provides further that the Commissions shall jointly prescribe such regulations regarding ''mixed swaps'' as may be necessary to carry out the purposes of Title VII. In addition, sections 721(b) and 761(b) of the Dodd-Frank Act provide that the Commissions may adopt rules to further define terms included in subtitles A and B, respectively, of Title VII, and sections 721(c) and 761(b) of the Dodd-Frank Act provide the Commissions with authority to define the terms ''swap'' and ''security-based swap,'' as well as the terms ''swap dealer,'' ''major swap participant,'' ''security-based swap dealer,'' and ''major security-based swap participant,'' to include transactions and entities that have been structured to

[2] *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 is available at *http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm.*

[3] Pursuant to section 701 of the Dodd-Frank Act, Title VII may be cited as the ''Wall Street Transparency and Accountability Act of 2010.''

[4] In addition, section 719(d)(1)(A) of the Dodd-Frank Act requires the Commissions to conduct a joint study, within 15 months of enactment, to determine whether stable value contracts, as defined in section 719(d)(2) of the Dodd-Frank Act, are encompassed by the swap definition. If the Commissions determine that stable value contracts are encompassed by the swap definition, section 719(d)(1)(B) of the Dodd-Frank Act requires the Commissions jointly to determine whether an exemption for those contracts from the swap definition is appropriate and in the public interest. Section 719(d)(1)(B) also requires the Commissions to issue regulations implementing the determinations made under the required study. Until the effective date of such regulations, the requirements under Title VII do not apply to stable value contracts, and stable value contracts in effect prior to the effective date of such regulations are not considered swaps. *See* section 719(d) of the Dodd-Frank Act. The Commissions currently are conducting the required joint study and will consider whether to propose any implementing regulations (including, if appropriate, regulations determining that stable value contracts: (i) Are not encompassed within the swap definition; or (ii) are encompassed within the definition but are exempt from the swap definition) at the conclusion of that study.

evade the requirements of subtitles A and B, respectively, of Title VII.

Section 712(d)(2)(B) of the Dodd-Frank Act requires the Commissions, in consultation with the Board, to jointly adopt rules governing books and records requirements for SBSAs by persons registered as swap data repositories (''SDRs'') under the CEA,[5] including uniform rules that specify the data elements that shall be collected and maintained by each SDR.[6] Similarly, section 712(d)(2)(C) of the Dodd-Frank Act requires the Commissions, in consultation with the Board, to jointly adopt rules governing books and records for SBSAs, including daily trading records, for swap dealers, major swap participants, security-based swap dealers, and security-based swap participants.[7]

Under the comprehensive framework for regulating swaps and security-based swaps established in Title VII, the CFTC is given regulatory authority over swaps,[8] the SEC is given regulatory authority over security-based swaps,[9] and the Commissions shall jointly prescribe such regulations regarding mixed swaps as may be necessary to carry out the purposes of Title VII.[10] In addition, the SEC is given antifraud authority over, and access to information from, certain CFTC-regulated entities regarding SBSAs, which are a type of swap related to securities over which the CFTC is given regulatory authority.[11]

To assist the Commissions in further defining the Product Definitions (as well as certain other definitions) and in prescribing regulations regarding mixed swaps as may be necessary to carry out the purposes of Title VII, the Commissions published an advance notice of proposed rulemaking (''ANPR'') in the **Federal Register** on August 20, 2010.[12] The comment period for the ANPR closed on September 20, 2010.[13] The Commissions received comments addressing the Product Definitions and/or mixed swaps in response to the ANPR, as well as comments in response to the Commissions' informal solicitations,[14] from a wide range of commenters. Taking into account comments received on the ANPR, the Commissions published a notice of proposed rulemaking in the **Federal Register** on May 23, 2011.[15] The comment period for the Proposing Release closed on July 22, 2011.[16] Together, the Commissions received approximately 86 written comment letters in response to the Proposing Release.

The Commissions have reviewed and considered the comments received, and the staffs of the Commissions have met with many market participants and other interested parties to discuss the definitions.[17] Moreover, the Commissions' staffs have consulted extensively with each other as required by sections 712(a)(1) and (2) of the Dodd-Frank Act and have consulted with staff of the Board as required by section 712(d) of the Dodd-Frank Act.

Based on this review and consultation, the Commissions are adopting rules and interpretations regarding, among other things: (i) The regulatory treatment of insurance products; (ii) the exclusion of forward contracts from the swap and security-

[5] 7 U.S.C. 1 *et seq.*

[6] The CFTC has issued final rules regarding SDRs and, separately, swap data recordkeeping and reporting. *See Swap Data Repositories: Registration Standards, Duties and Core Principles,* 76 FR 54538 (Sep. 1, 2011); *Swap Data Recordkeeping and Reporting Requirements,* 77 FR 2136 (Jan. 13, 2012). The SEC has also issued proposed rules regarding security-based swap data repositories (''SBSDRs''), including rules specifying data collection and maintenance standards for SBSDRs, as well as rules regarding security-based swap data recordkeeping and reporting. *See Security-Based Swap Data Repository Registration, Duties, and Core Principles,* 75 FR 77306 (Dec. 10, 2010); *Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information,* 75 FR 75208 (Dec. 2, 2010).

[7] The CFTC has issued final rules regarding recordkeeping requirements for swap dealers and major swap participants. *See 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,* 77 FR 20128 (Apr. 3, 2012).

[8] Section 721(a) of the Dodd-Frank Act defines the term ''swap'' by adding section 1a(47) to the CEA, 7 U.S.C. 1a(47). This new swap definition also is cross-referenced in new section 3(a)(69) of the Exchange Act, 15 U.S.C. 78c(a)(69). Citations to provisions of the CEA and the Exchange Act, 15 U.S.C. 78a *et seq.,* in this release refer to the numbering of those provisions after the effective date of Title VII, except as indicated.

[9] Section 761(a) of the Dodd-Frank Act defines the term ''security-based swap'' by adding new section 3(a)(68) to the Exchange Act, 15 U.S.C. 78c(a)(68). This new security-based swap definition also is cross-referenced in new CEA section 1a(42), 7 U.S.C. 1a(42). The Dodd-Frank Act also explicitly includes security-based swaps in the definition of security under the Exchange Act and the Securities Act of 1933 (''Securities Act''), 15 U.S.C. 77a *et seq.*

[10] Section 721(a) of the Dodd-Frank Act describes the category of ''mixed swap'' by adding new section 1a(47)(D) to the CEA, 7 U.S.C. 1a(47)(D). Section 761(a) of the Dodd-Frank Act also includes the category of ''mixed swap'' by adding new section 3(a)(68)(D) to the Exchange Act, 15 U.S.C. 78c(68)(D). A mixed swap is defined as a subset of security-based swaps that also are based on the value of 1 or more interest or other rates, currencies, commodities, instruments of indebtedness, indices, quantitative measures, other financial or economic interest or property of any kind (other than a single security or a narrow-based security index), or the occurrence, non-occurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence (other than the occurrence, non-occurrence, or extent of the occurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index, provided that such event directly affects the financial statements, financial condition, or financial obligations of the issuer).

[11] Section 761(a) of the Dodd-Frank Act defines the term ''security-based swap agreement'' by adding new section 3(a)(78) to the Exchange Act, 15 U.S.C. 78c(a)(78). The CEA includes the definition of ''security-based swap agreement'' in subparagraph (A)(v) of the swap definition in CEA section 1a(47), 7 U.S.C. 1a(47). The only difference between these definitions is that the definition of SBSA in the Exchange Act specifically excludes security-based swaps (*see* section 3(a)(78)(B) of the Exchange Act, 15 U.S.C. 78c(a)(78)(B)), whereas the definition of SBSA in the CEA does not contain a similar exclusion. Instead, under the CEA, the exclusion for security-based swaps is placed in the general exclusions from the swap definition (*see* CEA section 1a(47)(B)(x), 7 U.S.C. 1a(47)(B)(x)). Although the statutes are slightly different structurally, the Commissions interpret them to have consistent meaning that the category of security-based swap agreements excludes security-based swaps.

[12] *See Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act,* 75 FR 51429 (Aug. 20, 2010). The ANPR also solicited comment regarding the definitions of the terms ''swap dealer,'' ''security-based swap dealer,'' ''major swap participant,'' ''major security-based swap participant,'' and ''eligible contract participant.'' These definitions are the subject of a separate joint rulemaking by the Commissions. *See Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' ''Major Swap Participant,'' ''Major Security-Based Swap Participant'' and ''Eligible Contract Participant,''* 77 FR 30596 (May 23, 2012) (''Entity Definitions Release''). The Commissions also provided the public with the ability to present their views more generally on implementation of the Dodd-Frank Act through their Web sites, dedicated electronic mailboxes, and meetings with interested parties. *See* Public Comments on SEC Regulatory Initiatives Under the Dodd-Frank Act/Meetings with SEC Officials, located at *http://www.sec.gov/spotlight/regreformcomments.shtml*; Public Submissions, located at *http://comments.cftc.gov/PublicComments/ReleasesWithComments.aspx*; External Meetings, located at *http://www.cftc.gov/LawRegulation/DoddFrankAct/ExternalMeetings/index.htm.*

[13] Copies of all comments received by the SEC on the ANPR are available on the SEC's Internet Web site, located at *http://www.sec.gov/comments/s7-16-10/s71610.shtml.* Comments are also available for Web site viewing and printing in the SEC's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of all comments received by the CFTC on the ANPR are available on the CFTC's Internet Web site, located at *http://www.cftc.gov/LawRegulation/DoddFrankAct/OTC_2_Definitions.html.*

[14] *See supra* note 12.

[15] *See 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) (''Proposing Release'').

[16] *Id.*

[17] Information about meetings that CFTC staff have had with outside organizations regarding the implementation of the Dodd-Frank Act is available at *http://www.cftc.gov/LawRegulation/DoddFrankAct/ExternalMeetings/index.htm.* Information about meetings that SEC staff have had with outside organizations regarding the product definitions is available at *http://www.sec.gov/comments/s7-16-10/s71610.shtml#meetings.*

based swap definitions; (iii) the regulatory treatment of certain consumer and commercial contracts; (iv) the regulatory treatment of certain foreign-exchange related and other instruments; (v) swaps and security-based swaps involving interest rates (or other monetary rates) and yields; (vi) total return swaps (''TRS''); (vii) Title VII instruments based on futures contracts; (viii) the application of the definition of ''narrow-based security index'' in distinguishing between certain swaps and security-based swaps, including credit default swaps (''CDS'') and index CDS; and (ix) the specification of certain swaps and security-based swaps that are, and are not, mixed swaps. In addition, the Commissions are adopting rules: (i) To clarify that there will not be additional books and records requirements applicable to SBSAs other than those required for swaps; (ii) providing a mechanism for requesting the Commissions to interpret whether a particular type of agreement, contract, or transaction (or class of agreements, contracts, or transactions) is a swap, security-based swap, or both (*i.e.,* a mixed swap); and (iii) providing a mechanism for evaluating the applicability of certain regulatory requirements to particular mixed swaps. Finally, the CFTC is adopting rules to implement the anti-evasion authority provided in the Dodd-Frank Act.

Overall Economic Considerations

The Commissions are sensitive to the costs and benefits of their rules. In considering the adoption of the Product Definitions, the Commissions have been mindful of the costs and benefits associated with these rules, which provide fundamental building blocks for the Title VII regulatory regime. There are costs, as well as benefits, arising from subjecting certain agreements, contracts, or transactions to the regulatory regime of Title VII.[18] Additionally, there are costs that parties will incur to assess whether certain agreements, contracts, or transactions are indeed subject to the Title VII regulatory regime, and, if so, the costs to assess whether such Title VII instrument is subject to the regulatory regime of the SEC or the CFTC.[19]

Title VII created a jurisdictional division between the CFTC and SEC. The costs and benefits flowing from an agreement, contract, or transaction being subject to the regulatory regime of the CFTC or the SEC may be impacted by similarities and differences in the Commissions' regulatory programs for swaps and security-based swaps. Title VII calls on the SEC and the CFTC to consult and coordinate for the purposes of assuring regulatory consistency and comparability to the extent possible.[20] Title VII also calls on the agencies to treat functionally or economically similar products or entities in a similar manner, but does not require identical rules.[21] Although the Commissions may differ on certain rulemakings, as the relevant products, entities and markets are different, the Commissions believe that, as the CFTC and SEC regulatory regimes share a statutory basis in Title VII, the costs and benefits of their respective regimes should be broadly similar and complementary.

In acknowledging the economic consequences of the final rules, the Commissions recognize that the Product Definitions do not themselves establish the scope or nature of those substantive requirements or their related costs and benefits. In determining the appropriate scope of these rules, the Commissions consider the types of agreement, contract, or transaction that should be regulated as a swap, security-based swap, or mixed swap under Title VII in light of the purposes of the Dodd-Frank Act. The Commissions have sought to further define the terms ''swap,'' ''security-based swap,'' and ''mixed swap'' to include agreements, contracts, and transactions only to the extent that capturing these agreements, contracts, and transactions is necessary and appropriate given the purposes of Title VII, and to exclude agreements, contracts, and transactions to the extent that the regulation of such agreements, contracts, and transactions does not serve the statutory purposes of Title VII, so as not to impose unnecessary burdens for agreements, contracts, and transactions whose regulation may not be necessary or appropriate to further the purposes of Title VII.

II. Scope of Definitions of Swap and Security-Based Swap

A. Introduction

Title VII of the Dodd-Frank Act applies to a wide variety of agreements, contracts, and transactions classified as swaps or security-based swaps. The statute lists these agreements, contracts, and transactions in the definition of the term ''swap.'' [22] The statutory definition of the term ''swap'' also has various exclusions,[23] rules of construction, and other provisions for the interpretation of the definition.[24] One of the exclusions to the definition of the term ''swap'' is for security-based swaps.[25] The term ''security-based swap,'' in turn, is defined as an agreement, contract, or transaction that is a ''swap'' (without regard to the exclusion from that definition for security-based swaps) and that also has certain characteristics specified in the statute.[26] Thus, the statutory definition of the term ''swap'' also determines the scope of agreements, contracts, and transactions that could be security-based swaps.

The statutory definitions of the terms ''swap'' and ''security-based swap'' are detailed and comprehensive, and the Commissions believe that extensive ''further definition'' of the terms by rule is not necessary. Nevertheless, the definitions could be read to include certain types of agreements, contracts, and transactions that previously have not been considered swaps or security-based swaps, and nothing in the legislative history of the Dodd-Frank Act appears to suggest that Congress intended such agreements, contracts, or transactions to be regulated as swaps or security-based swaps under Title VII. The Commissions thus believe that it is important to further clarify the treatment under the definitions of certain types of agreements, contracts, and transactions, such as insurance products and certain consumer and commercial contracts.

In addition, commenters also raised questions regarding, and the Commissions believe that it is important to clarify: (i) The exclusion for forward contracts from the definitions of the terms ''swap'' and ''security-based swap;'' and (ii) the status of certain commodity-related products (including various foreign exchange products and forward rate agreements) under the definitions of the terms ''swap'' and ''security-based swap.'' Finally, the Commissions are providing

[18] The Commissions refer to these costs and benefits as programmatic costs and benefits.

[19] The Commissions refer to these costs as assessment costs.

[20] *See* sections 712(a)(1) and (a)(2) of the Dodd-Frank Act.

[21] *See* sections 712(a)(7)(A) and (B) of the Dodd-Frank Act.

[22] *See* CEA section 1a(47)(A), 7 U.S.C. 1a(47)(A). This swap definition is also cross-referenced in new section 3(a)(69) of the Exchange Act, 15 U.S.C. 78c(a)(69).

[23] *See* CEA section 1a(47)(B), 7 U.S.C. 1a(47)(B), clauses (i)–(x).

[24] *See* CEA sections 1a(47)(C)–(F), 7 U.S.C. 1a(47)(C)–(F).

[25] *See* CEA section 1a(47)(B)(x), 7 U.S.C. 1a(47)(B)(x).

[26] *See* section 3(a)(68) of the Exchange Act, 15 U.S.C. 78c(a)(68).

interpretations related to the definitions.[27]

B. Rules and Interpretations Regarding Certain Transactions Outside the Scope of the Definitions of the Terms ''Swap'' and ''Security-Based Swap''

1. Insurance Products

The statutory definition of the term ''swap'' includes, in part, any agreement, contract or transaction ''that provides for any purchase, sale, payment or delivery (other than a dividend on an equity security) that is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence.'' [28] As stated in the Proposing Release, the Commissions do not interpret this clause to mean that products historically treated as insurance products should be included within the swap or security-based swap definitions.[29] The Commissions are aware of nothing in Title VII to suggest that Congress intended for traditional insurance products to be regulated as swaps or security-based swaps. Moreover, the fact that swaps and insurance products are subject to different regulatory regimes is reflected in section 722(b) of the Dodd-Frank Act which, in new section 12(h) of the CEA, provides that a swap ''shall not be considered to be insurance'' and ''may not be regulated as an insurance contract under the law of any State.'' [30] Accordingly, the Commissions believe that state or Federally regulated insurance products that are provided by persons that are subject to state or Federal insurance supervision, that otherwise could fall within the definitions should not be considered swaps or security-based swaps so long as they satisfy the requirements of the Insurance Safe Harbor (as defined below). At the same time, however, the Commissions are concerned that certain agreements, contracts, or transactions that are swaps or security-based swaps might be characterized as insurance products to evade the regulatory regime under Title VII of the Dodd-Frank Act.

Accordingly, the Commissions are adopting final rules that (i) clarify that certain agreements, contracts, or transactions that satisfy the requirements of the Insurance Safe Harbor will not be considered to be swaps or security-based swaps, and (ii) provide an Insurance Grandfather exclusion from the swap and security-based swap definitions for any agreement, contract, or transaction entered into on or before the effective date of the Product Definitions, provided that, when the parties entered into such agreement, contract, or transaction, it was provided in accordance with the Provider Test (as defined below), including a requirement that an agreement, contract or transaction that is provided in accordance with the first prong of the Provider Test must be regulated as insurance under applicable state law or the laws of the United States.

The final rules contain four subparts: The first subpart addresses the agreement, contract, or transaction; the second subpart addresses the person [31] providing that agreement, contract, or transaction; the third subpart includes a list of traditional insurance products that do not have to meet the requirements set out in the first subpart; and the fourth subpart contains the Insurance Grandfather exclusion (as defined below).

More specifically, with respect to the first subpart, the Commissions are adopting paragraph (i)(A) of rule 1.3(xxx)(4) under the CEA and paragraph (a)(1) of rule 3a69–1 under the Exchange Act (the ''Product Test'') as proposed, with certain modifications to respond to commenters' concerns. As adopted, the Product Test provides that the terms ''swap'' and ''security-based swap'' will not include an agreement, contract, or transaction that, by its terms or by law, as a condition of performance:

- Requires the beneficiary of the agreement, contract, or transaction to have an insurable interest that is the subject of the agreement, contract, or transaction and thereby carry the risk of loss with respect to that interest continuously throughout the duration of the agreement, contract, or transaction;
- Requires that loss to occur and be proved, and that any payment or indemnification therefor be limited to the value of the insurable interest;
- Is not traded, separately from the insured interest, on an organized market or over the counter; and
- With respect to financial guaranty insurance only, in the event of payment default or insolvency of the obligor, any acceleration of payments under the policy is at the sole discretion of the insurer.

The Commissions are also adopting paragraph (i)(B) of rule 1.3(xxx)(4) under the CEA and paragraph (a)(2) of rule 3a69–1 under the Exchange Act (the ''Provider Test'') as proposed, with certain modifications to respond to commenters' concerns. As adopted, the Provider Test requires that an agreement, contract, or transaction that

[27] In response to the ANPR, some commenters raised concerns regarding the treatment of inter-affiliate swaps and security-based swaps. *See, e.g.,* Letter from Edward J. Rosen, Cleary Gottlieb Steen & Hamilton LLP, Sep. 21, 2010 (''Cleary ANPR Letter''); Letter from Coalition for Derivatives End Users, Sep. 20, 2010 (''CDEU ANPR Letter''); Letter from Robert Pickel, Executive Vice President, International Swaps and Derivatives Association, Inc. (''ISDA''), Sep. 20, 2010; Letter from Richard A. Miller, Vice President and Corporate Counsel, Prudential Financial Inc., Sep. 17, 2010; Letter from Richard M. Whiting, The Financial Services Roundtable, Sep. 20, 2010. A few commenters suggested that the Commissions should further define the term ''swap'' or ''security-based swap'' to exclude inter-affiliate transactions. *See* Cleary ANPR Letter and CDEU ANPR Letter. The Commissions are considering whether inter-affiliate swaps or security-based swaps should be treated differently from other swaps or security-based swaps in the context of the Commissions' other Title VII rulemakings.

[28] CEA section 1a(47)(A)(ii), 7 U.S.C. 1a(47)(A)(ii).

[29] *See* Proposing Release at 29821. The Commissions continue to believe that it was not the intent of Congress through the swap and security-based swap definitions to preclude the provision of insurance to individual homeowners and small businesses that purchase property and casualty insurance. *See* section 2(e) of the CEA, 7 U.S.C. 2(e), and section 6(l) of the Exchange Act, 15 U.S.C. 78f(l) (prohibiting individuals and small businesses that do not meet specified financial thresholds or other conditions from entering into swaps or security-based swaps other than on or subject to the rules of regulated futures and securities exchanges). Historically, insurance has not been regulated as such under the Federal securities laws or under the CEA. *See infra* note 1283.

[30] 7 U.S.C. 16(h). Moreover, other provisions of the Dodd-Frank Act address the status of insurance more directly, and more extensively, than Title VII. For example, Title V of the Dodd-Frank Act requires the newly established Federal Insurance Office to conduct a study and submit a report to Congress, within 18 months of enactment of the Dodd-Frank Act, on the regulation of insurance, including the consideration of Federal insurance regulation. Notably, the Federal Insurance Office's authority under Title V extends primarily to monitoring and information gathering; its ability to promulgate Federal insurance regulation that preempts state insurance regulation is significantly restricted. *See* section 502 of the Dodd-Frank Act (codified in various sections of 31 U.S.C.). Title V also addressed non-admitted insurance and reinsurance. Title X of the Dodd-Frank Act also specifically excludes the business of insurance from regulation by the Bureau of Consumer Financial Protection. *See* section 1027(m) of the Dodd-Frank Act, 12 U.S.C. 5517(m) (''The [Bureau of Consumer Financial Protection] may not define as a financial product or service, by regulation or otherwise, engaging in the business of insurance.''); section 1027(f) of the Dodd-Frank Act, 12 U.S.C. 5517(f) (excluding persons regulated by a state insurance regulator, except to the extent they are engaged in the offering or provision of consumer financial products or services or otherwise subject to certain consumer laws as set forth in Title X of the Dodd-Frank Act).

[31] In response to commenters, the Commissions are changing the word ''company'' from the proposal to ''person.'' Each of the CEA, the Securities Act, and the Exchange Act contains a definition of a ''person.'' *See, e.g.,* Letter from Carl B. Wilkerson, Vice President & Chief Counsel, American Council of Life Insurers (''ACLI''), dated July 22, 2011 (''ACLI Letter'') and Letter from John P. Mulhern, Dewey & LeBoeuf LLP (''D&L''), dated July 22, 2011 (''D&L Letter'').

satisfies the Product Test must be provided:

• By a person that is subject to supervision by the insurance commissioner (or similar official or agency) of any state [32] or by the United States or an agency or instrumentality [33] thereof, and such agreement, contract, or transaction is regulated as insurance under applicable state law [34] or the laws of the United States (the ''first prong'');

• (i) Directly or indirectly by the United States, any state or any of their respective agencies or instrumentalities, or (ii) pursuant to a statutorily authorized program thereof ((i) and (ii) together, the ''second prong''); or

• In the case of reinsurance only [35] by a person to another person that satisfies the Provider Test, provided that:

(i) Such person is not prohibited by applicable state law or the laws of the United States from offering such agreement, contract, or transaction to such person that satisfies the Provider Test;

(ii) The agreement, contract, or transaction to be reinsured satisfies the Product Test or is one of the Enumerated Products (as defined below); and

(iii) Except as otherwise permitted under applicable state law, the total amount reimbursable by all reinsurers [36] for such agreement, contract, or transaction may not exceed the claims or losses paid by the cedant [37] ((i), (ii), and (iii), collectively, the ''third prong''); or

• In the case of non-admitted insurance [38] by a person who:

(i) Is located outside of the United States and listed on the Quarterly Listing of Alien Insurers as maintained by the International Insurers Department of the National Association of Insurance Commissioners; or

(ii) Meets the eligibility criteria for non-admitted insurers [39] under applicable state law ((i) and (ii) together, the ''fourth prong'').

In response to commenters' requests that the Commissions codify the proposed interpretation regarding certain enumerated types of traditional insurance products in the final rules,[40] the Commissions are also adopting paragraph (i)(C) of rule 1.3(xxx)(4) under the CEA and paragraph (a)(3) of rule 3a69–1 under the Exchange Act. In addition, in response to comments, the Commissions are expanding and revising the enumerated types of traditional insurance products. As adopted, the rule provides that the terms ''swap'' and ''security-based swap'' will not include an agreement, contract, or transaction that is provided in accordance with the Provider Test and is any one of the following (collectively, ''Enumerated Products''): Surety bonds; fidelity bonds; life insurance; health insurance; long-term care insurance; title insurance; property and casualty insurance; annuities; disability insurance; insurance against default on individual residential mortgages (commonly known as private mortgage insurance, as distinguished from financial guaranty of mortgage pools); and reinsurance (including retrocession) of any of the foregoing. The Commissions note that the inclusion of reinsurance (including retrocession) as an Enumerated Product is meant to apply to traditional reinsurance and retrocession contracts. Specifically, traditional reinsurance and retrocession contracts that reinsure risks ceded under traditional insurance products included in the Enumerated Product list and provided in accordance with the Provider test do not fall within the swap or security-based swap definitions. An agreement, contract, or transaction that is labeled as ''reinsurance'' or ''retrocession'', but is executed as a swap or security-based swap or otherwise is structured to evade Title VII of the Dodd-Frank Act, would not satisfy the Insurance Safe Harbor, and would be a swap or security-based swap.[41]

In order for an agreement, contract, or transaction to qualify under the final rules as an insurance product that would not be a swap or security-based swap: (i) The agreement, contract, or transaction must satisfy the criteria in the Product Test or be one of the Enumerated Products and (ii) the person providing the agreement, contract or transaction must satisfy one prong of the Provider Test.[42] The fact that an agreement, contract, or transaction satisfies the Product Test or is one of the Enumerated Products does not exclude it from the swap or security-based swap definitions if it is not provided by a person that satisfies the Provider Test; nor does the fact that a product is provided by a person that satisfies the Provider Test exclude the product from the swap or security-based swap definitions if the agreement, contract, or transaction does not satisfy the criteria set forth in the Product Test or is not one of the Enumerated Products.[43]

[32] The term ''State'' is defined in section 3(a)(16) of the Exchange Act, 15 U.S.C. 78c(a)(16), to mean ''any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any other possession of the United States.'' The CFTC is incorporating this definition into rule 1.3(xxx)(4) for purposes of ensuring consistency between the CFTC and SEC rules further defining the terms ''swap'' and ''security-based swap.''

[33] For purposes of this release, the term ''instrumentality'' includes publicly supported, state operated or quasi-state operated insurance programs that may not be subject to state regulatory oversight, such as the Illinois Mine Subsidence Insurance Fund and the Florida Hurricane Catastrophe Fund.

[34] For purposes of this release, the Commissions anticipate that the parties to an agreement, contract, or transaction will evaluate which state law applies prior to entering into such agreement, contract, or transaction. The Commissions do not anticipate that the parties' analysis of which state law applies will change as a result of the adoption of the Insurance Safe Harbor. In addition, the Commissions will analyze which state law applies (if necessary, in consultation with state insurance regulatory authorities) if and when such issues arise that the Commissions determine to address. The Commissions note that courts routinely determine what is the ''applicable state law'' when adjudicating disputes involving insurance.

[35] For purposes of this release, the term ''reinsurance'' means the assumption by an insurer of all or part of a risk undertaken originally by another insurer.

[36] For purposes of this release, the term ''reinsurer'' means any person who provides reinsurance.

[37] For purposes of this release, the term ''cedant'' means the person writing the risk being ceded or transferred to a reinsurer.

[38] For purposes of this release, the term ''non-admitted insurance'' means any property and casualty insurance permitted to be placed directly or through a surplus lines broker with a non-admitted insurer eligible to accept such insurance.

[39] For purposes of this release, the term ''non-admitted insurer'' means, with respect to any State, an insurer not licensed to engage in the business of insurance in such State, but does not include a risk retention group, as that term is defined in section 2(a)(4) of the Liability Risk Retention Act of 1986, 15 U.S.C. 3901(a)(4).

[40] *See infra* notes 88, 89, and 90 and accompanying text.

[41] For example, if a person uses a weather derivative or catastrophe swap to assume all or part of the risks contained in a portfolio of property and casualty insurance policies, that weather derivative or catastrophe swap would be a Title VII instrument that is subject to regulation under Title VII.

[42] As was discussed in the Proposing Release, *see* Proposing Release at 29822 n. 31, certain variable life insurance products and annuities are securities and therefore are excluded from the swap and security-based swap definitions regardless of whether they meet the requirements under the final rules. *See* section 1a(47)(B)(v) of the CEA, 7 U.S.C. 1a(47)(B)(v). These securities would not be swaps or security-based swaps whether or not required to be registered under the Securities Act. *See SEC* v. *United Benefit Life Ins. Co.,* 387 U.S. 202 (1967) (holding that the accumulation provisions of a ''flexible fund'' annuity contract were not entitled to exemption under section 3(a)(8) of the Securities Act, 15 U.S.C. 77c(a)(8), for insurance and annuities); *SEC* v. *Variable Annuity Life Ins. Co.,* 359 U.S. 65 (1959) (holding that a variable annuity was not entitled to exemption under section 3(a)(8) of the Securities Act).

[43] For the purpose of determining whether an agreement, contract or transaction falls within the Insurance Safe Harbor, Title VII provides the Commissions with flexibility to address the facts and circumstances of new products that may be marketed or sold as insurance, through joint interpretations pursuant to section 712(d)(4) of the Dodd-Frank Act.

Further, in response to commenters' concerns,[44] the Commissions are confirming that the Product Test, the Provider Test and the Enumerated Products represent a non-exclusive safe harbor. None of the Product Test, the Provider Test, or the Enumerated Products (collectively, the ''Insurance Safe Harbor'') implies or presumes that an agreement, contract, or transaction that does not meet any of their respective requirements is a swap or security-based swap. Such an agreement, contract, or transaction will require further analysis of the applicable facts and circumstances, including the form and substance of such agreement, contract, or transaction, to determine whether it is insurance, and thus not a swap or security-based swap.

However, future market conditions or other developments may prompt the Commissions to reconsider whether a particular product that satisfies the requirements of the Insurance Safe Harbor should instead fall within the swap or security-based swap definition. Because a determination that such a product is a swap or security-based swap could potentially have an unsettling effect on the domestic insurance or financial markets, the Commissions would only consider making a determination that such a product is a swap or security-based swap through a rulemaking[45] process that would provide market participants with an opportunity to comment.[46]

(a) Types of Insurance Products

Final Rules

Product Test

The Commissions are adopting the Product Test as proposed, with certain modifications to respond to commenters' concerns. The Product Test sets forth four criteria for an agreement, contract, or transaction to be considered insurance. First, the final rules require that the beneficiary have an ''insurable interest'' underlying the agreement, contract, or transaction and thereby carry the risk of loss with respect to that interest continuously throughout the duration of the agreement, contract, or transaction. The requirement that the beneficiary be at risk of loss (which could be an adverse financial, economic, or commercial consequence) with respect to the interest that is the subject of the agreement, contract, or transaction continuously throughout the duration of the agreement, contract, or transaction will ensure that an insurance contract beneficiary has a stake in the interest on which the agreement, contract, or transaction is written.[47] Similarly, the requirement that the beneficiary have the insurable interest continuously throughout the duration of the agreement, contract, or transaction is designed to ensure that payment on the insurance product is inextricably connected to both the beneficiary and the interest on which the insurance product is written. In contrast to insurance, a credit default swap (''CDS'') (which may be a swap or a security-based swap) does not require the purchaser of protection to hold any underlying obligation issued by the reference entity on which the CDS is written.[48] One commenter identified the existence of an insurable interest as a material element to the existence of an insurance contract.[49] Because neither swaps nor security-based swaps require the presence of an insurable interest at all (although an insurable interest may sometimes be present coincidentally), the Commissions continue to believe that whether an insurable interest is present continuously throughout the duration of the agreement, contract, or transaction is a meaningful way to distinguish insurance from swaps and security-based swaps.

Second, the requirement that a loss occur and be proved similarly ensures that the beneficiary has a stake in the insurable interest that is the subject of the agreement, contract, or transaction. If the beneficiary can demonstrate loss, that loss would ''trigger'' performance by the insurer on the agreement, contract, or transaction such that, by making payment, the insurer is indemnifying the beneficiary for such loss. In addition, limiting any payment or indemnification to the value of the insurable interest aids in distinguishing swaps and security-based swaps (where there is no such limit) from insurance.[50]

Third, the final rules require that the insurance product not be traded, separately from the insured interest, on an organized market or over the counter. As the Commissions observed in the Proposing Release, with limited exceptions,[51] insurance products traditionally have not been entered into on or subject to the rules of an organized exchange nor traded in secondary market transactions (*i.e.,* they are not traded on an organized market or over the counter). While swaps and security-based swaps also generally have not been tradable at will in secondary market transactions (*i.e.,* on an organized market or over the counter) without counterparty consent, the Commissions understand that all or part of swaps and security-based swaps are novated or assigned to third parties, usually pursuant to industry standard terms and documents.[52] In response to commenter concerns,[53] the Commissions are clarifying when assignments of insurance contracts and trading on ''insurances exchanges'' do not constitute trading the contract separately from the related insurable interest, and thus would not violate the Product Test. The Commissions do not interpret the assignment of an insurance contract as described by commenters[54]

[44] *See infra* notes 178 and 179 and accompanying text.

[45] The Commissions can engage in rulemakings in a variety of ways including an advanced notice of proposed rulemaking, a notice of proposed rulemaking, or an interim final rule.

[46] When determining whether a particular product is a swap or security-based swap instead of insurance, if such product does not meet the requirements set out in the Insurance Safe Harbor, the Commissions will consider prior regulation as an insurance contract as one factor in their respective facts and circumstances analysis.

[47] Requiring that a beneficiary of an insurance policy have a stake in the interest traditionally has been justified on public policy grounds. For example, a beneficiary that does not have a property right in a building might have an incentive to profit from arson.

[48] Standard CDS documentation stipulates that the incurrence or demonstration of a loss may not be made a condition to the payment on the CDS or the performance of any obligation pursuant to the CDS. *See, e.g.,* ISDA, 2003 ISDA Credit Derivatives Definitions, art. 9.1(b)(i) (2003) (''2003 Definitions'') (stating that ''the parties will be obligated to perform * * * irrespective of the existence or amount of the parties' credit exposure to a Reference Entity, and Buyer need not suffer any loss nor provide evidence of any loss as a result of the occurrence of a Credit Event'').

[49] *See* D&L Letter.

[50] To the extent an insurance product provides for such items as, for example, a rental car for use while the car that is the subject of an automobile insurance policy is being repaired, the Commissions would consider such items as constituting part of the value of the insurable interest.

[51] *See, e.g.,* ''Life Settlements Task Force, Staff Report to the United States Securities and Exchange Commission'' (''In an effort to help make the bidding process more efficient and to facilitate trading of policies after the initial settlement occurs, some intermediaries have considered or instituted a trading platform for life settlements.''), available at *http://www.sec.gov/news/studies/2010/lifesettlements-report.pdf* (July 22, 2010).

[52] *See, e.g.,* ISDA, 2005 Novation Protocol, available at *http://www.isda.org/2005novationprot/docs/NovationProtocol.pdf* (2005); ISDA, ISDA Novation Protocol II, available at *http://www.isda.org/isdanovationprotII/docs/NPII.pdf* (2005); 2003 Definitions, Exhibits E (Novation Agreement) and F (Novation Confirmation).

[53] *See infra* notes 74 and 75 and accompanying text.

[54] *See, e.g.,* Letter from Kim O'Brien, President & CEO, National Association for Fixed Annuities (''NAFA''), dated July 21, 2011 (''NAFA Letter''); Letter from Robert Pickel, Executive Vice Chairman, ISDA, dated July 22, 2011 (''ISDA Letter''); ACLI Letter; and Letter from Letter from Stephen E. Roth, Frederick R. Bellamy and James M. Cain, Sutherland Asbill & Brennan LLP on behalf of the Committee of Annuity Insurers (''CAI''), dated July 22, 2011 (''CAI Letter'').

to be ''trading'' as that term is used in the Product Test.[55] Nor do the Commissions find that the examples of exchanges offered by commenters,[56] such as Federal Patient Protection and Affordable Care Act ''exchanges,'' [57] are exchanges as that term is used in the Product Test, *e.g.,* a national securities exchange or designated contract market. Mandated insurance exchanges are more like marketplaces for the purchase of insurance, and there is no trading of insurance policies separately from the insured interest on these insurance exchanges. Thus, the assignment of an insurance contract as permitted or required by state law, or the purchase or assignment of an insurance contract on an insurance exchange or otherwise, does not constitute trading an agreement, contract, or transaction separately from the insured interest and would not violate the trading restriction in the Product Test. For the foregoing reasons as clarified, the Commissions continue to believe that lack of trading separately from the insured interest is a feature of insurance that is useful in distinguishing insurance from swaps and security-based swaps.

Fourth, the final rules provide that in the case of financial guaranty insurance policies, also known as bond insurance or bond wraps, any acceleration of payment under the policy must be at the sole discretion of the provider of the financial guaranty insurance policy in order to satisfy the Product Test.[58] Although such products can be economically similar to products such as CDS, they have certain key characteristics that distinguish them from swaps and security-based swaps.[59] For example, under a financial guaranty policy, the insurer typically is required to make timely payment of any shortfalls in the payment of scheduled interest to the holders of the underlying guaranteed obligation. Also, for particular bonds that are covered by a financial guaranty policy, the indenture, related documentation, and/or the financial guaranty policy will provide that a default in payment of principal or interest on the underlying bond will not result in acceleration of the obligation of the insurer to make payment of the full amount of principal on the underlying guaranteed obligation unless the insurer, in its sole discretion, opts to make payment of principal prior to the final scheduled maturity date of the underlying guaranteed obligation. Conversely, under a CDS, a protection seller frequently is required to make payment of the relevant settlement amount to the protection buyer upon demand by the protection buyer after any credit event involving the issuer.[60]

As noted in the Proposing Release, the Commissions do not believe that financial guaranty policies, in general, should be regulated as swaps or security-based swaps. However, because of the close economic similarity of financial guaranty insurance policies guaranteeing payment on debt securities to CDS, in addition to the criteria noted above with respect to insurance generally, the final rules require that, in order to satisfy the Product Test, financial guaranty policies also must satisfy the requirement that they not permit the beneficiary of the policy to accelerate the payment of any principal due on the debt securities. This requirement further distinguishes financial guaranty policies from CDS because, as discussed above, the latter generally requires payment of the relevant settlement amount on the CDS after demand by the protection buyer.

Finally, in response to comments,[61] the Commissions are clarifying that reinsurance and retrocession transactions fall within the scope of the Product Test. The Commissions find that these transactions have insurable interests, as the Commissions interpret such interests in this context, if they have issued insurance policies covering the risks that they wish to insure (and reinsure). Moreover, the Commissions find that retrocession transactions are encompassed within the Product Test and the Provider Test because retrocession is reinsurance of reinsurance (provided the retrocession satisfies the other requirements of both tests). In addition, reinsurance (including retrocession) of certain types of insurance products is included in the list of Enumerated Products.[62]

Requiring all of the criteria in the Product Test will help to limit the application of the final rules to agreements, contracts, and transactions that are appropriately regulated as insurance, and help to assure that agreements, contracts, and transactions appropriately subject to the regulatory regime under Title VII of the Dodd-Frank Act are regulated as swaps or security-based swaps. As a result, the Commissions believe that these requirements will help prevent the final rules from being used to circumvent the applicability of the swap and security-based swap regulatory regimes under Title VII.

Enumerated Products

In the Proposing Release, the Commissions proposed an interpretation that certain enumerated types of insurance products would be outside the scope of the statutory definitions of swap and security-based swap under the Dodd-Frank Act if provided in accordance with the Provider Test and regulated as insurance. Based on comments received,[63] the Commissions are adding three products to the list of products as proposed (fidelity bonds, disability insurance and insurance against default on individual residential mortgages), adding reinsurance (including retrocession) of any of the traditional insurance products included in the list, deleting a requirement applicable to annuities, and codifying the Enumerated Products in the final rules. The revised list of Enumerated Products is: Surety bonds, fidelity bonds, life insurance, health insurance, long-term

[55] The assignment of the benefits or proceeds of an insurance contract by an owner or beneficiary does not violate the trading restriction in the Product Test. This interpretation does not extend to ''stranger originated'' products. The transfer of obligations for policyholder benefits between two insurance companies, such as would occur in connection with an insurance company merger or acquisition, also does not violate the trading restriction contained in the Product Test.

[56] *See* Letter from Susan E. Voss, Commissioner Iowa Insurance Division & National Association of Insurance Commissioners (''NAIC'') President, and Therese M. Vaughan, NAIC Chief Executive Officer, dated July 22, 2011 (''NAIC Letter'').

[57] *See Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans,* 76 FR 41866 (Jul. 15, 2011) (proposed).

[58] Financial guarantee policies are used by entities such as municipalities to provide greater assurances to potential purchasers of their bonds and thus reduce their interest costs. *See* ''Report by the United States Securities and Exchange Commission on the Financial Guarantee Market: The Use of the Exemption in section 3(a)(2) of the Securities Act for Securities Guaranteed by Banks and the Use of Insurance Policies to Guarantee Debt Securities'' (Aug. 28, 1987).

[59] *See, e.g.,* Letter from Sean W. McCarthy, Chairman, Association of Financial Guaranty Insurers on the ANPR, dated Sept. 20, 2010 (explaining the differences between financial guaranty policies and CDS); Letter from James M. Michener, General Counsel, Assured Guaranty on the ANPR, dated Dec. 14, 2010 (noting that the Financial Accounting Standards Board has issued separate guidance on accounting for financial guaranty insurance and CDS); Letter from Ernest C. Goodrich, Jr., Managing Director—Legal Department, Deutsche Bank AG on the ANPR, dated Sept. 20, 2010 (noting that financial guaranty policies require the incurrence of loss for payment, whereas CDS do not).

[60] While a CDS requires payment in full on the occurrence of a credit event, the Commissions recognize that there are other financial instruments, such as corporate guarantees of commercial loans and letters of credit supporting payments on loans or debt securities, that allow for acceleration of payment obligations without such guarantees or letters of credit being swaps or security-based swaps.

[61] *See infra* note 105 and accompanying text.

[62] *See supra* note 41 and accompany text.

[63] *See infra* notes 93 and 94 and accompanying text.

care insurance, title insurance, property and casualty insurance, annuities, disability insurance, insurance against default on individual residential mortgages (commonly known as private mortgage insurance, as distinguished from financial guaranty of mortgage pools), and reinsurance (including retrocession) of any of the foregoing.[64] The Commissions believe that the Enumerated Products, as traditional insurance products, are not the types of agreements, contracts, or transactions that Congress intended to subject to the regulatory regime for swaps and security-based swaps under the Dodd-Frank Act. Codifying the Enumerated Products in the final rules appropriately places traditional insurance products outside the scope of the swap and security-based swap definition so long as such Enumerated Products are provided in accordance with the Provider Test, including a requirement that an Enumerated Product that is provided in accordance with the first prong of the Provider Test must be regulated as insurance under applicable state law or the laws of the United States.

Comments

Insurable Interest

Six commenters objected to the requirement in the Product Test that the beneficiary have an insurable interest continuously throughout the duration of the contract.[65] These commenters noted that, under state law, an insurable interest may not always be required to be present continuously throughout the duration of the policy. For example, commenters noted that life insurance may only require an insurable interest at the time the policy is executed;[66] and some property and casualty or liability insurance may only require an insurable interest at the time a loss occurs.[67] Commenters also noted that annuities and health insurance do not require the existence of an insurable interest at all.[68] Another commenter suggested that the Commissions modify the Product Test to indicate that annuities would not need to satisfy the ''insurable interest'' component, or to use terminology other than insurable interest to make clear that annuities are not swaps.[69]

As discussed above, the Commissions are retaining the insurable interest requirement of the Product Test. The Commissions continue to believe that this requirement is a useful tool to distinguish insurance from swaps and security-based swaps, because swaps and security-based swaps do not require the presence of an insurable interest (or require either counterparty to bear any risk of loss) at any time during the term of the agreement, contract, or transaction. While the Commissions acknowledge commenters who argued that products such as life insurance, property and casualty insurance, and annuities may fail the Product Test because of the insurable interest requirement, the Commissions do not interpret any such failure to mean that life insurance, property and casualty insurance, and annuities are not insurance products. To the contrary, as discussed above, these products are included in the list of Enumerated Products that are excluded from the swap and security-based swap definitions so long as they are provided in accordance with the Provider Test. If a life insurance, property and casualty insurance, or annuity is provided in accordance with the Provider Test, such product is not a swap or security-based swap, whether or not an insurable interest is present at all times during the term of the contract.

Indemnification for Loss

Five commenters objected to the requirement in the Product Test that a loss occur and be proven, and that any payment be limited to the value of the insurable interest, because payment under many insurance products may not be directly based upon actual losses incurred.[70] Two commenters argued that annuities do not provide indemnification for loss and that life insurance products are not constrained by the value of the insurable interest.[71] Another argued that many insurance policies pay fixed amounts upon the occurrence of a loss without a requirement that the loss be tied to the value of an insurable interest.[72] Disability insurance and long-term care insurance are other products that commenters indicate would not be able to satisfy this requirement of the Product Test.[73]

As discussed above, the Commissions are retaining the requirement in the Product Test that a loss occur and be proven and that any payment for such loss be limited to the value of the insurable interest. The Commissions continue to believe that this requirement is a useful tool to distinguish insurance from swaps and security-based swaps, because payments under swaps and security-based swaps may be required when neither party incurs a loss, nor is the amount of payment limited by any such loss. While the Commissions acknowledge commenters who identified various products that may fail this part of the Product Test, the Commissions do not interpret any such failure to mean that products such as annuities, disability insurance, and long-term care insurance are not insurance products. To the contrary, as discussed above, these products are included in the list of Enumerated Products that are excluded from the swap and security-based swap definitions so long as they are provided in accordance with the Provider Test. If long-term care insurance, disability insurance, or an annuity is provided in accordance with the Provider Test, such product is not a swap or a security-based swap, whether or not a loss occurs, is proven, or indemnification for loss is limited to the value of the insurable interest.

Not Traded Separately

Six commenters stated that the proposed requirement that the agreement, contract, or transaction not be traded, separately from the insured interest, on an organized market or over the counter, is not an effective criterion in determining whether a product is insurance.[74] According to commenters, this criterion is ineffective and should be deleted from the Product Test because many conventional insurance

[64] *See supra* note 41 and accompanying text.

[65] *See* ACLI Letter; CAI Letter; ISDA Letter (objecting to the requirement that the risk of loss be held continuously throughout the contact); NAFA Letter; NAIC Letter; and Letter from Kenneth F. Spence III, Executive Vice President & General Counsel, The Travelers Companies, Inc. (''Travelers''), dated Nov. 14, 2011 (''Travelers Letter'').

[66] *See* ACLI Letter; CAI Letter; ISDA Letter; NAIC Letter; and Travelers Letter. The Commissions understand that some states may define what constitutes an insurable interest with reference to personal or emotional consequence in addition to the financial, economic, or commercial consequence mentioned in the statutory swap definition.

[67] *See* NAIC Letter and Travelers Letter. However, one commenter noted that the Product and Provider Tests, as proposed, should be an effective means of helping to distinguish between those contracts that qualify for exclusion from the definition of swap and security-based swap from those contracts that will not. *See* Letter from Michael A. Bell, Senior Counsel, Financial Policy, The Property Casualty Insurers Association of America, dated July 22, 2011.

[68] *See* CAI Letter; ISDA Letter; NAFA Letter; and NAIC Letter.

[69] *See* Letter from Nicholas D. Latrenta, Executive Vice President and General Counsel, Metropolitan Life Insurance Companies and its insurance affiliates (''MetLife''), dated July 22, 2011 (''MetLife Letter'').

[70] *See* ACLI Letter; CAI Letter; ISDA Letter; NAFA Letter; and Travelers Letter.

[71] *See* ACLI Letter and Travelers Letter.

[72] *See* Travelers Letter.

[73] *See, e.g.,* ACLI Letter and CAI Letter.

[74] *See* ACLI Letter; Letter from Chris Barnard (''Barnard''), dated June 28, 2011 (''Barnard Letter''); CAI Letter; NAFA Letter; NAIC Letter; and ISDA Letter.

products, such as annuities, are assignable (and therefore tradable), which may violate the trading restriction.[75] Two commenters observed that the trading of insurance policies has already occurred and is expected to increase.[76] One commenter stated that a number of states have ''insurance exchanges'' that sell reinsurance and excess or surplus lines, and that the Patient Protection and Affordable Care Act requires states or the Federal government to establish health benefit ''insurance exchanges'' through which insurers will sell health insurance to individuals and small groups.[77] One commenter recommended that the trading restriction apply only to trading by the policyholder or beneficiary of an insurance policy.[78]

The Commissions are retaining the requirement in the Product Test that the agreement, contract, or transaction not be traded separately from the insured interest, on an organized market or over the counter, and as discussed above have provided a clarification regarding assignments and trading on insurance exchanges. The Commissions continue to believe that using this criterion is an effective way to distinguish insurance from swaps and security-based swaps because swaps and security-based swaps are traded on organized markets and over the counter.

As stated above, the Commissions do not interpret the assignment of an insurance contract as described by commenters to be ''trading'' as that term is used in the Product Test.[79] Nor do the Commissions find that the examples of exchanges offered by commenters, such as Federal Patient Protection and Affordable Care Act ''exchanges,'' are exchanges as that term is used in the Product Test, *e.g.,* a national securities exchange or designated contract market.[80] Mandated insurance exchanges are more like marketplaces for the purchase of insurance, and there is no trading of insurance policies separately from the insured interest on these insurance exchanges. Thus, the assignment of an insurance contract as permitted or required by state law, or the purchase or assignment of an insurance contract on an insurance exchange or otherwise, does not constitute trading an agreement, contract, or transaction separately from the insured interest and would not violate the trading restriction in the Product Test.

Acceleration

Three commenters believed that the proposed requirement that, in the event of payment default or insolvency of the obligor, any acceleration of payments under a financial guaranty insurance policy be at the sole discretion of the insurer, is not an effective criterion in determining whether financial guaranty insurance falls outside the swap and security-based swap definitions and should be deleted from the Product Test.[81] However, one commenter supported its inclusion, observing that the proposed requirement is ''firmly based on substantive business realities.''[82] Two commenters believed that the acceleration of payments requirement is not useful in distinguishing between financial guaranty insurance and swaps or security-based swaps because it is designed to protect financial guaranty insurers from insolvency.[83] They noted that the criterion is a regulatory requirement imposed by state insurance commissioners that is subject to change, and that a state could not change this regulatory requirement without converting the financial guaranty policy into a swap or security-based swap.[84] One commenter stated that the acceleration of payments criterion has been the subject of significant analysis and interpretation by state insurance regulators, and including the requirement in the rules could result in conflicting interpretations and additional legal uncertainty.[85] This commenter also stated that this uncertainty will impose significant burdens on financial guaranty insurers that insure municipal bonds.[86]

The Commissions are retaining the requirement that acceleration be at the sole option of the provider of the financial guaranty insurance policy in the Product Test. In response to commenter concerns, the Commissions are clarifying that they plan to interpret the acceleration limitation in accordance with applicable state law to the extent that it does not contradict the Commissions' rules, interpretations and/or guidance regarding what is a swap or security-based swap.[87] The Commissions continue to believe that, for purposes of further defining swaps and security-based swaps, this criterion is useful to distinguish between financial guaranty insurance on the one hand, and swaps and security-based swaps, such as CDS, on the other because, as discussed above, the latter generally requires payment of the relevant settlement amount on the CDS after demand by the protection buyer.

Enumerated Products

The Commissions proposed an interpretation that certain enumerated types of insurance products would be outside the scope of the statutory definitions of swap and security-based swap. Several commenters stated that the list of enumerated insurance products should be codified in order to enhance legal certainty.[88] In particular, one commenter stated that it is important for the Commissions to codify the interpretation because the traditional insurance products included in the enumerated list may not satisfy the Product Test.[89] The commenter also expressed concern that insurance companies and state insurance

[75] *Id.* ACLI stated that many conventional insurance products, particularly annuities, can be assigned by the owner, and often state insurance law requires such assignability as a condition for approval of the product for sale under applicable insurance law. ACLI also stated that insurance policies are frequently assigned among family members, to third parties as collateral for loans, and in a host of other situations, and does not believe that these common kinds of assignment should cause an insurance product to be characterized as a swap.

[76] *See* Barnard Letter and NAIC Letter.

[77] *See* NAIC Letter. The commenter explained that the ''insurance exchanges'' mandated by the Patient Protection and Affordable Care Act would be marketplaces for insurance policies. The commenter described them as ''cooperatives'' where people could go to buy insurance policies with standardized terms/actuaries. The commenter noted that the insurable interest would not ''trade'' separately from the insurance policy in these cooperatives.

[78] *See* Travelers Letter.

[79] *See supra* notes 54 and 55.

[80] *See supra* notes 56 and 57.

[81] *See* Letter from Bruce E. Stern, Chairman, Association of Financial Guaranty Insurers (''AFGI''), dated July 20, 2011 (''AFGI Letter''); ISDA Letter; and Letter from Kimberly M. Welsh, Vice President and Assistant General Counsel, Reinsurance Association of America (''RAA''), dated July 22, 2011 (''RAA Letter'').

[82] *See* Letter from Dennis M. Kelleher, President & CEO, Better Markets Inc., dated July 22, 2011 (''Better Markets Letter'').

[83] *See* ISDA Letter and RAA Letter.

[84] *Id.*

[85] *See* AFGI Letter.

[86] *Id.* The commenter argued that these burdens would (a) increase instability in the currently fragile municipal bond market and (b) decrease the availability or attractiveness of bond insurance to municipal issuers that would otherwise save money by employing bond insurance. The Commissions understand that only one member of AFGI is currently active in the municipal bond insurance market.

[87] One commenter noted that ''financial guarantors, for some time and in full compliance with state insurance laws, have issued insurance policies that contemplate acceleration upon events unrelated to an issuer default, *e.g.,* upon the downgrade of the insurer.'' *See* AFGI Letter. In response to this comment, the Commissions note that the acceleration requirement in the Product Test refers only to ''payment default or insolvency of the *obligor*'' (emphasis added), without precluding other triggers.

[88] *See* ACLI Letter; NAIC Letter; RAA Letter; AIA Letter; NAFA Letter; and Letter from Mark R. Thresher, Executive Vice President, Nationwide, dated July 19, 2011 (''Nationwide Letter'').

[89] *See* Travelers Letter.

regulators would face the possibility that the Commissions could revise or withdraw the interpretation in the future, with or without undergoing a formal rulemaking process.[90] As noted above, in response to commenters' concerns, the Commissions are codifying the Enumerated Products in the final rules.

One commenter further argued that the enumerated types of insurance products included in the list should not have to additionally satisfy the requirements that the person offering such product be a U.S. domiciled insurer and that the product be regulated in the U.S. as insurance.[91] The commenter argued that this additional requirement would result in the Insurance Safe Harbor not applying to traditional insurance products offered by insurers domiciled outside of the U.S. or by insurers that are not organized as insurance companies. The Commissions are retaining the requirement that the Enumerated Products be provided in accordance with the Provider Test. The Commissions also note that, in response to commenters' concerns, the Commissions have revised the first prong of the Provider Test so that it is not limited to insurance companies or to entities that are domiciled in the U.S. A product that need not satisfy the Product Test must be provided in accordance with the Provider Test, including a requirement that products provided in accordance with the first prong of the Provider Test must be regulated as insurance.[92]

Five commenters addressed the treatment of annuities in the proposed interpretive guidance, with all recommending that all annuities be excluded from the swap and security-based definitions regardless of their status under the tax laws.[93] In response to the comments, the Commissions are eliminating the proposed requirement that annuities comply with section 72 of the Internal Revenue Code in order to qualify as an Enumerated Product. The Commissions are persuaded that the proposed reference to the Internal Revenue Code is unnecessarily limiting and does not help to distinguish insurance from swaps and security-based swaps.

Other commenters suggested adding other products to the list of enumerated types of insurance products,[94] with one suggesting that the Commissions' interpretation cover all transactions currently reportable as insurance in the provider's regulatory and financial reports under a state's or a foreign jurisdiction's insurance laws.[95] One commenter noted that the list of enumerated types of insurance products does not include other state-regulated products such as service contracts, that may not satisfy the Product Test.[96] In response to requests to expand the list of enumerated products, the Commissions are adding fidelity bonds,[97] disability insurance, and insurance against default on individual residential mortgages (commonly known as private mortgage insurance, as distinguished from financial guaranty of mortgage pools) to the list of Enumerated Products. The Commissions agree that these are traditional insurance products, and thus their inclusion in the list of Enumerated Products is appropriate. The Commissions have also added reinsurance (including retrocession) of any of the traditional insurance products to the list of Enumerated Products.[98] However, the Commissions decline at this time to expand the list of Enumerated Products to include other types of contracts such as, guaranteed investment contracts (''GICs''), synthetic GICs, funding agreements, structured settlements, deposit administration contracts, immediate participation guaranty contracts, industry loss warrants, and catastrophe bonds.[99] These products do not receive the benefit of state insurance guaranty funds; their providers are not limited to insurance companies. The Commissions received little detail on sales of these other products, and do not believe it is appropriate to determine whether particular complex, novel or still evolving products are swaps or security-based swaps in the context of a general definitional rulemaking. Rather these products should be considered in a facts and circumstances analysis. With respect to GICs, the Commissions have published a request for comment regarding the study of stable value contracts. [100]

Reliance on State Law Concepts

Two commenters noted that the Product Test relies on concepts derived from state law, such as ''insurable interest'' and ''indemnification for loss,'' which do not have uniform definitions.[101] This would require the

[90] *Id.*

[91] *See* D&L Letter.

[92] *See infra* notes 147 and 148 and accompanying text.

[93] *See* ACLI Letter; CAI Letter; MetLife Letter; Nationwide Letter; and RAA Letter.

[94] *See* ACLI Letter; AIA Letter; CAI Letter; D&L Letter; NAIC Letter; Letter from Michael A. Bell, Senior Counsel, Financial Policy, RAA Letter; and Letter from Robert J. Duke, The Surety & Fidelity Association of America (''SFAA''), dated July 13, 2011 (''SFAA Letter''). ACLI, CAI and RAA requested the addition of other types of annuity and pension plan products, such as group annuity contracts, guaranteed investment contracts, funding agreements, structured settlements, deposit administration contracts, and immediate participation guarantee contracts. D&L requested the addition of reinsurance of any of the enumerated types of traditional insurance products. NAIC requested the addition of mortgage guaranty, accident, and disability insurance. SFAA request the addition of surety and fidelity bonds.

[95] *See* Letter from J. Stephen Zielezienski, Senior Vice President & General Counsel, American Insurance Association (''AIA''), dated July 22, 2011 (''AIA Letter'').

[96] *See* NAIC Letter. The Commissions note that service contracts, although regulated as insurance in some states, comprise consumer warranties, extended service plans, and buyer protection plans of the sort purchased with major appliances, electronics, and the like. The Commissions are addressing these contracts in their interpretation regarding consumer/commercial transactions. *See infra* part II.B.3.

[97] SFAA requested that the Commissions issue specific guidance that surety and fidelity bonds are insurance products rather than swaps, noting that all states include surety and fidelity bonds as lines of insurance subject to state oversight. Surety bonds were already included in the list of enumerated insurance products contained in the Proposing Release.

[98] *See supra* note 41 and accompanying text.

[99] *See, e.g.,* RAA Letter; CAI Letter; Letter from Ian K. Shepherd, Managing Director, Alice Corp. Pty Ltd (''Alice Corp.''), dated July 22, 2011. Alice Corp. stated that industry loss warrants are a contingent instrument with a somewhat illiquid secondary market but ''are currently treated as a reinsurance product and require an insurable interest.'' Alice Corp. also stated that ''[c]atastrophe bonds may reference a specific insured portfolio or a set of parameters and may be traded in a secondary market and behave like a coupon bond if there is no triggering event but have a contingent element since some or all of the principal may be lost if the referenced event or loss occurs.'' *Id.* The Commissions note that catastrophe bonds are ''securities'' under the Federal securities laws and decline to provide an interpretation regarding industry loss warrants because it is inappropriate to determine whether a complex and novel product is a swap or a security-based swap in a general definitional rulemaking.

[100] *See Acceptance of Public Submissions Regarding the Study of Stable Value Contracts,* 76 FR 53162 (Aug. 25, 2011).

[101] *See* ACLI Letter and AFGI Letter. Some states define concepts such as ''insurable interest'' in statute; in other states definitions have developed through common law. The Commissions recognize that the terms denoting such concepts may vary from state to state; for instance, what one state calls an ''insurable interest'' may be referred to as a ''material interest'' in another. *See, e.g.,* New York Insurance Law Section 1101 (''material interest''). The Commissions believe, however, that both the concepts and their labels are well understood by insurance professionals and that any such variations would not impede market participants from interpreting or applying the final rules. Indeed, one commenter acknowledged this and applied the concepts, labeled differently, to particular products. ''The terms used in the rule's criteria are different from the terms used with respect to a surety bond. For example, the bond is generally not referred to as a 'policy.' In addition, the beneficiary of a bond typically is known as the 'obligee.' Further, the bond's limit is referred to as the 'penal sum.' Nevertheless, the criteria can be applied to surety bonds and fidelity bonds, and such application would exclude bonds from the statutory definition of swaps.'' *See* SFAA Letter.

Commissions to analyze state insurance law, as well as to determine which state law should apply.[102] One of these commenters also requested that such concepts be applied consistently with the historical interpretation by the applicable state.[103]

State law differences regarding these concepts should not impede the ability of market participants from interpreting or applying the final rules to distinguishing between insurance and swaps or security-based swaps, and thus the Commissions are retaining these concepts in the Product Test. The Commissions intend to interpret these concepts consistently with the existing and developing laws of the relevant state(s) governing the agreement, contract, or transaction in question. However, the Commissions note their authority to diverge from state law if the Commissions become aware of evasive conduct.[104]

Inclusion of Reinsurance and Retrocession Transactions

Several commenters suggested that the Commissions amend the Product Test to explicitly address reinsurance and retrocession (*i.e.,* reinsurance of reinsurance) transactions.[105]

In response to these comments, the Commissions are clarifying that reinsurance and retrocession transactions may fall within the Insurance Safe Harbor, thus, it is unnecessary for the Product Test to be modified as suggested by these commenters. In addition, the Commissions have modified the final rules to include reinsurance (including retrocession) of certain types of insurance products in the list of Enumerated Products. Reinsurance or retrocession of these Enumerated Products will fall within the Insurance Safe Harbor so long as such reinsurance or retrocession is provided in accordance with the Provider Test.[106]

Payment Based on the Price, Rate, or Level of a Financial Instrument

In the Proposing Release, the Commissions requested comment on whether, in order for an agreement, contract, or transaction to be considered insurance under the Product Test, the Commissions should require that payment not be based on the price, rate, or level of a financial instrument, asset, or interest or any commodity. The Commissions also requested comment on whether variable annuity contracts (where the income is subject to tax treatment under section 72 of the Internal Revenue Code) and variable life insurance should be excepted from such a requirement, if adopted.[107]

Eight commenters stated that it is inappropriate to include such a requirement in the final rules because a number of traditional insurance products would not satisfy the requirement and suggested that the Commissions should instead consider whether the agreement, contract, or transaction transfers risk and argued that such a requirement is not a useful marker for distinguishing insurance from swaps and security-based swaps.[108] Several commenters also believed that the addition to the Product Test of the criterion that payment not be based on the price, rate, or level of a financial instrument, asset, or interest or any commodity would contribute to greater legal uncertainty.[109]

Two commenters agreed that such a requirement should be included in the final rules.[110] One commenter argued that any insurance instrument that provides for payment based on the price, rate, or level of a financial instrument, asset, or interest in any commodity is in substance a swap or security-based, regardless of its label, and should be regulated as such.[111] One of these commenters further recommended that the Commissions exclude annuity and variable universal life insurance from this requirement because these products were investments with some minimal level of life insurance cover or investment guarantee rider on top.[112]

The Commissions are not adopting an additional requirement for the Product Test that payment not be based on the price, rate, or level of a financial instrument, asset, or interest or any commodity because the Commissions find the requirement to be unsuitable for distinguishing insurance from swaps and security-based swaps. While the provision might work for property and casualty insurance, as many commenters noted, it is not an effective distinction for a number of other traditional insurance products.

Accounting Standards

In the Proposing Release, the Commissions requested comment on whether the proposed rules relating to insurance should include a provision related to whether a product is recognized at fair value on an ongoing basis with changes in fair value reflected in earnings under U.S. generally accepted accounting principles.[113]

Three commenters argued that the proposed rules should not include a provision that an insurance product is recognized at fair value under generally accepted accounting principles.[114] One commenter argued that the determinants of what is an insurance product should be the existence of an insurable interest, transfer of risk, and indemnification of covered loss.[115] Another argued that factoring accounting standards into the analysis of whether a product is a swap

[102] *See* ACLI Letter and AFGI Letter.

[103] *See* AFGI Letter.

[104] The Commissions may also diverge from interpretations or determinations of state law based on an analysis of applicable facts and circumstances when determining whether a particular product is a swap or security-based swap.

[105] *See* ACLI Letter; CAI Letter; D&L Letter; ISDA Letter; NAFA Letter; Nationwide Letter; and RAA Letter. ACLI noted that the Product Test does not include a reference to reinsurance and that the ''insurable interest'' requirement under state insurance law generally does not apply to reinsurance products which, therefore, would not satisfy the Product Test. ACLI and CAI state that reinsurance in a chain of reinsurance also should not be considered a swap or security-based swap. In addition to expressly referencing reinsurance and retrocession transactions, ACLI believes that the Product Test should be expanded to include reinsurance and retrocession of insurance risks ceded by non-U.S. insurance companies to domestic insurance companies. RAA recommended adding a new clause to the Product Test to provide that ''[a]ny agreement, contract, or transaction which reinsures any agreement, contract, or transaction meeting the criteria of paragraph (xxx)(4)(i)(A)–(C) of this section is also an insurance product.''

[106] *See supra* note 41 and accompanying text.

[107] *See* Proposing Release at 29824. *See also id.* at 29825, Request for Comment 7.

[108] *See* ACLI Letter; AIA Letter; AFGI Letter; CAI Letter; ISDA Letter; NAFA Letter; NAIC Letter; and Nationwide Letter (concurring with ACLI's comments).

Commenters cited several examples of products that would fail a requirement that payment not be based on the price, rate, or level of a financial instrument, asset, or interest or any commodity. ACLI, CAI and NAFA cited registered and unregistered variable annuities and variable life insurance, and certain fixed annuities and equity indexed annuities, stating that these could be construed as being based on, or related to, a price, rate or level of a financial asset. ACLI also cited financial guaranty insurance, and replacement value property and casualty insurance, where the insurer's payment obligation may be based on the current price of the insured property or adjusted to reflect inflation. ACLI and ISDA cited crop insurance, because it could call for payment to be based in some way on the market price of the covered crop on the date of loss. ISDA and RAA cited ''dual trigger'' insurance (such as replacement power insurance); property and casualty policies purchased by some commodity producers (*e.g.,* oil refineries, copper mines) with deductibles that increase or decrease based on the price of the commodity that the company produces; event cancellation insurance that uses commodity indices to determine claims; and weather insurance and malpractice insurance. NAIC cited guaranteed investment contracts, financial guaranty insurance, and mortgage guaranty insurance

[109] *See* AIA Letter and AFGI Letter.

[110] *See* Barnard Letter and Better Markets Letter.

[111] *See* Better Markets Letter.

[112] *See* Barnard Letter.

[113] *See* Proposing Release at 29827, Request for Comment 17.

[114] *See* AFGI Letter; D&L Letter; and ISDA Letter.

[115] *See* D&L Letter.

or insurance will introduce unnecessary complexity in most cases but that the examination of accounting standards would be useful in cases where the classification of a product as insurance or swap is unclear.[116]

After considering these comments, the Commissions are not including a reference to accounting standards in the Product Test.

(b) Providers of Insurance Products

Under the first prong of the Provider Test, the agreement, contract, or transaction must be provided by a person that is subject to supervision by the insurance commissioner (or similar official or agency) of any state[117] or by the United States.[118] In addition, such agreement, contract, or transaction also must be regulated as insurance under applicable state law[119] or the laws of the United States.

The Commissions have revised the first prong of the Provider Test from the proposal. As proposed, the first prong of the Provider Test could only be satisfied by a company that was organized as an insurance company whose primary and predominant business activity was the writing of insurance or the reinsuring of risks underwritten by insurance companies.[120] The Commissions have revised this prong of the Provider Test to address commenters' concerns that the proposed rules would exclude insurers that were not organized as ''insurance companies,'' as well as insurers that were domiciled outside of the United States.[121] As adopted, the first prong of the Provider Test can be satisfied by any person that is subject to state or Federal insurance supervision, regardless of that person's corporate structure or domicile. The Commissions understand that, with the exception of non-admitted insurers,[122] foreign insurers are subject to supervision in the states in which they offer insurance products. The treatment of non-admitted insurers is addressed in the fourth prong of the Provider Test.

The Commissions believe that the requirement that the agreement, contract, or transaction be provided by a person that is subject to state or Federal insurance supervision should help prevent regulatory gaps that otherwise might exist between insurance regulation and the regulation of swaps and security-based swaps by ensuring that products provided by persons that are not subject to state or Federal insurance supervision are not able to be offered by persons that avoid regulation under Title VII of the Dodd-Frank Act as well.

The first prong of the Provider Test also requires that the agreement, contract, or transaction being provided is ''regulated as insurance'' under applicable state law or the laws of the United States. As stated in the Proposing Release, the purpose of this requirement is that an agreement, contract, or transaction that satisfies the other conditions of the final rules must be subject to regulatory oversight as an insurance product. The Commissions believe that this condition will help prevent products that are not regulated as insurance in the states in which they are offered, and that are swaps or security-based swaps, from being characterized as insurance products in order to evade the regulatory regime under Title VII of the Dodd-Frank Act. As noted by commenters,[123] the Commissions recognize that the ''regulated as insurance'' limitation means that it is possible that a particular product that may not be regulated as insurance in a particular state may not qualify for the Insurance Safe Harbor.[124]

As stated in the Proposing Release, the Commissions believe that it is appropriate to exclude, from regulation under Title VII, insurance that is issued by the United States or any of its agencies or instrumentalities, or pursuant to a statutorily authorized program thereof, from regulation as swaps or security-based swaps.[125] Such insurance includes, for example, Federal insurance of funds held in banks, savings associations, and credit unions; catastrophic crop insurance; flood insurance; Federal insurance of certain pension obligations; and terrorism risk insurance. At the request of commenters,[126] the Commissions are persuaded that it is also appropriate to provide a similar exclusion to insurance that is issued by a state or any of its agencies or instrumentalities, or pursuant to a statutorily authorized program thereof. Accordingly, the Commissions have revised the second prong of the Provider Test to provide that products meeting the Product Test are excluded from the swap and security-based swap definitions if they are provided (i) directly or indirectly by the Federal government or a state or (ii) pursuant to a statutorily authorized program of either.[127]

As stated in the Proposing Release, the Commissions believe that where an agreement, contract, or transaction qualifies for the safe harbor and therefore is considered insurance excluded from the swap and security-based swap definitions, the lawful reinsurance of that agreement, contract, or transaction similarly should be excluded.[128] Accordingly, the Commissions are adopting the third prong of the Provider Test as proposed, with certain modifications, to provide that an agreement, contract, or transaction of reinsurance will be excluded from the swap and security-based swap definitions, provided that: (i) The person offering such reinsurance is not prohibited by applicable state law or the laws of the United States from offering such reinsurance to a person that satisfies the Provider Test; (ii) the agreement, contract, or transaction to be reinsured meets the requirements under the Product Test or is one of the Enumerated Products; and (iii) except as otherwise permitted under applicable state law, the total amount reimbursable by all reinsurers for such insurance product cannot exceed the claims or losses paid by the cedant.

In response to commenters' concerns,[129] the Commissions have revised the third prong of the Provider Test from that contained in the Proposing Release. As adopted, the third prong of the Provider Test encompasses all reinsurers wherever incorporated or organized, and not just those based outside of the United States. The Commissions also have revised the third prong of the Provider Test to clarify that the total amount reimbursable by all reinsurers may not exceed the claims or losses paid by the cedant, unless otherwise permitted by applicable state law. It is not the Commissions' intent to

[116] *See* ISDA Letter.

[117] *See supra* note 32, regarding the definition of ''State'' contained in the Proposing Release.

[118] This requirement in the final rules is substantially similar to the requirement included in section 3(a)(8) of the Securities Act, 15 U.S.C. 77c(a)(8).

[119] *See supra* note 34.

[120] *See* Proposing Release at 29824.

[121] *See infra* notes 139, 140, and 141 and accompanying text.

[122] The Commissions understand that the surplus lines brokers who place insurance on behalf of non-admitted insurers are subject to supervision in the states in which they offer non-admitted insurance products.

[123] *See infra* notes 145 and 146 and accompanying text.

[124] *See infra* notes 147 and 148 and accompanying text.

[125] *See* Proposing Release at 29824.

[126] *See* Ex Parte Communication between NAIC and CFTC and SEC Staff on October 5, 2011, at *http://sec.gov/comments/s7-16-11/s71611-61.pdf.*

[127] The Commissions understand that certain types of Federal and State insurance programs, including crop insurance, are administered by third parties; as a result, the Commissions have added ''directly or indirectly'' to the second prong of the Provider Test to clarify that it can be satisfied even if the agreement, contract, or transaction is not provided directly by the federal government or a state. *See Id.*

[128] *See* Proposing Release at 29825.

[129] *See infra* notes 150, 151, 152, and 153 and accompanying text.

impose requirements that conflict with state law regarding the calculation of amounts reimbursable under reinsurance contracts.

The Commissions have added a fourth prong to the Provider Test to address commenters' concerns that the proposed Provider Test excluded entities issuing insurance products on a non-admitted basis through surplus lines brokers.[130] Non-admitted insurance is typically property and casualty insurance that is permitted to be placed through a surplus lines broker[131] by an insurer that is not licensed to do business in the state where the product is offered.[132] In practice, a provider of non-admitted insurance may not satisfy the first prong of the Provider Test because it may not be subject to state or Federal insurance supervision. The Commissions understand that non-admitted insurance plays a very important role in the insurance marketplace. In addition, Congress has explicitly recognized non-admitted insurance products as insurance and specified that a state cannot prohibit certain types of entities from offering non-admitted insurance products.[133] Because Congress recognized that certain persons qualify as non-admitted insurers, the Commissions find that it is appropriate to add the fourth prong to the Provider Test.

A person will qualify under the fourth prong of the Provider Test if it satisfies any one of the following two requirements:

- It is located outside of the United States and listed on the Quarterly Listing of Alien Insurers that is compiled and maintained by the International Insurers Department of the National Association of Insurance Commissioners;[134] or
- It meets the eligibility criteria for non-admitted insurers under applicable state law.

Comments

General

The Commissions received ten comment letters that addressed the Provider Test.[135] A few commenters recommended that the Commissions retract the Provider Test.[136] These commenters argued that if a product is subject to regulation as insurance in the United States, the regulated status of the insurer is irrelevant.[137] The Commissions are retaining the Provider Test with modifications as discussed above. The Commissions believe that insurance products should fall outside the swap or security-based swap definitions only if they are offered by persons subject to state or Federal insurance supervision or by certain reinsurers.[138] The Provider Test will help to prevent products that are swaps or security-based swaps from being characterized as insurance in order to evade the regulatory regime under Title VII of the Dodd-Frank Act. Other commenters suggested various modifications to the Provider Test and those comments are discussed in more detail below.

''Insurance Company'' Limitation

Several commenters recommended that the Commissions expand the first prong of the Provider Test so that it is not limited to ''insurance companies,'' but to all insurers because not all insurers are organized as ''insurance companies,''[139] to accommodate insurers and reinsurers that are domiciled outside of the United States,[140] and to cover domestic and foreign insurance companies and other entities that issue insurance products on a non-admitted basis through surplus lines brokers.[141]

The Commissions have revised the first prong of the Provider Test to remove the ''insurance company'' limitation and to clarify that any person that is subject to state or Federal insurance supervision will qualify under the first prong of the Provider Test. As noted above, the Commissions also believe that this revision should address commenters' concerns that the proposed rules could have excluded some foreign insurers since the revised test does not require that a person be domiciled in the United States; it only requires that the person be subject to state or Federal insurance supervision.

Several commenters suggested that the proposed Provider Test would permit an insurer that is not organized as an insurance company to evade state insurance oversight by deliberately failing the exemption for insurance products (that is, by issuing a contract that would fail the proposed rules because it would not be issued by an insurance company).[142] These commenters were concerned that if a product were to be considered a swap merely because it was not issued by an insurance company, this would render the regulation of such products outside of the scope of state insurance laws due to the Federal preemption of swaps regulation.[143] Commenters noted that a likely consequence of this preemption would be that the same product would be subject to substantially different regulation within a state's jurisdiction based solely on the nature of the issuing person.[144]

The Commissions have revised the first prong of Provider Test to address commenters' concerns that providers of insurance products could evade state insurance regulation by intentionally failing the Provider Test, *i.e.,* marketing the insurance products as swaps or security-based swaps in order to avoid state insurance supervision. As adopted, any person that provides insurance products (and therefore should be subject to state or Federal insurance supervision) must, in fact, be subject to state or Federal insurance supervision in order to satisfy the first prong of the Provider Test. Persons that are organized as insurance companies or whose business activity is predominantly insurance or reinsurance, but who are not in fact subject to state or Federal insurance supervision, would not satisfy the first prong of the Provider Test.

Finally, as discussed below, the Commissions have added a fourth prong

[130] *See infra* note 146 and accompanying text.

[131] For the purposes of this release, the term ''surplus lines broker'' means an individual, firm, or corporation that is licensed in a state to sell, solicit, or negotiate insurance on properties, risks, or exposures located or to be performed in a state with non-admitted insurers.

[132] *See supra* note 39. With respect to domestic reinsurance, state insurance regulators do retain the authority to prevent or allow a non-admitted company from participating in a state market. Some states compile a list of companies that may sell as non-admitteds; other states list non-admitted companies that may not sell.

[133] *See* Subtitle B of Title V of the Dodd-Frank Act.

[134] Section 524 of the Nonadmitted and Reinsurance Reform Act of 2010 (15 U.S.C. 8204) provides that a state cannot prohibit a surplus lines broker from placing non-admitted insurance with a non-admitted insurer that is listed on the Quarterly Listing of Alien Insurers. According to the NAIC the non-admitted alien insurers whose names appear in the Quarterly Listing of Alien Insurers have filed financial statements, copies of auditors' reports, the names of their U.S. attorneys or other representatives, and details of U.S. trust accounts with the NAIC's International Insurers Department and, based upon those documents and other information, appear to fulfill the criteria set forth in the International Insurers Department Plan of Operation for Listing of Alien Nonadmitted Insurers.

[135] *See* ACLI Letter; AIA Letter; CAI Letter; D&L Letter; ISDA Letter; NAIC Letter; NAFA Letter; Nationwide Letter; RAA Letter; and Travelers Letter.

[136] *See* AIA Letter; D&L Letter; and ISDA Letter.

[137] *Id.*

[138] *See infra* notes 147 and 148 and accompanying text.

[139] *See* AIA Letter; D&L Letter; ISDA Letter; RAA Letter; NAIC Letter; and Travelers Letter.

[140] *See* AIA Letter; D&L Letter; RAA Letter; and Travelers Letter.

[141] *See* RAA Letter and Travelers Letter.

[142] *See* ACLI Letter; CAI Letter; NAFA Letter; Nationwide Letter; RAA Letter; and Travelers Letter.

[143] *Id.*

[144] *Id.*

to the Provider Test to provide relief for persons that provide insurance products on a non-admitted basis through surplus lines brokers.

''Regulated as Insurance'' Limitation

Two commenters recommended that the Commissions remove the provision in the first prong of the Provider Test that states ''and such agreement, contract, or transaction is regulated as insurance under the laws of such state or of the United States.''[145] These commenters argued that the provision should be deleted because it was redundant with the Product Test and may exclude certain reinsurers and non-admitted insurers, as well as products that may not be specifically ''regulated as insurance'' in all states.[146]

The Commissions have retained the requirement in the first prong of the Provider Test that an insurance product must be regulated as insurance, but have revised the provision to clarify that an insurance product must be regulated as insurance under applicable state law or the laws of the United States. As discussed above, the Commissions believe that this condition will help prevent products that are not regulated as insurance and are swaps or security-based swaps from being characterized as insurance products in order to evade the regulatory regime under the Dodd-Frank Act.

The Commissions have received conflicting comments regarding whether surety bonds are currently offered by persons who do not satisfy the Provider Test, in particular the ''regulated as insurance'' requirement.[147] If a person who does not satisfy the Provider Test sells a surety bond incidental to other business activity and is not subject to state or Federal insurance supervision, it does not mean that such surety bond is a swap or security-based swap. The surety bond may not satisfy the Insurance Safe Harbor, but it would be subject to a facts and circumstances analysis. Similarly, one commenter indicated that title insurance is not always subject to state insurance regulation.[148] Title insurance sold in a state that does not regulate title insurance as insurance would be in the list of Enumerated Products but would not satisfy the Provider Test and, thus would not qualify for the Insurance Safe Harbor. However, this does not mean that title insurance sold in a state that does not regulate title insurance as insurance is a swap or security-based swap. The title insurance may not satisfy the Insurance Safe Harbor, but it would be subject to a facts and circumstances analysis. The Commissions anticipate that many factors would militate against a determination that such a surety bond or title insurance that fails the Provider Test, because it cannot meet the ''regulated as insurance'' requirement, is a swap or security-based swap rather than insurance.

The Commissions agree that the inclusion of the ''regulated as insurance'' requirement in the first prong of the Provider Test will have the effect of causing non-admitted insurance products to fall within the swap and security-based swap definitions. In response to commenters' concerns about the ability of non-admitted insurers to qualify under the Provider Test, the Commissions have added a fourth prong to the Provider Test to address providers of non-admitted insurance products.[149]

Providers of Reinsurance

Several commenters recommended that the Commissions expand the third prong of the Provider Test to include domestic reinsurers.[150] One commenter requested that the Commissions remove the third prong of the Provider Test from the final rules because it appears to prohibit a reinsurer from offering a product in a state where it is permitted if any other state prohibits that product.[151] Two commenters requested revisions to the portion of the third prong of the Provider Test that addresses a cedant's reimbursable losses.[152] One commenter argued this portion of the third prong of the Provider Test may conflict with the state-based insurance receivership law.[153]

As noted above, the Commissions have revised the third prong of the Provider Test to remove the limitation that a reinsurance provider has to be located outside of the United States, and thereby address commenters' concerns that domestic reinsurers would not qualify under the reinsurance prong. In addition, in response to commenters' concerns, the Commissions have clarified the third prong of the Provider Test so that it does not prohibit a reinsurer from offering a product in a state where it is permitted, even if that product is prohibited in another state, and have revised the portion of the third prong of the Provider Test that addresses a cedant's reimbursable losses to make it subject to applicable state law so that it does not conflict with state-based insurance receivership law.

(c) Grandfather Provision for Existing Insurance Transactions

In the Proposing Release, the Commissions asked whether the proposed rules should include a provision similar to section 302(c)(1) of the Gramm-Leach-Bliley Act that any product regulated as insurance before the date the Dodd-Frank Act was signed into law and provided in accordance with the Provider Test would be considered insurance and not fall within the swap or security-based swap definitions.

In response to comments,[154] the Commissions are adding a new paragraph (ii) to rule 1.3(xxx)(4) under the CEA and new paragraph (b) to rule 3a69–1 under the Exchange Act that provides that an agreement, contract, or transaction entered into on or before the effective date of the Product Definitions will be considered insurance and not fall within the swap and security-based swap definitions, provided that, at such time it was entered into, such agreement, contract, or transaction was provided in accordance with the Provider Test (the ''Insurance Grandfather'').

As stated in the Proposing Release, the Commissions are aware of nothing in Title VII to suggest that Congress intended for traditional insurance products to be regulated as swaps or security-based swaps.[155] The

[145] *See* RAA Letter and Travelers Letter.

[146] *Id.* These commenters also recommended the addition of a new prong to the Provider Test to cover domestic or foreign entities that issue insurance products on a non-admitted basis through surplus lines brokers. *See* discussion below. The Commissions note that the first prong of the Provider Test does not apply to reinsurance contracts and the third prong of the Provider Test, which does apply to reinsurance contracts, does not contain the ''regulated as insurance'' limitation.

[147] *See* SFAA Letter. SFAA stated that all states include surety and fidelity bonds as lines of insurance subject to state oversight. However, Travelers stated that surety bonds may not be ''specifically'' regulated as insurance. *See* Travelers Letter.

[148] *See* ACLI Letter.

[149] *See supra* notes 130, 131, and 132 and accompanying text.

[150] *See* ACLI Letter; CAI Letter; NAIC Letter; and RAA Letter.

[151] *See* RAA Letter. The commenter argued that one state's prohibition on a reinsurance product should not affect the ability of the reinsurer to offer the product in a state where it is permitted.

[152] *See* RAA Letter and Travelers Letter. Both commenters suggested specific edits to the proposed rules.

[153] *See* RAA Letter. RAA stated that in an insurance receivership reinsurers are required to comply with the reinsurance contract and pay all amounts due and owing to the estate of the insolvent cedant even if the estate of the cedant may not necessarily pay the full amount of the underlying claims to the applicable policyholders.

[154] *See infra* notes 157, 158, 159, and 160 and accompanying text.

[155] *See* Proposing Release at 29821.

Commissions have designed the Insurance Safe Harbor to provide greater assurance to market participants that traditional insurance products that were regulated as insurance prior to the Dodd-Frank Act will fall outside the swap and security-based swap definitions. Nevertheless, after considering comments received, the Commissions believe that it is appropriate to adopt the Insurance Grandfather in order to assure market participants that those agreements, contracts, or transactions that meet the conditions set out in the Insurance Grandfather will not fall within the swap or security-based swap definitions.

In order to qualify for the Insurance Grandfather an agreement, contract, or transaction must meet two requirements. First, it must be entered into on or before the effective date of the Product Definitions. The Commissions are linking the Insurance Grandfather to the effective date of the Product Definitions, rather than the date that the Dodd-Frank Act was signed into law, in order to avoid unnecessary market disruption.[156] Second, such agreement, contract, or transaction must be provided in accordance with the Provider Test. In other words, the provider must be subject to state or Federal insurance supervision or be a non-admitted insurer or a reinsurer that satisfies the conditions for non-admitted insurers and reinsurers that are set out in the Provider Test. The Commissions note that an agreement, contract or transaction that is provided in accordance with the first prong of the Provider Test must also be regulated as insurance under applicable state law or the laws of the United States.

By adopting the Insurance Grandfather and the Insurance Safe Harbor, the Commissions are excluding agreements, contracts, and transactions for which the Commissions have found no evidence that Congress intended them to be regulated as swaps or security-based swaps, and are providing greater certainty regarding the treatment of agreements, contracts, and transactions currently regulated as insurance.

Comments

Four commenters addressed whether the final rules should include a grandfather provision that would exclude certain insurance products from the swap or security-based swap definitions.[157] Two commenters suggested that a grandfather provision for all products that were regulated as insurance before the Dodd-Frank Act was signed into law would be appropriate, stating that it would reduce confusion and uncertainty in applying the swap and security-based swap definitions to products that are traditionally regulated as insurance while addressing the Commissions' stated concern that products might be structured as insurance products to evade Dodd-Frank Act requirements.[158] These commenters also stated that it is necessary to add an effective date-based grandfather provision to the final rule providing that any contract or transaction subject to state insurance regulation and entered into prior to any final rules necessary to implement Title VII, including the Product Definitions, are not swaps or security-based swaps.[159] These commenters noted that a grandfather provision based on effective date of all the Title VII rules was needed to address product development and variation that occurred between the date the Dodd-Frank Act was enacted and the effective date of the rules mandated under that statute.[160]

The Commissions believe that the combination of the Insurance Grandfather along with the Insurance Safe Harbor provides market participants with increased legal certainty with respect to existing agreements, contracts, transactions, and products. In addition, the fact that the Commissions are linking the Insurance Grandfather to the effective date of the Product Definitions, rather than the date that the Dodd-Frank Act was signed into law, takes into account product development and innovation that may have occurred between the date the Dodd-Frank Act was signed into law at the effective date of the Product Definitions. Further, the Commissions believe that a grandfather provision that would exclude all products regulated as insurance before the Dodd-Frank Act was signed into law, as recommended by some commenters,[161] is unnecessary because non-grandfathered regulated insurance transactions generally should fall within the Insurance Safe Harbor. The Commissions believe that market participants could be incentivized to use such a broader grandfather provision to create new swap or security-based swap products with characteristics similar to those of existing categories of regulated insurance contracts for the purpose of evading the Dodd-Frank Act regulatory regime. The Commissions also believe that a broader grandfather provision would be contrary to the explicit direction of sections 722(b) and 767 of the Dodd-Frank Act which provide that swaps and security-based swaps may not be regulated as insurance contracts by any state.[162]

One commenter argued that the Provider Test should not apply to grandfathered contracts. The commenter stated that it should be enough that the product is regulated as insurance.[163] As described above, the grandfather provision will apply only to agreements, contracts, and transactions that are entered into prior to the effective date of the Product Definitions if they were provided in accordance with the Provider Test, including a requirement that an agreement, contract or transaction that is provided in accordance with the first prong of the Provider Test must be regulated as insurance under applicable State law or the laws of the United States. As the Commissions discussed in the Proposing Release, and above in describing the Provider Test, the Commissions believe the requirement that the agreement, contract, or transaction be provided in accordance with the Provider Test should help ensure that persons who are not subject to state or Federal insurance supervision are not able to avoid the oversight

[156] The Commissions believe that 60 days after publication of this release should be sufficient time for market participants to enter into pending agreements, contracts, or transactions for which the Insurance Grandfather may provide relief.

[157] *See* ACLI Letter; AFGI Letter; CAI Letter; and D&L Letter.

[158] *See* ACLI Letter and CAI Letter. ACLI and CAI argued that products that were regulated as insurance prior to the effective date of the Dodd-Frank Act clearly were not characterized as insurance to avoid the Title VII regulatory regime. *See also* AFGI Letter; AFGI argued that all insurance contracts issued by state-regulated insurance companies should be excluded from the swap definition but in the alternative, all insurance products regulated as insurance before July 21, 2010 should be grandfathered. *See also* D&L Letter. D&L stated that prior regulation of insurance products before July 21, 2010 could be a consideration, but not an absolute determinant for exclusion from the swap or security-based swap definitions.

[159] *See* ACLI Letter and CAI Letter.

[160] *Id.*

[161] *See* ACLI Letter; AGFI Letter; and CAI Letter.

[162] Section 722(b) of the Dodd-Frank Act provides, (B) Regulation of Swaps Under Federal and State Law.—Section 12 of the Commodity Exchange Act (7 U.S.C. 16) is amended by adding at the end the following: ''(h) Regulation of Swaps as Insurance Under Federal and State Law.—A swap—(1) Shall not be considered to be insurance; and (2) may not be regulated as an insurance contract under the law of any State.'' Section 767 of the Dodd-Frank Act amended section 28(a) of the Exchange Act, 15 U.S.C. 78bb(a), to provide, ''A security-based swap may not be regulated as an insurance contract under any provision of State law.''

[163] *See* CAI Letter. CAI suggested that for a product to be regulated as insurance it means that it was provided by an insurance company. *See supra* part II.B.1.b) for a discussion of the need for the Provider Test portion of the Insurance Safe Harbor.

provided for under Title VII of the Dodd-Frank Act.

(d) Alternative Tests

A number of commenters proposed that the Commissions adopt alternative tests to distinguish insurance from swaps and security-based swaps.[164] After considering each of these alternatives, the Commissions are not adopting them.

Several commenters suggested that the sole test for determining whether an agreement, contract, or transaction is insurance should be whether it is subject to regulation as insurance by the insurance commissioner of the applicable state(s).[165] The Commissions find this alternative to be unworkable because it does not provide a sufficient means to distinguish agreements, contracts and transactions that are insurance from those that are swaps or security-based swaps. Section 712(d) of the Dodd-Frank Act directs the Commissions to ''further define'' the terms swap and security-based swap. Neither swaps nor security-based swaps may be regulated as insurance contracts under the laws of any state.[166] While insurance contracts have long been subject to state regulation, swaps and security-based swaps were largely unregulated. Since the Dodd-Frank Act created a new regulatory regime for swaps and specifically provides that ''swaps may not be regulated as an insurance contract under the law of any state,[167] the Commissions believe that it is important to have a test that distinguishes insurance from swaps and security-based swaps without relying entirely on the regulatory environment prior to the enactment of the Dodd-Frank Act. The Product Test is an important element of the Insurance Safe Harbor.

Several commenters suggested an approach in which insurance products that qualify for the exclusion contained in section 3(a)(8) of the Securities Act[168] would be excluded from the swap definition.[169] One commenter argued that ''Section 3(a)(8) has long been recognized as the definitive provision as to where Congress intends to separate securities products that are subject to SEC regulation from 'insurance' and 'annuity' products that are to be left to state insurance regulation'' and that the section 3(a)(8) criteria are well understood and have a long history of interpretation by the SEC and the courts.[170] Other commenters suggest that because section 3(a)(8) includes both a product and a provider requirement, if the Commissions include it in their final rules, it should be a requirement separate from the Product Test and the Provider Test, and should extend to insurance products that are securities.[171]

While the Commissions agree that the section 3(a)(8) criteria have a long history of interpretations by the SEC and the courts, the Commissions find that it is inappropriate to apply the section 3(a)(8) criteria in this context. Although section 3(a)(8) contains some conditions applicable to insurance providers that are similar to the prongs of the Provider Test, it does not contain any conditions that are similar to the prongs of the Product Test. Moreover, section 3(a)(8) provides an exclusion from the Securities Act and the CFTC has no jurisdiction under the Federal securities laws. Congress directed both agencies to further define the terms ''swap'' and ''security-based swap.'' As such, the Commissions find that it is more appropriate to have a standalone rule that incorporates features that distinguish insurance products from swaps and security-based swaps and over which both Commissions will have joint interpretative authority.

One commenter suggested yet another approach, recommending that insurance be defined as an agreement, contract, or transaction that by its terms:

- Exists for a specified period of time;
- Where the party (the ''insured'') to the contract promises to make one or more payments such as money, goods or services;
- In exchange for another party's promise to provide a benefit of pecuniary value for the loss, damage, injury, or impairment of an identified interest of the insured as a result of the occurrence of a specified event or contingency outside of the parties' control; and
- Where such payment is related to a loss occurring as a result of a contingency or specified event.[172]

The Commissions do not find this alternative preferable to the Commissions' proposal for two reasons. First, the requirements of a specified term and the promise to make payments are present in both insurance products and in agreements, contracts, or transactions that are swaps or security-based swaps and therefore do not help to distinguish between them. A test based solely on these requirements, then, could be over-inclusive and exclude from the Dodd-Frank Act regulatory regime agreements, contracts, and transactions that have not traditionally been considered insurance. Further, the third and fourth requirements of this alternative test collapse into the Product Test's requirement that the loss must occur and be proved, and any payment or indemnification therefor must be limited to the value of the insurable interest.

One commenter suggested a three-part test in lieu of the Product and Provider Tests. Under this test, the terms ''swap'' and ''security-based swap'' would exclude any agreement, contract, or transaction that:

- Is issued by a person who is or is required to be organized as an insurance company and subject to state insurance regulation;
- Is the type of contract issued by insurance companies; and
- Is not of the type that the Commissions determine to regulate. [173]

This commenter stated that its approach does not contain a definition of insurance, and believes that is preferable to the Commissions' approach, which it believes creates legal uncertainty because any attempted definition of insurance has the potential to be over- or under- inclusive.[174] As discussed above, the Commissions' rules and interpretations are not intended to define insurance. Rather, they provide a safe harbor for certain types of traditional insurance products by reference to factors that may be used to distinguish insurance from swaps and security-based swaps, and a list of

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[164] *See* ACLI Letter; AIA Letter; AFGI Letter; CAI Letter; MetLife Letter; NAFA Letter; NAIC Letter; Nationwide Letter; and Travelers Letter.

[165] *See* ACLI Letter; AIA Letter; AFGI Letter; MetLife Letter; and Travelers Letter.

[166] *See* section 12(h) of the CEA, 7 U.S.C. 16(h) (regarding swaps) and section 28(a)(4) of the Exchange Act, 15 U.S.C. 78bb(a)(4) (regarding security-based swaps).

[167] *See* section 12(h)(2) of the CEA, 7 U.S.C. 16(h)(2).

[168] Section 3(a)(8) of the Securities Act excludes the following from all provisions of the Securities Act: Any insurance or endowment policy or annuity contract or optional annuity contract, issued by a corporation subject to the supervision of the insurance commissioner, bank commissioner, or any agency or officer performing like functions, of any State or Territory of the United States or the District of Columbia.

See infra note 1283 and accompanying text.

[169] *See* ACLI Letter; CAI Letter; NAFA Letter; and Nationwide Letter.

[170] *See* NAFA Letter.

[171] *See* ACLI Letter and CAI Letter.

[172] *See* NAIC Letter.

[173] *See* ACLI Letter (Appendix 1). *See also* CAI Letter. CAI stated that it believes that the approach and test recommended by ACLI is a fundamentally sound method for determining those insurance products that are not swaps or security-based swaps and that should remain subject to state regulation, and is more appropriate than the Commissions' proposals. Nationwide suggested a three-part test to differentiate insurance products from swaps and security-based swaps similar to the test proposed by ACLI. *See also* Nationwide Letter.

[174] *See* ACLI Letter.

products that do not have to satisfy a portion of the safe harbor factors. Agreements, contracts, and transactions that do not qualify for the Insurance Safe Harbor may or may not be insurance, depending upon the facts and circumstances regarding such agreements, contracts and transactions. The Commissions find the first two requirements of the commenter's three-part test to be tautologous, and the third provides no greater certainty than the Commissions' facts and circumstances approach. In addition, the Commissions find that this alternative test could exclude from the Dodd-Frank Act regulatory regime agreements, contracts, and transactions that have not traditionally been considered insurance.

Another commenter proposed different approaches for existing products and new products.[175] Specifically, if an existing type of agreement, contract or transaction is currently reportable as insurance in the provider's regulatory and financial reports under a state or foreign jurisdiction's insurance laws, then that agreement, contract, or transaction would be insurance rather than a swap or security-based swap. On the other hand, for new products, if this approach were inconclusive, this commenter recommended that the Commissions use the Product Test of the Commissions' rules only.[176] As discussed above, rather than treating existing products and new products differently, the Commissions are providing ''grandfather'' protection for agreements, contracts, and transactions entered into prior to the effective date of the Products Definitions.[177] Moreover, this commenter's test would eliminate the Provider Test for new products, which the Commissions believe is important to help prevent products that are swaps or security-based swaps from being characterized as insurance.

In sum, the Commissions find that each of the alternatives proposed by commenters could exclude from the Dodd-Frank Act regulatory regime agreements, contracts, and transactions that have not historically been considered insurance, and that should, in appropriate circumstances, be regulated as swaps or security-based swaps. Accordingly, the Commissions do not find these alternatives to be appropriate for delineating the scope of the Insurance Safe Harbor from the swap and security-based swap definitions.

[175] *See* AIA Letter.

[176] *Id.*

[177] *See supra* part II.B.1.c)

(e) ''Safe Harbor''

Five commenters recommended that the Product Test, the Provider Test, and related interpretations should be structured as a ''safe harbor'' so that they do not raise any presumption or inference that products that do not meet the Product Test, Provider Test and related interpretations are necessarily swaps or security-based swaps.[178] One commenter suggested that this safe harbor approach could be modeled after Rule 151 under the Securities Act.[179]

As discussed above, the Commissions do not intend to create a presumption that agreements, contracts, or transactions that do not fall within the Insurance Safe Harbor are necessarily swaps or security-based swaps. As stated above, the Commissions are instead adopting final rules that clarify that certain agreements, contracts, or transactions meeting the requirements of a non-exclusive ''safe harbor'' established by such rules will not be considered to be swaps or security-based swaps. An agreement, contract, or transaction that does not fall within the Insurance Safe Harbor will require further analysis of the applicable facts and circumstances to determine whether it is insurance, and thus not a swap or security-based swap.

(f) Applicability of Insurance Exclusion to Security-Based Swaps

Four commenters expressed concerns that the proposed rules were unclear in their application to both swaps and security-based swaps.[180] These commenters argued that the proposed rules do not directly exclude insurance products from the term ''security-based swap'' because the rules explicitly state that ''[t]he term 'swap' does not include'' the products that meet the Product and Provider Tests, but do not make the same statement as to the term ''security-based swap.'' [181]

The Commissions have revised rule 1.3(xxx)(4) under the CEA and rule 3a69–1 under the Exchange Act to clarify that the exclusion contained therein applies to both swaps and security-based swaps.

[178] *See* ACLI Letter; CAI Letter; NAFA Letter (concurring with ACLI and CAI); Nationwide Letter; and Travelers Letter.

[179] *See* ACLI Letter.

[180] *See* ACLI Letter; CAI Letter; NAFA Letter (concurring with ACLI and CAI); and Nationwide Letter (concurring the ACLI and CAI).

[181] *Id.* The commenters suggested that this ambiguity could be resolved by making it clear in the final rules that an excluded product is neither a swap nor a security-based swap.

(g) Guarantees

In the Proposing Release, the Commissions requested comment on whether insurance of an agreement, contract, or transaction that falls within the swap or security-based swap definitions should itself be included in the swap or security-based swap definition. The Commissions also requested comment on whether the Commissions should provide guidance as to whether swap or security-based swap guarantees offered by non-insurance companies should be considered swaps or security-based swaps.[182]

Guarantees of Swaps.[183]

No commenter identified any product that insures swaps (that are not security-based swaps or mixed swaps) other than financial guaranty insurance. The CFTC finds that insurance of an agreement, contract, or transaction that falls within the swap definition (and is not a security-based swap or mixed swap) is functionally or economically similar to a guarantee of a swap (that is not a security-based swap or mixed swap) offered by a non-insurance company.[184] Therefore, the CFTC is treating financial guaranty insurance of swaps (that are not security-based swaps or mixed swaps) the same way it is treating all other guarantees of swaps (that are not security-based swaps or mixed swaps), as discussed below.[185]

The CFTC is persuaded that when a swap has the benefit of a guarantee,[186] the guarantee is an integral part of that swap. The CFTC finds that a guarantee of a swap (that is not a security-based swap or mixed swap) is a term of that swap that affects the price or pricing attributes of that swap.[187] When a swap

[182] *See* Proposing Release at 29827.

[183] The discussion in this subsection relates only to swaps that are not security-based swaps or mixed swaps and has no effect on the laws or regulations applicable to security-based swaps or mixed swaps.

[184] The Commissions did not express a view regarding whether financial guaranty insurance is a swap or security-based swap in the Entities Release. *See* Entities Release at 30689, n.1132.

[185] Subsequent references to ''guarantees'' in this discussion shall thus be deemed to include ''financial guaranty insurance policies.''

[186] For purposes of this release, the CFTC views a guarantee of a swap to be a collateral promise by a guarantor to answer for the debt or obligation of a counterparty obligor under a swap. A guarantee of a swap does not include for purposes of this release: (i) A ''guarantee agreement'' as defined in CFTC regulation § 1.3(nn), 17 CFR 1.3(nn); (ii) any assumption by a clearing member of financial or performance responsibility to a derivatives clearing organization (''DCO'') for swaps cleared by a DCO; or (iii) any guarantee by a DCO with respect to a swap that it clears.

[187] *E.g.*, a swap counterparty may specify that a guarantee is a Credit Support Document under an

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counterparty typically provides a guarantee as credit support for its swap obligations, the market will not trade with that counterparty at the same price, on the same terms, or at all without the guarantee. The guarantor's resources are added to the analysis of the swap; if the guarantor is financially more capable than the swap counterparty, the analysis of the swap becomes more dependent on the creditworthiness of the guarantor. Therefore, the CFTC is interpreting the term ''swap'' (that is not a security-based swap or mixed swap) to include a guarantee of such swap, to the extent that a counterparty to a swap position would have recourse to the guarantor in connection with the position.[188] The CFTC anticipates that a ''full recourse'' guarantee would have a greater effect on the price of a swap than a ''limited'' or ''partial recourse'' guarantee; nevertheless, the CFTC is determining that the presence of any guarantee with recourse, no matter how robust, is price forming and an integral part of a guaranteed swap.

The CFTC's interpretation of the term ''swap'' to include guarantees of swaps does not limit or otherwise affect in any way the relief provided by the Insurance Grandfather. In a separate release, the CFTC will address the practical implications of interpreting the term ''swap'' to include guarantees of swaps (the ''separate CFTC release'').[189]

Comments

Three commenters provided comments regarding the treatment of guarantees. Two commenters[190] opposed treating insurance or guarantees of swaps as swaps. Suggesting that the products are not economically similar, one commented that insurance wraps of swaps do not ''necessarily replicate the economics of the underlying swap, and only following default could the wrap provider end up with the same payment obligations as a wrapped defaulting swap counterparty.''[191] This commenter also stated that the non-insurance guarantees are not swaps because the result of most guarantees is that the guarantor is responsible for monetary claims against the defaulting party, which in this commenter's view is a different obligation than the arrangement provided by the underlying swap itself.[192]

One commenter supported treating financial guaranty insurance of a swap or security-based swap as itself a swap or a security-based swap. This commenter argued that financial guaranty insurance of a swap or security-based swap transfers the risk of counterparty non-performance to the guarantor, making it an embedded and essential feature of the insured swap or security-based swap. This commenter further argued that the value of such swap or security-based swap is largely determined by the likelihood that the proceeds from the financial guaranty insurance policy will be available if the counterparty does not meet its obligations.[193] This commenter maintained that financial guaranty insurance of swaps and security-based swaps serves a very similar function to credit default swaps in hedging counterparty default risk.[194]

The CFTC is persuaded that when a swap (that is not a security-based swap or mixed swap) has the benefit of a guarantee, the guarantee and related guaranteed swap must be analyzed together. The events surrounding the failure of AIG Financial Products (''AIGFP'') highlight how guarantees can cause major risks to flow to the guarantor.[195] The CFTC finds that the regulation of swaps and the risk exposures associated with them, which is an essential concern of the Dodd-Frank Act, would be less effective if the CFTC did not interpret the term ''swap'' to include a guarantee of a swap.

Two commenters cautioned against unnecessary and duplicative regulation. One commented that, because the underlying swap, and the parties to it, will be regulated and reported to the extent required by Title VII, there is no need for regulation of non-insurance guarantees.[196] The other commented that an insurance policy on a swap would be subject to state regulation; without addressing non-insurance guarantees, this commenter stated that additional Federal regulation would be duplicative.[197] The CFTC disagrees with these arguments. As stated above, the CFTC is treating financial guaranty insurance of swaps and all other guarantees of swaps in a similar manner because they are functionally or

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ISDA Master Agreement. If the guarantor fails to comply with or perform under such guarantee, such guarantee expires or terminates, or if such guarantee ceases to be in full force and effect, the ''Credit Support Default'' Event of Default under the ISDA Master Agreement would generally be triggered, potentially bringing down the entire swap trading relationship between the parties to the ISDA Master Agreement. *See generally* the standard 1992 ISDA Master Agreement and 2002 ISDA Master Agreement. However, the CFTC finds the presence of a guarantee to be an integral part of a swap and that affects the price or pricing attributes of a swap whether or not such guarantee is a Credit Support Document under an ISDA Master Agreement.

[188] This interpretation is consistent with the interpretations of the Commissions in the Entity Definitions Release. *See, e.g.*, Entity Definitions Release at 30689 (''[A]n entity's swap or security-based swap positions in general would be attributed to a parent, other affiliate or guarantor for purposes of major participant analysis to the extent that 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.''). A swap backed by a partial or limited recourse guarantee will include the guarantee to the extent of such partial or limited recourse; a blanket guarantee that supports both swap and non-swap obligations will be treated as part of the guaranteed swap only to the extent that such guarantee backstops obligations under a swap or swaps.

In the Entity Definitions Release, the Commissions stated, ''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 is already 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.'' *Id.* In a footnote, the Commissions continued, ''As a result of this interpretation, holding companies will not be deemed to be major swap participants as a result of guarantees to certain U.S. entities that are already subject to capital regulation.'' *Id.*

As a result of interpreting the term ''swap'' (that is not a security-based swap or mixed swap) to include a guarantee of such swap, to the extent that a counterparty to a swap position would have recourse to the guarantor in connection with the position, and based on the reasoning set forth above from the Entity Definitions Release in connection with major swap participants, the CFTC will not deem holding companies to be swap dealers as a result of guarantees to certain U.S. entities that are already subject to capital regulation. It may, however, be appropriate to regulate as a swap dealer a parent or other guarantor who guarantees swap positions of persons who are not already subject to capital regulation by the CFTC (i.e., who are not swap dealers, major swap participants or FCMs). The CFTC is addressing guarantees provided to non-U.S. entities, and guarantees by non-U.S. holding companies, in its proposed interpretive guidance and policy statement regarding the cross-border application of the swaps provisions of the CEA, 77 FR 41214 (Jul. 12, 2012).

[189] Briefly, in the separate CFTC release the CFTC anticipates proposing reporting requirements with respect to guarantees of swaps under Parts 43 and 45 of the CFTC's regulations and explaining the extent to which the duties and obligations of swap dealers and major swap participants pertaining to guarantees of swaps, as an integral part of swaps, are already satisfied to the extent such obligations are satisfied with respect to the related guaranteed swaps. The CFTC also anticipates addressing in the separate CFTC release the effect, if any, of the interpretation regarding guarantees of swaps on position limits and large trader reporting requirements.

[190] *See* AFGI Letter and ISDA Letter.

[191] ISDA Letter.

[192] *Id.*

[193] *See* Better Markets Letter.

[194] *See* Better Markets Letter.

[195] ''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.'' Congressional Oversight Panel, *The AIG Rescue, Its Impact on Markets, and the Government's Exit Strategy* 20 (2010).

[196] *See* ISDA Letter.

[197] *See* AFGI Letter.

economically similar products. If a guarantee of a swap is not treated as an integral part of the underlying swap, price forming terms of swaps and the risk exposures associated with the guarantees may remain hidden from regulators and may not be regulated appropriately. Moreover, treating guarantees of swaps as part of the underlying swaps ensures that the CFTC will be able to take appropriate action if, after evaluating information collected with respect to the guarantees and the underlying swaps, such guarantees of swaps are revealed to pose particular problems in connection with the swaps markets. In the separate CFTC release, the CFTC will clarify the limited practical effects of the CFTC's interpretation, which should address concerns regarding duplicative regulation.

One commenter also argued that regulating financial guaranty of swaps as swaps would cause monoline insurers to withdraw from the market, which could adversely affect the U.S. and international public finance, infrastructure and structured finance markets, given that insuring a related swap often is integral to the insurance of municipal bonds and other securities.[198] The CFTC finds this argument unpersuasive. The CFTC understands that the 2008 global financial crisis severely affected most monolines and only one remains active in U.S. municipal markets. Thus, it appears that the monolines have, for the most part, already exited these markets. In addition, as stated above, the CFTC will clarify in the separate CFTC release the limited practical effects of the CFTC's interpretation, which should address these concerns.

Guarantees of Security-Based Swaps

The SEC believes that a guarantee of an obligation under a security-based swap, including financial guaranty insurance of a security-based swap, is not a separate security-based swap. Further, the SEC is not adopting an interpretation that a guarantee of a security-based swap is part of the security-based swap. Instead, the SEC will consider requiring, as part of its rulemaking relating to the reporting of security-based swaps,[199] the reporting of information about any guarantees and the guarantors of obligations under security-based swaps in connection with the reporting of the security-based swap transaction itself. In addition, the SEC will consider issues involving cross-border guarantees of security-based swaps in a separate release addressing the cross-border application of Title VII. The SEC notes that security-based swaps are included in the definition of ''security'' contained in the Securities Act and the Exchange Act.[200] Under the Securities Act, a guarantee of a security also is a ''security.'' [201] Therefore, a guarantee of a security-based swap is a security subject to Federal securities law regulation.[202]

2. The Forward Contract Exclusion

As the Commissions explained in the Proposing Release, the definitions of the terms ''swap'' and ''security-based swap'' do not include forward contracts.[203] These definitions exclude ''any sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled.'' [204] The Commissions provided an interpretation in the Proposing Release regarding the applicability of the exclusion from the swap and security-based swap definition for forward contracts with respect to nonfinancial commodities [205] and securities. The Commissions are restating this interpretation as set forth in the Proposing Release with certain modifications in response to commenters.

(a) Forward Contracts in Nonfinancial Commodities

The CFTC provided an interpretation in the Proposing Release regarding the forward contract exclusion for nonfinancial commodities and is restating this interpretation with certain modifications in response to commenters. These clarifications include that the CFTC will interpret the forward contract exclusion consistent with the entire body of CFTC precedent.[206] The CFTC is also clarifying what ''commercial participant'' means under the ''Brent Interpretation.'' [207] In addition, while the CFTC is withdrawing its 1993 ''Energy Exemption'' [208] as proposed, it is clarifying that certain alternative delivery procedures will not disqualify a transaction from the forward contract exclusion. In response to comments, the CFTC is providing a new interpretation regarding book-out documentation, as well as additional factors that may be considered in its ''facts and circumstances'' analysis of whether a particular contract is a forward.

(i) Forward Exclusion From the Swap and Future Delivery Definitions

(A) Consistent Interpretation

The wording of the forward contract exclusion from the swap definition with respect to nonfinancial commodities is similar, but not identical, to the forward exclusion from the definition of the term ''future delivery'' that applies to futures contracts, which excludes ''any sale of any cash commodity for deferred shipment or delivery.'' [209]

In the Proposing Release, the CFTC proposed an interpretation clarifying the scope of the exclusion of forward contracts for nonfinancial commodities from the swap definition and from the ''future delivery'' definition in a number of respects. After considering the comments received, the CFTC is restating substantially all of its interpretation regarding these forward exclusions set forth in the Proposing Release, but with several clarifications in response to commenters.

The CFTC is restating from the Proposing Release that the forward exclusion for nonfinancial commodities in the swap definition will be interpreted in a manner consistent with the CFTC's historical interpretation of the existing forward exclusion with respect to futures contracts, consistent with the Dodd-Frank Act's legislative history.[210] In addition, in response to a

[198] *See* AFGI Letter. Of the members of AFGI, only Assured Guaranty (or its affiliates) is currently writing financial guaranty insurance policies on U.S. municipal obligations.

[199] See Regulation SBSR Proposing Release *infra* note 1231.

[200] *See* sections 768(a)(1) and 761(a)(2) of the Dodd-Frank Act (amending sections 2(a)(1) of the Securities Act, 15 U.S.C. 77b(a)(1), and 3(a)(10) of the Exchange Act, 15 U.S.C. 78c(a)(10), respectively).

[201] *See* section 2(a)(1) of the Securities Act, 15 U.S.C. 77b(a)(1).

[202] The SEC has previously addressed the treatment of financial guaranty insurance under the Federal securities laws. See *supra* note 58.

[203] *See* Proposing Release at 29827.

[204] CEA section 1a(47)(B)(ii), 7 U.S.C. 1a(47)(B)(ii).

[205] The discussion in subsections (a) and (b) of this section applies solely to the exclusion of nonfinancial commodity forwards from the swap definition in the CEA.

[206] *See infra* part II.B.2(a)(i)(F).

[207] *Statutory Interpretation Concerning Forward Transactions,* 55 FR 39188 (Sep. 25, 1990) (''Brent Interpretation'').

[208] *Exemption for Certain Contracts Involving Energy Products,* 58 FR 21286–02 (Apr. 20, 1993) (''Energy Exemption'').

[209] CEA section 1a(27), 7 U.S.C. 1a(27).

[210] *See* 156 Cong. Rec. H5248–49 (June 30, 2010) (introducing into the record a letter authored by Senator Blanche Lincoln, Chairman of the U. S. Senate Committee on Agriculture, Nutrition and Forestry, and Christopher Dodd, Chairman U. S. Senate Committee on Banking, Housing, and Urban Affairs, stating that the CFTC is encouraged ''to clarify through rulemaking that the exclusion from the definition of swap for 'any sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled' is intended to be consistent with the forward contract exclusion that is currently in the [CEA] and the CFTC's established

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commenter, the CFTC is clarifying that the entire body of CFTC precedent regarding forwards should apply to the forward exclusions from the swap and future delivery definitions.[211]

The CFTC's historical interpretation has been that forward contracts with respect to nonfinancial commodities are ''commercial merchandising transactions.'' [212] The primary purpose of a forward contract is to transfer ownership of the commodity and not to transfer solely its price risk. As the CFTC has noted and reaffirms today:

The underlying postulate of the [forward] exclusion is that the [CEA's] regulatory scheme for futures trading simply should not apply to private commercial merchandising transactions which create enforceable obligations to deliver but in which delivery is deferred for reasons of commercial convenience or necessity.[213]

As noted in the Proposing Release, because a forward contract is a commercial merchandising transaction, intent to deliver historically has been an element of the CFTC's analysis of whether a particular contract is a forward contract.[214] In assessing the parties' expectations or intent regarding delivery, the CFTC consistently has applied a ''facts and circumstances'' test.[215] Therefore, the CFTC reads the ''intended to be physically settled'' language in the swap definition with respect to nonfinancial commodities to reflect a directive that intent to deliver a physical commodity be a part of the analysis of whether a given contract is a forward contract or a swap, just as it is a part of the CFTC's analysis of whether a given contract is a forward contract or a futures contract.

(B) Brent Interpretation

In this interpretation, the CFTC is restating, with certain clarifications in response to commenters, its interpretation from the Proposing Release that the principles underlying the CFTC's ''Brent Interpretation'' regarding book-outs developed in connection with the forward exclusion from futures apply to the forward exclusion from the swap definition as well. Book-out transactions meeting the requirements specified in the Brent Interpretation that are effectuated through a subsequent, separately negotiated agreement qualify for the safe harbor under the forward exclusions.

As was noted in the Proposing Release, the issue of book-outs first arose in 1990 in the Brent Interpretation [216] because the parties to the crude oil contracts in that case could individually negotiate cancellation agreements, or ''book-outs,'' with other parties.[217] In describing these transactions, the CFTC stated:

It is noteworthy that while such [book-out] agreements may extinguish a party's delivery obligation, they are separate, individually negotiated, new agreements, there is no obligation or arrangement to enter into such agreements, they are not provided for by the terms of the contracts as initially entered into, and any party that is in a position in a distribution chain that provides for the opportunity to book-out with another party or parties in the chain is nevertheless entitled to require delivery of the commodity to be made through it, as required under the contracts.[218]

Thus, in the scenario at issue in the Brent Interpretation, the contracts created a binding obligation to make or take delivery without providing any right to offset, cancel, or settle on a payment-of-differences basis. The ''parties enter[ed] into such contracts with the recognition that they may be required to make or take delivery.'' [219]

On these facts, the Brent Interpretation concluded that the contracts were forward contracts, not futures contracts:

Under these circumstances, the [CFTC] is of the view that transactions of this type which are entered into between commercial participants in connection with their business, which create specific delivery obligations that impose substantial economic risks of a commercial nature to these participants, but which may involve, in

policy and orders on this subject, including situations where commercial parties agree to 'book-out' their physical delivery obligations under a forward contract.''). *See also* 156 Cong. Rec. H5247 (June 30, 2010) (colloquy between U. S. House Committee on Agriculture Chairman Collin Peterson and Representative Leonard Boswell during the debate on the Conference Report for the Dodd-Frank Act, in which Chairman Peterson stated: ''Excluding physical forward contracts, including book-outs, is consistent with the CFTC's longstanding view that physical forward contracts in which the parties later agree to book-out their delivery obligations for commercial convenience are excluded from its jurisdiction. Nothing in this legislation changes that result with respect to commercial forward contracts.'').

[211] *See* Letter from Craig Donahue, Chief Executive Officer, CME Group Inc. (''CME''), dated July 22, 2011 (''CME Letter'') (requesting this clarification). *But see* below regarding the CFTC's response to CME's comment concerning the Brent Interpretation that it may be inconsistent, in CME's view, with more recent CFTC adjudicatory decisions.

[212] *See, e.g.*, Brent Interpretation, *supra* note 207.

[213] *See* Brent Interpretation, *supra* note 207. The CFTC has reiterated this view in more recent adjudicative orders. *See, e.g., In re Grain Land Coop.,* [2003–2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,636 (CFTC Nov. 25, 2003); *In re Competitive Strategies for Agric., Ltd.,* [2003–2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,635 (CFTC Nov. 25, 2003). Courts have expressed this view as well. *See, e.g., Salomon Forex, Inc.* v. *Tauber,* 8 F.3d 966, 971 (4th Cir. 1993) (''[C]ash forwards are generally individually negotiated sales * * * in which actual delivery of the commodity is anticipated, but is deferred for reasons of commercial convenience or necessity.''); *CFTC* v. *Int'l Fin. Serv. (N.Y.),* 323 F. Supp. 2d 482, 495 (S.D.N.Y. 2004). *See also CFTC* v. *Co Petro Mktg. Grp., Inc., 680 F.2d 573, 579–580 (9th Cir. 1982); CFTC* v. *Noble Metals Int'l, Inc.,* 67 F.3d 766, 772–773 (9th Cir. 1995; *CFTC* v. *Am. Metal Exch. Corp.,* 693 F. Supp. 168, 192 (D.N.J. 1988); *CFTC* v. *Morgan, Harris & Scott, Ltd.,* 484 F. Supp. 669, 675 (S.D.N.Y. 1979) (forward contract exclusion does not apply to speculative transactions in which delivery obligations can be extinguished under the terms of the contract or avoided for reasons other than commercial convenience or necessity).

[214] The CFTC observed in its decision in *In re Wright* that ''it is well-established that the intent to make or take delivery is the critical factor in determining whether a contract qualifies as a forward.'' *In re Wright,* CFTC Docket No. 97–02, 2010 WL 4388247 at *3 (CFTC Oct. 25, 2010) (*citing In re Stovall, et al.,* [1977–1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) 20,941 (CFTC Dec. 6, 1979); Brent Interpretation, *supra* note 207). In *Wright,* the CFTC noted that ''[i]n distinguishing futures from forwards, the [CFTC] and the courts have assessed the transaction as a whole with a critical eye toward its underlying purpose. Such an assessment entails a review of the overall effect of the transaction as well as a determination as to what the parties intended.'' *Id.* at *3 (*quoting Policy Statement Concerning Swap Transactions,* 54 FR 30694 (Jul. 21, 1989) (''Swap Policy Statement'') (citations and internal quotations omitted)).

[215] In *Wright,* the CFTC applied its facts and circumstances test in an administrative enforcement action involving hedge-to-arrive contracts for corn, and observed that ''[o]ur views of the appropriateness of a multi-factor analysis remain unchanged.'' *Wright,* note 214, *supra,* n.13. The CFTC let stand the administrative law judge's conclusion that the hedge-to-arrive contracts at issue in the case were forward contracts. *Id.* at **5–6. *See also Grain Land, supra* note 213; *Competitive Strategies for Agric., supra* note 213.

[216] *See* Brent Interpretation, *supra* note 207. The CFTC issued the Brent Interpretation in response to a Federal court decision that held that certain 15-day Brent system crude oil contracts were illegal off-exchange futures contracts. *See Transnor (Bermuda) Ltd.* v. *BP N. Am. Petroleum,* 738 F. Supp. 1472 (S.D.N.Y. 1990). The Brent Interpretation provided clarification that the 15-day Brent system crude oil contracts were forward contracts that were excluded from the CEA definition of ''future delivery,'' and thus were not futures contracts. *See* Brent Interpretation, *supra* note 207.

[217] The Brent Interpretation described these ''book-outs'' as follows: ''In the course of entering into 15-day contracts for delivery of a cargo during a particular month, situations often arise in which two counterparties have multiple, offsetting positions with each other. These situations arise as a result of the effectuation of multiple, independent commercial transactions. In such circumstances, rather than requiring the effectuation of redundant deliveries and the assumption of the credit, delivery and related risks attendant thereto, the parties may, but are not obligated to and may elect not to, terminate their contracts and forego such deliveries and instead negotiate payment-of-differences pursuant to a separate, individually-negotiated cancellation agreement referred to as a 'book-out.' Similarly, situations regularly arise when participants find themselves selling and purchasing oil more than once in the delivery chain for a particular cargo. The participants comprising these 'circles' or 'loops' will frequently attempt to negotiate separate cancellation agreements among themselves for the same reasons and with the same effect described above.'' Brent Interpretation, *supra* note 207, at 39190.

[218] *Id.* at 39192.

[219] *Id.* at 39189.

certain circumstances, string or chain deliveries of the type described * * * are within the scope of the [forward contract] exclusion from the [CFTC's] regulatory jurisdiction.[220]

Although the CFTC did not expressly discuss intent to deliver, the Brent Interpretation concluded that transactions retained their character as commercial merchandising transactions, notwithstanding the practice of terminating commercial parties' delivery obligations through ''book-outs'' as described. At any point in the chain, one of the parties could refuse to enter into a new contract to book-out the transaction and, instead, insist upon delivery pursuant to the parties' obligations under their contract.

The CFTC also is clarifying that commercial market participants that regularly make or take delivery of the referenced commodity in the ordinary course of their business meet the commercial participant standard of the Brent Interpretation.[221] The CFTC notes that the Brent Interpretation applies to ''commercial participants in connection with their business.'' [222] The CFTC intends that the interpretation in this release be consistent with the Brent Interpretation, and accordingly is adding ''commercial'' before ''market participants'' in this final interpretation. Such entities qualify for the forward exclusion from both the future delivery and swap definitions for their forward transactions in nonfinancial commodities under the Brent Interpretation even if they enter into a subsequent transaction to ''book out'' the contract rather than make or take delivery. Intent to make or take delivery can be inferred from the binding delivery obligation for the commodity referenced in the contract and the fact that the parties to the contract do, in fact, regularly make or take delivery of the referenced commodity in the ordinary course of their business.

Further, in this final interpretation, the CFTC clarifies, in response to a comment received, that an investment vehicle taking delivery of gold as part of its investment strategy would not be engaging in a commercial activity within the meaning of the Brent Interpretation.[223] By contrast, were the investment vehicle, for example, to own a gold mine and sell the output of the gold mine for forward delivery, or own a chain of jewelry stores that produces its own jewelry from raw materials and purchase a supply of gold from another entity's gold mine in order to provide raw materials for its jewelry stores, such contracts could qualify as forward contracts under the Brent Interpretation—provided that such contracts otherwise satisfy the terms thereof.

In sum, the CFTC is interpreting the term ''commercial'' in the context of the Brent Interpretation in the same way it has done since 1990: ''related to the business of a producer, processor, fabricator, refiner or merchandiser.'' [224] While a market participant need not be solely engaged in ''commercial'' activity to be a ''commercial market participant'' within the meaning of the Brent Interpretation under this interpretation, the business activity in which it makes or takes delivery must be commercial activity for it to be a commercial market participant. A hedge fund's investment activity is not commercial activity within the CFTC's longstanding view of the Brent Interpretation.

In addition, the CFTC is expanding the Brent Interpretation, which applied only to oil, to all nonfinancial commodities, as proposed.[225] As a result, book-outs are permissible (where the conditions of the Brent Interpretation are satisfied) for all nonfinancial commodities with respect to the exclusions from the definition of the term ''swap'' and the definition of the term ''future delivery'' under the CEA.[226]

(C) Withdrawal of the Energy Exemption

Because the CFTC has expanded the Brent Interpretation to nonfinancial commodities in this final interpretation, the CFTC also has determined to withdraw the Energy Exemption as proposed. In response to comments received, the CFTC is clarifying that certain alternative delivery procedures discussed in the Energy Exemption [227] will not disqualify a transaction from the Brent Interpretation safe harbor.

In the Proposing Release, the CFTC proposed to withdraw the Energy Exemption, which, among other things,

[220] *Id.* at 39192.

[221] *See* CME Letter (noting that, although the Brent Interpretation applies to ''commercial market participants,'' the proposed guidance in the Proposing Release was described as applying to ''market participants'' (omitting the word ''commercial'') who ''regularly make or take delivery of the referenced commodities * * * in the ordinary course of business.'' *See also* Proposing Release at 29829.

[222] Brent Interpretation, *supra* note 207, at 39192.

[223] *See* CME Letter. In connection with its comment regarding ''market participants'' described above, *see supra* note 221, the CME further requests confirmation that the CFTC intends to apply the Brent Interpretation to market participants who can demonstrate that they meet the standard in the guidance as proposed, but are not themselves commercial actors:

> Because the Commission's interpretation does not explicitly refer to commercial market participants, it would seem to cover financial players as long as those entities regularly make or take delivery of the underlying commodity in connection with their business. Examples of such entities would be hedge funds or other investment vehicles that regularly make or take delivery of commodities (*e.g.* gold) in conjunction with their line of business—that is, as part of their investment strategies. [CME] asks that the [CFTC] confirm that the Brent safe harbor would be available to these types of market participants that technically are not ''commercial'' actors.

See CME Letter.

[224] Brent Interpretation, *supra* note 207, at 39191. *See also* dissent of Commissioner Fowler West (stating that commercial means ''in the traditional sense of those who produce, process, use or * * * handle the underlying commodity.''). Note that being a commercial market participant with respect to an agreement, contract or transaction in one commodity, or grade of a commodity, neither makes an entity, nor precludes an entity from being, a commercial market participant with respect to an agreement, contract or transaction in a different grade of the commodity or a different commodity. For example, a West Texas Intermediate oil producer may or may not also be a commercial with respect to Brent. Similarly, that same West Texas Intermediate oil producer may or may not have commercial corn operations. In determining whether an entity is a commercial market participant with respect to an agreement, contract or transaction in a commodity, the CFTC will consider the facts and circumstances, though it is not unlikely that an entity that is a commercial market participant with respect to one commodity may also be a commercial market participant with respect to either a different grade of the commodity or a closely related commodity.

[225] *See infra* part II.B.2(a)(ii), with respect to the CFTC's interpretation concerning nonfinancial commodities.

[226] The CFTC reminds market participants that this does not mean, as was noted in the Brent Interpretation, that these transactions or persons who engage in them are wholly outside the reach of the CEA for all purposes. *See, e.g.,* CEA section 8(d), 7 U.S.C. 12(d), which directs the CFTC to investigate the marketing conditions of commodities and commodity products and byproducts, including supply and demand for these commodities, cost to the consumer, and handling and transportation charges; CEA sections 6(c), 6(d), and 9(a)(2), 7 U.S.C. 9, 13b, and 13(a)(2), which proscribe any manipulation or attempt to manipulate the price of any commodity in interstate commerce; and CEA section 6(c) as amended by section 753 of the Dodd-Frank Act, which contains prohibitions regarding manipulation and false reporting with respect to any commodity in interstate commerce, including prohibiting any person to (i) ''use or employ, or attempt to use or employ * * * any manipulative or deceptive device or contrivance'' (section 6(c)(1)); (ii) ''to make any false or misleading statement of material fact'' to the CFTC or ''omit to state in any such statement any material fact that is necessary to make any statement of material fact made not misleading in any material respect'' (section 6(c)(2)); and (iii) ''manipulate or attempt to manipulate the price of any swap, or of any commodity in interstate commerce * * * (section 6(c)(3)). *See also* Rule 180.1(a) under the CEA, 17 CFR 180.1(a) (broadly prohibiting in connection with a commodity in interstate commerce manipulation, false or misleading statements or omissions of material fact to the Commission, fraud or deceptive practices or courses of business, and false reporting).

[227] These include pre-transaction netting agreements that result in offsetting physical delivery obligations, ''bona fide termination rights,'' and certain other methods by which parties may settle their delivery obligations. *See* Energy Exemption, *supra* note 208, at 21293.

expanded the Brent Interpretation to energy commodities other than oil, on the basis that the exemption was no longer necessary in light of the extension of the Brent Interpretation to nonfinancial commodities.[228] The Energy Exemption, like the Brent Interpretation, requires binding delivery obligations at the outset, with no right to cash settle or offset transactions.[229] Each requires that book-outs be undertaken pursuant to a subsequent, separately negotiated agreement.

As discussed above, the CFTC is extending the Brent Interpretation to the swap definition and applying it to all nonfinancial commodities for both the swap and future delivery definitions, but is withdrawing the Energy Exemption. With regard to netting agreements that were expressly permitted by the Energy Exemption,[230] the CFTC clarifies that a physical netting agreement (such as, for example, the Edison Electric Institute Master Power Purchase and Sale Agreement) that contains a provision contemplating the reduction to a net delivery amount of future, unintentionally offsetting delivery obligations, is consistent with the intent of the book out provision in the Brent Interpretation—provided that the parties had a bona fide intent, when entering into the transactions, to make or take delivery (as applicable) of the commodity covered by those transactions.

The CFTC also has determined that, notwithstanding the withdrawal of the Energy Exemption, a failure to deliver as a result of the exercise by a party of a ''bona fide termination right'' does not render an otherwise binding delivery obligation as non-binding.[231] In the Energy Exemption, the CFTC provided the following examples of bona fide termination rights: force majeure provisions and termination rights triggered by events of default, such as counterparty insolvency, default or other inability to perform.[232] The CFTC confirms that market participants who otherwise qualify for the forward exclusion may continue to rely on the bona fide termination right concept as set forth in this interpretation, although, as was stated in the Energy Exemption, such right must be bona fide and not for the purpose of evasion. In this regard, the CFTC further clarifies, consistent with the Energy Exemption, that a bona fide termination right must be triggered by something not expected by the parties at the time the contract is entered into.[233]

The Energy Exemption also discussed a number of methods by which parties to energy contracts settle their obligations, including: The seller's passage of title and the buyer's payment and acceptance of the underlying commodity; taking delivery of the commodity in some instances and in others instead passing title to another intermediate purchaser in a chain; and physically exchanging (i.e., delivering) one quality, grade or type of physical commodity for another quality, grade or type of physical commodity.[234] The CFTC clarifies that these settlement methods generally [235] are not inconsistent with the Brent Interpretation.[236]

(D) Book-Out Documentation

The CFTC has taken into consideration comments regarding the documentation of book-outs.[237] Under the Brent Interpretation, what is relevant is that the book out occur through a subsequent, separately negotiated agreement. While the CFTC is sensitive to existing recordkeeping practices for book-outs, in order to prevent abuse of the safe harbor, the CFTC clarifies that in the event of an oral agreement, such agreement must be followed in a commercially reasonable timeframe by a confirmation in some type of written or electronic form.

(E) Minimum Contract Size and Other Contextual Factors

In the Proposing Release, the CFTC requested comment about potentially imposing additional conditions (such as, for example, a minimum contract size) in order for a transaction to qualify as a forward contract under the Brent Interpretation with respect to the future delivery and swap definitions.[238] The CFTC has determined that a minimum contract size should not be required in order for a contract to qualify as a forward contract under the Brent Interpretation.[239] However, as suggested

[228] *See* Proposing Release at 29829. The CFTC also noted that, to avoid any uncertainty, the Dodd-Frank Act supersedes the Swap Policy Statement. *Id.* at 29829 n. 74. The CFTC reaffirms that such is the case.

[229] *Compare* Energy Exemption, *supra* note 208, at 21293 *with* Brent Interpretation, *supra* note 207, at 39192.

[230] *See* Energy Exemption, *supra* note 208, at 21293.

[231] *See also infra* part II.B.2(b)(v) for a discussion of liquidated damages.

[232] Energy Exemption, *supra* note 208, at 21293.

[233] *Id.*

[234] *Id.*

[235] The CFTC will carefully scrutinize whether market participants are legitimately relying on the Brent Interpretation safe harbor. For example, if non-commercial market participants are intermediate purchasers in a delivery chain, then the transaction is not actually a commercial merchandising transaction, and the parties cannot rely on the Brent Interpretation safe harbor.

[236] By definition, if two parties exchange (*i.e.,* physically deliver) one physical commodity for another physical commodity in settlement of the parties' delivery obligations, each seller has delivered the commodity that is the subject of its delivery obligation under the relevant agreement, contract or transaction. Depending on the settlement timing, such transactions, which resemble barter transactions, would be spot transactions or forward transactions. While the most common forward transaction involves an exchange of a physical commodity for cash, neither the Brent Interpretation nor any other CFTC authority requires payment for a forward delivery to be made in cash. Thus, a physical exchange of one quality, grade or type of physical commodity for another quality, grade, or type of physical commodity does not affect the characterization of the transaction as a spot or forward transaction. As for the sellers passing title and buyers, instead of taking delivery of the commodity, passing title to another intermediate purchaser in a chain, this is consistent with the description of Brent transactions in the Brent Interpretation, provided that, as set forth therein, delivery is required and ''the delivery obligations create substantial economic risk of a commercial nature to the parties required to make or take delivery * * * includ[ing, without limitation,] demurrage, damage, theft or deterioration.'' That description was based on the industry delivery structure as it existed prior to the Brent Interpretation. To the extent other industries are similarly structured for commercial reasons, the delivery-by-title-and-related-bill-of-lading-transfer delivery method would be able to rely on the Brent Interpretation if it otherwise satisfied the terms thereof. However, to the extent persons seek to establish such a delivery structure for new products and markets (*e.g.,* not actually delivering the commodity to most of the participants in a chain), that could, depending on the applicable facts and circumstances, be viewed as outside the Brent Interpretation safe harbor or evasion. The CFTC expects that the limitation of counterparties eligible to rely on the Brent Interpretation to those with a commercial purpose for entering into the transaction should limit the development of such markets to those with commercial reasons for such a delivery structure.

[237] *See* Letter from R. Michael Sweeney, Jr., Hunton & Williams LLP, on behalf of the Working Group of Commercial Energy Firms (''WGCEF''), dated July 22, 2011 (''WGCEF Letter'').

[238] *See* Proposing Release at 29831, Request for Comment 27.

[239] Most commenters opposed adding a minimum contract size or other conditions to the CFTC's interpretation of the forward exclusion. One commenter argued that such an approach would be inconsistent with CFTC precedent, citing the fact that neither the Brent Interpretation nor subsequent CFTC precedent interpreting the forward exclusion mention contract size. *See* CME Letter. Another commenter pointed out that Congress did not impose such a requirement, and thus believes that the CFTC should not do so. *See* Letter from David M. Perlman, Partner, Bracewell & Giuliani LLP, Counsel to the Coalition of Physical Energy Companies (''COPE''), dated July 22, 2011 (''COPE Letter''). Similarly, a third commenter argued that the only condition Congress placed on the forward exclusion is intent to physically settle, and contract size is not relevant to such intent. *See* Letter from Natural Gas Supply Association/National Corn Growers Association (''NGSA/NCGA''), dated July 22, 2011 (''NGSA/NCGA Letter'').

Two commenters questioned the reasonableness in instituting a minimum contract size below which a transaction would become regulated, but otherwise would not. *See* Letter from Craig G. Goodman, Esq., President, The National Energy Marketers Association (''NEMA''), dated July 21, 2011, (''NEMA Letter'') and Letter from Phillip G. Lookadoo on behalf of the International Energy

by a commenter, the CFTC may consider contract size as a contextual factor in determining whether a particular contract is a forward.[240] Moreover, the CFTC may consider other contextual factors when determining whether a contract qualifies as a forward, such as a demonstrable commercial need for the product, the underlying purpose of the contract (*e.g.* whether the purpose of the claimed forward was to sell physical commodities, hedge risk, or speculate), the regular practices of the commercial entity with respect to its general commercial business and its forward and swap transactions more specifically, or whether the absence of physical settlement is based on a change in commercial circumstances. These contextual factors are consistent with the CFTC's historical facts-and-circumstances approach to the forward contract exclusion outside of the Brent Interpretation safe harbor.

Comments

Several commenters believed that the CFTC should codify its proposed interpretation regarding the Brent Interpretation in rule text to provide greater legal certainty.[241] One commenter further commented that the Dodd-Frank Act's legislative history expressly directed the CFTC to clarify through rulemaking that the nonfinancial commodity forward contract exclusion from the swap definition is intended to be consistent with the forward contract exclusion from the term ''future delivery.''[242] The commenter also stated its view that the interpretation as proposed does not provide notice to the electricity industry as to how to determine whether a nonfinancial commodity agreement is a swap or a nonfinancial commodity forward contract, nor as to which factors the CFTC would consider in distinguishing between swaps and nonfinancial forward contracts.[243] Moreover, another commenter suggested that the CFTC should include in regulatory text a representative, non-exhaustive list of the kinds of contracts that are excluded from the swap definition.[244]

The CFTC has determined not to codify its interpretation in rule text. The CFTC has never codified its prior interpretations of the forward contract exclusion with respect to the future delivery definition as a rule or regulation;[245] thus, providing an interpretation is consistent with the manner in which the CFTC has interpreted the forward exclusion in the past, which in turn is consistent with the Dodd-Frank Act legislative history.[246] Moreover, Congress did not direct the CFTC to write rules regarding the forward exclusion. The Dodd-Lincoln letter, cited by a commenter in support of its argument, ''encourages'' the CFTC to clarify the forward exclusion ''through rulemaking'' in the generic sense of that term (*i.e.,* through the rulemaking process of notice and comment), not specifically through rule text.[247] Similarly, the CFTC is not providing in rule text a representative list of contracts in nonfinancial commodities that are excluded from the swap definition as forwards.

The CFTC believes that its interpretation provides sufficient clarity with respect to the forward contract exclusion from the swap and future delivery definitions.[248] The CFTC also believes that the interpretation provides sufficient notice to the public regarding how the forward exclusions from the swap and future delivery definitions will be interpreted. As noted above, the CFTC's historical approach to the forward contract exclusion from the future delivery definition developed on a case-by-case basis, not by rule.

Commenters generally supported applying the Brent Interpretation to the forward exclusion from the swap definition and expanding it to all nonfinancial commodities for purposes of the forward exclusion from both the definitions of the terms ''future delivery'' and ''swap.'' [249] However, in addition to the requests for clarification to which the CFTC has responded in its final interpretation provided above, commenters raise other requests for clarification. One commenter,[250] for example, believed that the CFTC's adjudicatory decisions in *Grain Land* [251] and *Wright* [252] should be construed to have expanded the Brent Interpretation's safe harbor. This commenter stated its view that in *Grain Land,* the CFTC recognized that cancellation provisions or an option to roll the delivery date within flexible hedge-to-arrive contracts did not render the transactions futures contracts, as opposed to forwards. As such, this commenter believed this case may be at odds with the literal terms of the Brent Interpretation regarding book-outs, which required that, to be a forward contract, any cancellation of delivery must be effected through a subsequent, separately negotiated agreement. The commenter argued that cases subsequent to the Brent Interpretation, such as *Grain Land* and *Wright,* recognized the need for flexibility and innovation in the commercial merchandising transactions that are eligible for the forward exclusion. Therefore, this commenter requested that the CFTC consider the body of

Credit Association (''IECA''), dated July 28, 2011 (''IECA Letter''). Two commenters believed that such an approach would be contrary to the purposes of Dodd-Frank in regulating transactions that would affect systemic risk. *See* NEMA Letter and Letter from Dan Gilligan and Michael Trunzo, Petroleum Marketers Association of America and New England Fuel Institute (''PMAA/NEFI''), dated July 22, 2011 (''PMAA/NEFI Letter''). One commenter urged that the Brent Interpretation be applied with minimal restrictive overlay. It believed that contract size is a ''contextual factor'' that may be considered in evaluating the existence of intent to deliver, but should not be viewed as an independent determinant. *See* ISDA Letter.

One commenter argued that the forward exclusion should be strengthened with additional conditions to preclude evasion. Its suggested conditions include defining the required regularity of delivery (such as a predominance, or ''more often than not'' standard); providing a quantitative test of bona fide intent to deliver (such as a demonstrable commercial need for the product and justifying non-physical settlement based on a change in commercial circumstances); and re-evaluating the book-outs aspect of the Brent Interpretation. *See* Better Markets Letter.

[240] *See* ISDA Letter.

[241] *See* Letter from Lisa Yoho, Director, Regulatory Affairs, BGA, dated July 22, 2011) (''BGA Letter''); COPE Letter; Letter from Michael Bardee, General Counsel, Federal Energy Regulatory Commission (''FERC''), dated July 22, 2011 (''FERC Staff Letter''); Letter from Stephanie Bird, Chief Financial Officer, Just Energy, dated July 22, 2011 (''Just Energy Letter''); Letter from the Electric Trade Associations (the Electric Power Supply Association, National Rural Electric Cooperative Association, Large Public Power Council, Edison Electric Institute and American Power Association) (''ETA Letter''), dated July 22, 2011.

[242] *See* ETA Letter (citing the ''Lincoln-Dodd Letter'' printed at 156 Cong. Rec. H5248–249).

[243] *See* ETA Letter. The commenter requests that the CFTC ''further define the statutory term 'swap' by defining relevant terms in the Dodd-Frank Act, reconciling the wording used in the various provisions in the CEA as amended by the Dodd-Frank Act, and setting forth in the [CFTC's] rules the factors that are determinative in drawing the distinction between a 'swap' and a 'nonfinancial commodity forward contract.''' The commenter suggests rule text to codify the CFTC's interpretation regarding the exclusion of nonfinancial commodity forward contracts. *Id.*

[244] *See* FERC Staff Letter.

[245] *See, e.g.* Brent Interpretation, *supra* note 207; Energy Exemption, *supra* note 208; *Characteristics Distinguishing Cash and Forward Contracts and ''Trade'' Options,* 50 FR 39656 (Sep. 30, 1985) (''1985 CFTC OGC Interpretation'').

[246] *See supra* note 210 and accompanying text.

[247] *See* 156 Cong. Rec. H5248–49 (June 30, 2010).

[248] This is particularly true given that the CFTC intends to interpret the forward exclusion from the swap definition consistently with its interpretation of the forward exclusion from the term ''future delivery,'' with which market participants have had decades of experience.

[249] *See* BGA Letter; COPE Letter; ISDA Letter; IECA Letter; Letter from Stuart J. Kaswell, Executive Vice President & Managing Director, Managed Funds Association (''MFA''), dated July 22, 2011 (''MFA Letter''); NGSA/NCGA Letter; Letter from Charles F. Conner, President and CEO, National Council of Farmer Cooperatives (''NCFC''), dated July 22, 2011 (''NCFC Letter''); NEMA Letter; PMAA/NEFI Letter; WGCEF Letter.

[250] *See* CME Letter.

[251] *Grain Land, supra* note 213.

[252] *Wright, supra* note 214.

forward contract precedent as a whole and extend the Brent Interpretation's safe harbor to situations like those presented in *Grain Land,* notwithstanding the absence of a subsequent, separately-negotiated agreement.[253]

While, as noted above, the CFTC has clarified that the entire body of its precedent applies to its interpretation of the forward exclusion for nonfinancial commodities in the swap definition, the CFTC does not believe that there is a conflict between the Brent Interpretation and the *Grain Land* or *Wright* cases. In *Grain Land,* the CFTC concluded that the fact that a contract includes a termination right, standing alone, is not determinative of whether the contract is a forward. Rather, as the CFTC has always interpreted the forward exclusion, it looks to the facts and circumstances of the transaction. Similarly in *Wright,* which cited *Grain Land* with approval, the CFTC stated that ''[i]n assessing the parties' expectations or intent regarding delivery, the Commission applies a 'facts and circumstances' test rather than a bright-line test focused on the contract's terms * * * .'' In contrast, the Brent Interpretation is a safe harbor that assures commercial parties that book-out their contracts through a subsequent, separately negotiated agreement that their contracts will not fall out of the forward exclusion. The CFTC's conclusion that application of its facts-and-circumstances approach demonstrated that the particular contracts at issue in *Grain Land* and *Wright* were forwards did not expand the scope of the safe harbor afforded by the Brent Interpretation.[254]

Several commenters suggested that the Energy Exemption should not be withdrawn. One commenter noted that the Energy Exemption, along with the Brent Interpretation, should inform the CFTC's interpretation of the forward exclusion.[255] Another commenter believed that the Energy Exemption appears entirely consistent with the Dodd-Frank Act and should be included in the rules as a non-exclusive exemption to ensure continued clarity.[256] A third commenter requested clarification that revoking the Energy Exemption will not harm market participants, stating that the Proposing Release did not sufficiently explain the rationale for withdrawing the Energy Exemption or the possible consequences for energy market participants. This commenter sought confirmation that, despite the withdrawal of the Energy Exemption, market participants will be permitted to rely on the Brent Interpretation, as expanded by the Energy Exemption, particularly as it relates to alternative delivery procedures.[257] This commenter expressed concern that by withdrawing the Energy Exemption, the CFTC would be revoking the ability of market participants to rely on pre-transaction netting agreements to offset physical delivery obligations as an alternative to separately negotiating book-outs after entering into the transactions.[258] As discussed above, the CFTC has determined to withdraw the Energy Exemption as proposed, but has provided certain clarifications to address commenters' concerns.

One commenter suggested the deletion of ''commercial merchandising transaction'' as a descriptive term in the interpretation. Although recognizing its provenance from the Brent Interpretation, this commenter believed that the phrase was anachronistic at that time, and that it is misleading and narrow in the current evolving commercial environment.[259] Contrary to this commenter's suggestion, the CFTC has determined to retain the phrase ''commercial merchandising transaction'' in its final interpretation regarding forward contracts. The CFTC characterized forward transactions in this manner in the Brent Interpretation, as well as in its subsequent adjudications. Courts also have characterized forwards as commercial merchandising transactions or cited the CFTC's characterization with approval.[260] Accordingly, the CFTC believes that ''commercial merchandising transaction'' continues to be an accurate descriptive term for characterizing forward transactions.

Another commenter requested that the CFTC clarify that a subsequent, separately-negotiated agreement to effectuate a book-out under the Brent Interpretation may be oral or written. This commenter noted that the pace at which certain energy markets transact and the frequency with which book-outs may sometimes occur, makes formal written documentation of all book-outs impracticable.[261] The CFTC has provided an interpretation above regarding the documentation of book-outs in response to this commenter's concerns.

(ii) Nonfinancial Commodities

In response to commenters,[262] the CFTC is providing an interpretation regarding the scope of the term ''nonfinancial commodity'' in the forward exclusion from the swap definition.[263]

The CFTC interprets the term ''nonfinancial commodity'' to mean a commodity that can be physically delivered and that is an exempt commodity[264] or an agricultural commodity.[265] Unlike excluded commodities, which generally are financial,[266] exempt and agricultural commodities by their nature generally are nonfinancial. The requirement that the commodity be able to be physically delivered is designed to prevent market participants from relying on the forward exclusion to enter into swaps based on indexes of exempt or agricultural commodities outside of the Dodd-Frank Act and settling them in cash, which would be inconsistent with the historical limitation of the forward exclusion to commercial merchandising transactions. However, to the extent that a transaction is intended to be physically settled, otherwise meets the terms of the forward contract exclusion and uses an index merely to determine the price to be paid for the nonfinancial commodity intended to be delivered,

[253] *See* CME Letter.

[254] As described above in the interpretation, the CFTC has addressed CME's other comments on the forward exclusion, including the interpretation's applicability to commercial market participants and CME's hedge fund example.

[255] *See* COPE Letter Appendix.

[256] *See* IECA Letter.

[257] *See* MFA Letter.

[258] Ex Parte Communication between MFA and CFTC Staff on September 15, 2011, at *http://comments.cftc.gov/PublicComments/ViewExParte.aspx?id=387&SearchText=* .

[259] *See* ISDA Letter.

[260] *See, e.g., In re Bybee,* 945 F.2d 309, 315 (9th Cir. 1991).

[261] *See* WGCEF Letter.

[262] The Commissions requested comment in the Proposing Release on whether they should provide guidance regarding the scope of the term ''nonfinancial commodity'' and, if so, how and where the line should be drawn between financial and nonfinancial commodities. *See* Proposing Release at 29832.

[263] As noted above, the CEA definition of the term ''swap'' excludes ''any sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled.'' CEA section 1a(47)(B)(ii), 7 U.S.C. 1a(47)(B)(ii). Thus, the forward exclusion from the swap definition is limited to transactions in nonfinancial commodities. To the extent the CFTC uses the term ''nonfinancial commodity'' in other contexts in this release, such as in connection with the Brent Interpretation (including as it applies with respect to the ''future delivery'' definition), the term will have the same meaning as discussed in this section in those contexts.

[264] The CEA defines an ''exempt commodity'' as ''a commodity that is not an excluded commodity or an agricultural commodity.'' CEA section 1a(20), 7 U.S.C. 1a(20). A security is an excluded commodity as discussed below, and therefore is not an exempt commodity.

[265] The CFTC has defined the term ''agricultural commodity'' in its regulations at Rule 1.3(zz) under the CEA, 17 CFR 1.3(zz). *See Agricultural Commodity Definition,* 76 FR 41048 (Jul. 13, 2011).

[266] The CEA defines an ''excluded commodity'' at CEA section 1a(19), 7 U.S.C. 1a(19).

the transaction may qualify for the forward exclusion from the swap definition.

In addition, the CFTC is providing an interpretation that an intangible commodity (that is not an excluded commodity) which can be physically delivered qualifies as a nonfinancial commodity if ownership of the commodity can be conveyed in some manner and the commodity can be consumed. One example of an intangible nonfinancial commodity that qualifies under this interpretation, as discussed in greater detail below, is an environmental commodity, such as an emission allowance, that can be physically delivered and consumed (*e.g.,* by emitting the amount of pollutant specified in the allowance).[267] The interpretation provided herein recognizes that transactions in intangible commodities can, in appropriate circumstances, qualify as forwards, while setting forth certain conditions to assure that the forward exclusion may not be abused with respect to intangible commodities.

Comments

Several commenters believed that the CFTC should provide an interpretation regarding the meaning of the term ''nonfinancial commodity'' to provide clarity to market participants on the applicability of the forward exclusion.[268] The CFTC is providing the interpretation discussed above to address these commenters' concerns but, contrary to one commenter's request, declines to adopt a regulation.[269]

(iii) Environmental Commodities

The Commissions requested comment on whether environmental commodities should fall within the forward exclusion from the swap definition and, if so, subject to what parameters.[270] In response to commenters, the CFTC is providing an interpretation regarding the circumstances under which agreements, contracts or transactions in environmental commodities will satisfy the forward exclusion from the swap definition.[271] The CFTC did not propose a definition of the term ''environmental commodity'' in the Proposing Release and is not doing so in this release.[272] The CFTC believes it is not necessary to define the term ''environmental commodity'' because any intangible commodity—environmental or otherwise—that satisfies the terms of the interpretation provided herein is a nonfinancial commodity, and thus an agreement, contract or transaction in such a commodity is eligible for the forward exclusion from the swap definition.[273] The forward exclusion from the swap definition does not apply to commodities themselves, but to certain types of agreements, contracts or transactions in a specified type of commodity (i.e., a ''nonfinancial'' commodity).[274] Environmental commodities that meet the interpretation regarding nonfinancial commodities discussed in subsection (ii) above are nonfinancial commodities and, therefore, a sale for deferred shipment or delivery in such a commodity, so long as the transaction is intended to be physically settled, may qualify for the forward exclusion from the swap definition.

The intangible nature of environmental, or other, commodities does not disqualify contracts based on such commodities from the forward exclusion from the swap definition, notwithstanding that the core of the forward exclusion is intent to deliver the underlying commodity.[275] As commenters noted, securities are intangible (with the exception of the rare certificated security) and yet they are expressly permitted by CEA section 1a(47)(B)(ii)[276] to be the subject of the forward exclusion; this reflects recognition by Congress that the forward exclusion can apply to intangible commodities.[277]

The CFTC understands that market participants often engage in environmental commodity transactions in order to transfer ownership[278] of the environmental commodity (and not solely price risk),[279] so that the buyer

[267] *See supra* part II.B.2.a)iii), regarding environmental commodities. An emission allowance buyer also can consume the allowance by retiring it without emitting the permitted amount of pollutant.

[268] *See* Letter from Steven J. Mickelsen, Counsel, 3Degrees Group, Inc., dated July 22, 2011 (''3Degrees Letter''); ETA Letter; and Letter from Kari S. Larsen, General Counsel, Chief Regulatory Officer, Green Exchange LLC, dated July 22, 2011 (''GreenX Letter''). Each of these commenters proposed its own definition of ''nonfinancial commodity.'' The interpretation above incorporates many of their suggestions.

[269] *See* ETA Letter. This is consistent with CFTC practice in providing an interpretation rather than regulations where warranted. In this context, the CFTC is providing an interpretation rather than rule text because the CFTC is not limiting the definition of ''nonfinancial commodity'' to exempt and agricultural commodities (the latter category includes agricultural commodity indexes (*see* 17 CFR 1.3(zz)(4))). The definition also requires physical deliverability and, with respect to intangible commodities, ownership transferability and consumability. Whether a commodity has these features may require interpretation. In any case, courts can rely on agency interpretations.

[270] *See* Proposing Release at 29832, Request for Comment 32, asked: Should the forward contract exclusion from the swap definition apply to environmental commodities such as emissions allowances, carbon offsets/credits, or renewable energy certificates? If so, please describe these commodities, and explain how transactions can be physically settled where the commodity lacks a physical existence (or lacks a physical existence other than on paper)? Would application of the forward contract exclusion to such environmental commodities permit transactions that should be subject to the swap regulatory regime to fall outside the Dodd-Frank Act?

[271] Because the CFTC has determined, as discussed elsewhere in this release, to interpret the forward exclusion from the swap definition consistently with the forward exclusion from the ''future delivery'' definition, the discussion in this section applies equally to the forward exclusion from future delivery.

[272] *See also* Letter from Gene Grace, Senior Counsel, American Wind Energy Association (''AWEA''), dated July 22, 2011 (''AWEA Letter'') (providing a general description of renewable energy credits (''RECs''), emission allowances, and offsets, which the commenter collectively termed ''environmental commodities'' for purposes of its letter).

[273] Thus, market participants should apply the interpretation to their facts to determine whether their specific circumstances support reliance on the forward exclusion from the swap definition.

[274] Several commenters appear to have confused these concepts. The term ''commodity'' is defined in CEA section 1a(9), 7 U.S.C. 1a(9). The forward exclusion in CEA section 1a(47)(B)(ii), 7 U.S.C. 1a(47)(B)(ii), excludes from the swap definition ''any sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled.''

[275] *See supra* part II.B.2.a)i)(A).

[276] 7 U.S.C. 1a(47)(B)(ii).

[277] As commenters also note, each Commission or its staff has previously indicated that environmental commodities, in the CFTC's case, and securities, in the SEC's case, can be physically settled. *See* Letter from Kyle Danish, Van Ness Feldman, P.C., on behalf of Coalition for Emission Reduction Policy (''CERP''), dated July 18, 2011 (''CERP Letter'') and 3Degrees Letter. Also, the recent Carbon Report suggested that the forward exclusion could apply to agreements, contracts or transactions in environmental commodities. *See* Interagency Working Group for the Study on Oversight of Carbon Markets (''Interagency Working Group''), *Report on the Oversight of Existing and Prospective Carbon Markets* (January 2011) (''Carbon Report''). The Carbon Report specifically stated that—[n]o set of laws currently exist that apply a comprehensive regulatory regime—such as that which exists for derivatives—specifically to secondary market trading of carbon allowances and offsets. Thus, for the most part, absent specific action by Congress, a secondary market for carbon allowances and offsets may operate outside the routine oversight of any market regulator.

[278] One commenter maintains that a transaction in an environmental allowance represents a physically-settled transaction because its primary purpose is to transfer ownership of the right to emit a specified unit of pollution. *See* Letter from Andrew K. Soto, American Gas Association (''AGA''), dated July 22, 2011 (''AGA Letter''). *Compare* to Proposing Release at 29828 (stating that ''[t]he primary purpose of the contract is to transfer ownership of the commodity'').

[279] Another commenter states that, from a practical standpoint, the buyer must take delivery to satisfy a compliance obligation, which typically requires surrender of allowances and offset credits, and likens such transactions to forward sales of more tangible commodities, noting they are not devices for transferring price risk. *See* CERP Letter.

Continued

can consume the commodity in order to comply with the terms of mandatory or voluntary environmental programs.[280] Those two features—ownership transfer and consumption—distinguish such environmental commodity transactions from other types of intangible commodity transactions that cannot be delivered, such as temperatures and interest rates. The ownership transfer and consumption features render such environmental commodity transactions similar to tangible commodity transactions that clearly can be delivered, such as wheat and gold.[281]

For such transactions, in addition to the factors discussed above, intent to deliver is readily determinable,[282] delivery failures generally result from frustration of the parties' intentions,[283] and cash-settlement is insufficient because delivery of the commodity is necessary for compliance purposes.[284] For the foregoing reasons, environmental commodities can be nonfinancial commodities that can be delivered through electronic settlement or contractual attestation. Therefore, an agreement, contract or transaction in an environmental commodity may qualify for the forward exclusion from the swap definition if the transaction is intended to be physically settled.

Comments

Several commenters responded to the Commission's request for comment regarding the applicability of the forward exclusion from the swap definition for agreements, contracts and transactions in environmental commodities.[285]

Most commenters responding to the Commissions' request for comment concerning the appropriate treatment of agreements, contracts or transactions in environmental commodities asserted that emission allowances, carbon offsets/credits, or RECs should be able to qualify for the forward exclusion from the swap definition. In support of this view, several commenters explained that the settlement process for environmental commodity transactions generally involves ''the transfer of title via a tracking system, registry or contractual attestation, in exchange for a cash payment.'' [286] One commenter stated that this form of settlement demonstrates that the lack of physical existence of a commodity is not relevant to whether a transaction in the commodity physically settles for purposes of the forward exclusion.[287] Another commenter contended that title transfer constitutes physical delivery because the settlement results in the environmental commodity being consumed to meet an environmental obligation or goal, which occurs through ''retirement'' of the environmental commodity.[288] Other commenters compared the settlement of a transaction in an environmental commodity through an electronic registry system to a warehouse receipt that represents title to a physical commodity.[289]

Compare to Proposing Release at 29828 (stating that ''[t]he primary purpose of the contract is * * * not to transfer solely * * * price risk''). This commenter also advises that delivery of RECs and offsets is typically deferred for commercial convenience, consistent with the Brent Interpretation, because ''not all of the purchased RECs and offsets are generated at the time of the transaction'' and ''long-term contracts with deferred delivery are important for renewable energy projects to ensure a consistent revenue stream over a long period of time.'' *See* CERP Letter.

[280] Consumption also can be part of a commercial merchandising transaction in the chain of commerce. *See, e.g.,* Brent Interpretation, *supra* note 207 (dissent of Commissioner Fowler West) (citing the 1985 CFTC OGC Interpretation and cases cited therein for the proposition that ''parties to forward contracts * * * seek to profit in their businesses from producing, processing, distributing, storing, or consuming the commodity'').

[281] Similarly, the settlement method for the types of environmental commodity transactions described by commenters such as RECs, emission allowances, and offsets are equivalent to that of physical commodities where ownership is transferred by delivering a warehouse receipt from the seller to the buyer, thereby indicating the presence in the warehouse of the contracted for commodity volume. *See* GreenXLetter. *See also* REMA letter (averring that ''[i]n effect, the REC is an intangible contract right or interest in that specific quantity of energy; thus, it is quite analogous to a warehouse receipt that represents title to a physical commodity''). Another similarity between these environmental commodity transactions and tangible commodities is that it is possible to manipulate the deliverable supply of an environmental commodity just as it is for a tangible commodity. The CFTC reminds market participants of its continuing authority over forwards under the CEA's anti-manipulation provisions prohibiting manipulation, making false and misleading statements and omissions of material fact to the CFTC, fraud and deceptive practices, and false reporting. *See supra* note 226.

[282] *See* Letter from Jennifer Martin, Executive Director, Center for Research Solutions (''CRS''), dated July 22, 2011 (''CRS Letter'').

[283] *See* 3Degrees Letter.

[284] *See* GreenX Letter.

[285] One commenter provided a general description of renewable energy credits (''RECs''), emission allowances, offsets, (which the commenter collectively termed ''environmental commodities'' for purposes of its letter), and related transactions. *See* AWEA Letter. According to the commenter, RECs are created by state regulatory bodies in conjunction with the production of electricity from a qualifying renewable energy facility. The forward sale of a REC transfers ownership of the REC from the producing entity to another entity that can use the REC for compliance with an obligation to sell a certain percentage of renewable energy. Many times, this forward sale takes place prior to the construction of a project to enable developers to secure related project financing. *See* AWEA Letter. *See also* Letter from Mary Anne Mason, HoganLovells LLP on behalf of Southern California Edison Company, Pacific Gas and Electric Company and San Diego Gas and Electric Company (''California Utilities''), dated July 22, 2011 (''California Utilities Letter'') (stating that the California Utilities transact in allowances, under the EPA's and anticipated California cap-and-trade programs, as well as in RECs, in order to comply with or participate in various regulatory and voluntary programs).

The CFTC understands that, in the United States, emission allowances and offsets are issued by the U.S. Environmental Protection Agency (''EPA''), state government entities and private entities. Emission allowances and offsets are transferred between counterparties, often through forward contracts, with the purchasing party obtaining the ability to use the allowances or offsets for compliance with clean air or greenhouse gas regulations. The forward sale of allowances and offsets allows market participants to hedge the compliance obligations associated with expected emissions, or to meet a voluntary emissions reduction commitment or make an environmental claim. *See, e.g.,* AWEA Letter; Letter from Henry Derwent, President and CEO, International Emissions Trading Association, dated July 22, 2011 (defining a carbon offset as a ''credit[] granted by a state or regional governmental body or an independent standards organization in an amount equal to the generation of electricity from a qualifying renewable energy facility.'').

[286] *See* 3Degrees Letter. *See also* WGCEF Letter (advising that ''physical delivery takes place the moment that title and ownership in the environmental commodity itself is transferred from the seller to the buyer[,] whether through the execution of a legally binding contract or attestation, or submission of records to a centralized data base, such as a registry''); Letter from the Hons. Jeffrey A. Merkley, Sherrod Brown and Jeanne Shaheen, U.S. Senators, dated January 13, 2012 (''Senators Letter'') (relaying that ''[t]he purchase or sale of a REC is settled through the transfer of title to the REC, either electronically over a tracking system or via a paper attestation''); Letter from Harold Buchanan, Chief Executive Officer, CE2 Carbon Capital, LLC (''CE2''), dated July 22, 2011 (''CE2 Letter''); Letter from Jason M. Rosenstock, ML Strategies LLC on behalf of The Business Council for Sustainable Energy (''BCSE''), dated January 24, 2012 (''BCSE Letter''); NEMA Letter (stating that RECs must be physically settled through a REC registry, which ''ensures that there is a physical megawatt hour from a green generator behind the REC'').

[287] *See* 3Degrees Letter. *See also* GreenX Letter (stating that environmental commodities share the same characteristics as tangible physical commodities ''in all key respects,'' including that they are in limited supply).

[288] *See* CRS Letter. CRS explains that retirement occurs through a registry or electronic tracking system by transfer into a retirement account (or, alternatively, an exchange of paperwork) and that, once retired, an environmental commodity cannot be resold. The CRS also argues that such environmental commodity transactions are commercial merchandising transactions, and thus may be forward contracts, because the primary purpose of the transactions is to transfer ownership so that the purchaser may comply with an applicable environmental program. *See also* 3Degrees Letter and AWEA Letter.

[289] *See* Letter from Josh Lieberman, General Manager, Renewable Energy Markets Association (''REMA''), dated July 22, 2011 (''REMA Letter'') (distinguishing RECs, which allow the buyer to own environmental attributes, from a pure financial swap, where only price risk is transferred); *See also* GreenX Letter (likening the settlement of an environmental commodity transaction (where delivery typically would take place by electronic delivery from the registry account of the seller to the registry account of the buyer) to that of transactions in many tangible physical commodities, such as agricultural commodities and metals, where settlement is evidenced by an

A few commenters also analogized environmental commodities to securities, which (with the exception of certificated securities) are intangible. Some commenters, for example, asserted that the language of the forward exclusion from the swap definition means that non-physical items can be physically settled because the exclusion, which references securities, ''implies that securities—which lack a strict physical existence—may be physically settled.'' [290]

Some commenters assured the Commissions that applying the forward exclusion to transactions in environmental commodities would not permit transactions that should be subject to the swap regulatory regime to fall outside it. One commenter submitted that intent to deliver with respect to environmental commodities will be readily determinable.[291] Another commenter contended that: environmental commodity contracts almost universally require delivery and that failure to do so is an event of default; to the best of its knowledge, it is rare for such a contract to include the right to unilaterally terminate an agreement under a pre-arranged contractual provision permitting financial settlement; [292] and defaults generally are the result of something frustrating parties' intentions.[293] Still other commenters distinguished environmental commodities from other intangible commodities, such as the nonfinancial commodities (such as interest rates and temperatures) that the CFTC referred to in its Adaptation Notice of Proposed Rulemaking,[294] because RECs and emissions allowances or offsets can be physically transferred from one account to another, whereas ''it is not possible to move and physically transfer an interest rate or a temperature reading.'' [295]

As discussed above, the CFTC has addressed the foregoing concerns of commenters by providing an interpretation that agreements, contracts and transactions in environmental commodities may qualify for the forward exclusion from the swap definition.

One commenter stated its view that the forward exclusion from the swap definition should not be available for carbon transactions because they should be standardized and conducted on open, transparent and regulated exchanges.[296] This commenter acknowledged the possibility that carbon transactions can be physically settled (as the statute requires of excluded forward contracts) but argued that, in light of the fact that there is no cost associated with making or taking delivery of carbon, there is no cost to store it, and there is no delay in delivering it, a forward exclusion for carbon transactions may allow financial speculators to escape regulation otherwise required by the Dodd-Frank Act. The CFTC believes that if a transaction satisfies the terms of the statutory exclusion, the CFTC lacks the authority to deprive the transaction of the exclusion, absent evasion.[297]

One commenter stated that ''[i]n the solar industry, RECs are often traded by an individual consumer as an assignment of a right owned by that consumer.'' [298] This commenter also advised that many individual consumers transact forward contracts through solar REC (''SREC'') aggregators at a fixed price. The CFTC notes [299] that a transaction entered into by a consumer cannot be a forward transaction, and accordingly should not be the subject of an interpretation of the forward exclusion.[300]

One commenter takes the position that, because EPA emission allowances are issued in transactions with the EPA, only resales of such allowances (secondary market transactions) could be swaps because the EPA's initial issuance of allowances would be excluded from the swap definition under CEA section 1a(47)(B)(ix).[301] The CFTC declines to address the commenter's legal conclusion regarding the application of CEA section 1a(47)(B)(ix), but agrees that an emission allowance created by the EPA is a nonfinancial commodity and that agreements, contracts and transactions in such allowances may fall within the forward exclusion from the swap definition.

(iv) Physical Exchange Transactions

The Commissions received a comment letter seeking clarification that physical exchange transactions are forward contracts excluded from the swap definition.[302] As described by the commenter, physical exchange transactions involve ''a gas utility entering into a transaction with another gas utility or other market participant to take delivery of natural gas at one delivery point in exchange for the same quantity of gas to be delivered at an alternative delivery point * * * for the primary purpose of transferring ownership of the physical commodity in order to rationalize the delivery of physical supplies to where they are needed'' at a price ''generally reflecting the difference in value at the delivery points.'' [303] This commenter stated that ''exchange transactions create binding obligations on each party to make and take delivery of physical commodities [, i]n essence constituting paired forward contracts that are intended to go to physical delivery.'' [304] The commenter added that, to the extent an exchange transaction payment is based on an index price, such pricing is not severable from the physical exchange.[305]

The CFTC interprets the exchange transactions described by the commenter, to the extent they are for deferred delivery, as examples of transactions in nonfinancial commodities that are within the forward exclusion from the definition of the terms ''swap'' and ''future delivery.'' Based on the information supplied by the commenter, they are commercial merchandising transactions, the primary purpose of which is to transfer

electronic transfer of a warehouse receipt in the records of the warehouse and the underlying commodity does not move—it remains in the warehouse or vault—but its ownership changes)).

[290] *See* CRS Letter. *See also* CERP Letter (claiming that Congress did not intend for the phrase ''physically settled'' in the forward exclusion to be limited to tangible commodities because, like environmental commodities, securities only exist ''on paper.''). *See also* AWEA Letter.

[291] *See* CRS Letter (''unlike a stock or a bond, which can be resold for its cash value, purchasers of environmental commodities intend to take delivery of RECs or carbon offsets for either compliance purposes or in order to make an environmental claim regarding their renewable energy use or carbon footprint.''). *See also* GreenX Letter.

[292] Such a provision would preclude reliance on the forward exclusion.

[293] *See* 3Degrees Letter.

[294] *See Adaptation of Regulations to Incorporate Swaps,* 76 FR 33066, June 7, 2011.

[295] *See* California Utilities Letter.

[296] *See* Letter from Michelle Chan, Director, Economic Policy Programs, Friends of the Earth, dated July 22, 2011.

[297] While the commenter contended that ''the intangible nature of carbon makes it much easier for speculators or those simply seeking to hedge carbon price risk to take delivery of the carbon itself rather than enter into a derivatives transaction,'' as the CFTC states in section VII.A.2.c), *infra,* deciding to enter into a forward transaction rather than a swap does not constitute evasion. Thus, if the transaction in question is a forward contract, that is the end of the analysis, absent the presence of other factors that may indicate evasion. *See* AWEA Letter.

[298] *See* Letter from Katherine Gensler, Director, Regulatory Affairs, SEIA, dated August 5, 2011 (''SEIA Letter'').

[299] *See* Proposing Release at 29832 n.104.

[300] However, in section II.B.3., *infra,* the Commissions provide an interpretation regarding the applicability of the swap definition to consumer transactions.

[301] *See* Letter from Lauren Newberry, Jeffrey C. Fort, Jeremy D. Weinstein, and Christopher B. Berendt, Environmental Markets Association, dated July 21, 2011.

[302] *See* AGA Letter.

[303] *Id.* This commenter noted that gas utilities often can receive gas at more than one interconnection or delivery point on a pipeline.

[304] *Id.*

[305] *Id.*

ownership of natural gas between two parties who intend to physically settle such transactions. That exchange transactions may involve, in addition to gas deliveries at two separate delivery points, a cash payment by one party to the other reflecting the difference in value of the gas at different delivery points, or that such payment may be based on an index, does not necessarily affect the nature of the transactions as forward transactions.[306] For an exchange transaction to fall within the forward exclusion, though, the parties to the transaction must intend for the transaction to be physically settled, and the exchange transaction must satisfy all applicable interpretations set forth herein, including that relating to book-outs.[307]

(v) Fuel Delivery Agreements

The CFTC understands that fuel delivery agreements can generally be described as agreements whereby two or more parties agree to divide the cost of acquiring fuel for generation facilities based on some formula or factors, which can include, for example, their respective financial contributions to developing the source of the fuel (*e.g.,* a natural gas field). One example of a fuel delivery agreement could involve a joint power agency providing to a municipal utility a long-term supply of natural gas from a natural gas project developed by the joint power agency and other entities to provide fuel for, among others, the joint power agency's and the municipal utility's natural gas-fired electric generating facilities. The municipal utility would pay the joint power agency through direct capital contributions to the entity formed to develop the natural gas project for the cost of developing it. In addition, the municipal utility would pay the joint power agency a monthly fee for the natural gas supplied from the natural gas project. The monthly fee would be composed of an operating cost fee component, an interstate pipeline transportation cost fee component and an operating reserve cost fee component. The municipal utility's natural gas-fired electric generating facility would be used to supply a portion of its expected retail electric load.

Such agreements are forward transactions if they otherwise meet the interpretation set forth in this release regarding the forward exclusions (*e.g.,* no optionality other than as permitted by the interpretation). Monthly or other fees that are not in the nature of option premiums do not convert the transactions from forwards to options. Because the transactions as described above do not appear to exhibit optionality as to delivery, and no other aspect of the transactions as described above seem to exhibit optionality, the fees would not seem to resemble option premiums.[308]

(vi) Cleared/Exchange-Traded Forwards

In the Proposing Release, the Commissions requested comment regarding whether forwards executed on trading platforms should fall within the forward exclusion from the swap definition and, if so, subject to what parameters.[309] One commenter requested that the CFTC adopt a non-exclusive safe harbor providing that exchange-traded contracts with respect to which more than 50 percent of contracts, on average on a rolling three-month basis, go to delivery and where 100 percent of the counterparties are commercial counterparties, are neither futures nor swaps (''50/100 Forward Safe Harbor'').[310] This commenter further requested that the CFTC provide an appropriate transition period once those thresholds are breached. This commenter contended that two hallmarks of the exchange-traded forward markets, which it characterized as ''a relatively new development,'' are that the participants generally are commercials and a high percentage of contracts go to delivery, notwithstanding netting of delivery obligations.[311] This commenter added that, while parties to such contracts intend to go to delivery when they enter into them, their delivery needs may change as time passes.

The CFTC declines to address this request for the 50/100 Forward Safe Harbor, which raises policy issues that are beyond the scope of this rulemaking. Should the CFTC consider the implications of the requested 50/100 Forward Safe Harbor, including possible additional conditions for relief, it would be appropriate for the CFTC to obtain further comment from the public on this discrete proposal. For the same reasons, the CFTC declines to address at this time the comment requesting that the CFTC take the view that cleared forwards between commercial participants fall within the scope of the forward contract exclusion.

(b) Commodity Options and Commodity Options Embedded in Forward Contracts

(i) Commodity Options [312]

The CFTC noted in the Proposing Release [313] that the statutory swap definition explicitly provides that commodity options are swaps, that it had proposed revisions to its existing options rules in parts 32 and 33 of its regulations [314] with respect to the treatment of commodity options under the Dodd-Frank Act, and that it had requested comment on those proposed revisions in that rulemaking proceeding.[315] Accordingly, the CFTC did not propose an additional interpretation in the Proposing Release with respect to commodity options.

The CFTC reaffirms that commodity options are swaps under the statutory swap definition, and is not providing an additional interpretation regarding commodity options in this release. The CFTC recently addressed commodity options in the context of a separate final rulemaking and interim final rulemaking, under its plenary options authority in CEA section 4c(b).[316] There, the CFTC adopted a modified trade option exemption, and has invited

[306] However, if such payment stems from an embedded option, the interpretation set forth in the embedded option section of this release, *see infra* part II.B.2(b)(v), also would be relevant to determining whether an exchange transaction were covered by the forward exclusion from the swap definition.

[307] While the commenter also states that ''[g]as utilities contract with interstate pipelines for capacity rights to have their gas supplies delivered to specific delivery points,'' its discussion of exchange transactions appears unrelated to such capacity rights. Therefore, the CFTC's guidance on exchange transactions does not address exchange transactions with capacity elements, which, depending on their structures, may be covered by the guidance set forth in the embedded option section of this release or by the CFTC's recent Commodity Options release. *See infra* note 317. Conversely, that parties to an exchange transaction separately enter into a capacity transaction with a pipeline operator to transport natural gas delivered via an exchange transaction is not relevant to today's guidance regarding exchange transactions.

[308] This interpretation is limited to the facts and circumstances described herein; the CFTC is not opining on different facts or circumstances, which could change the CFTC's interpretation.

[309] *See* Proposing Release at 29831–29832, Request for Comment 30.

[310] *See* Letter from Peter Krenkel, President and CEO, NGX, dated Nov. 4, 2010, resubmitted by email to CFTC staff on Sept. 14, 2011 (''NGX Letter''). One other commenter addressed a related issue, asserting that the Commissions should clarify that cleared forwards between commercial participants should be permitted under the forward contract exclusion. *See* Ex Parte Communication among Evolution Markets Inc. (''Evolution''), Ogilvy Government Relations (''Ogilvy'') and CFTC staff on May 18, 2011 at *http://comments.cftc.gov/PublicComments/ViewExParte.aspx?id=197&SearchText=*.

[311] *Id.*

[312] As used in this release, the term ''commodity option'' refers to an option that is subject to the CEA.

[313] *See* Proposing Release at 29829–30.

[314] 17 CFR Parts 32 and 33.

[315] *See Commodity Options and Agricultural Swaps,* 76 FR 6095 (Feb. 3, 2011) (proposed).

[316] 7 U.S.C. 6c(b).

public comment on the interim final rules.[317]

Comments

Several commenters in response to the Proposing Release argued that commodity options should not be regulated as swaps.[318] In general, these commenters believed that commodity options should qualify for the forward exclusion from the swap definition, emphasizing similarities between commodity options and forward contracts on nonfinancial commodities.[319]

The CFTC is not providing an interpretation that commodity options qualify as forward contracts in nonfinancial commodities. Such an approach would be contrary to the plain language of the statutory swap definition, which explicitly provides that commodity options are swaps.[320] This approach also would be a departure from the CFTC's and its staff's longstanding interpretation of the forward exclusion with respect to the term ''future delivery,'' [321] which the CFTC has determined above to apply to the forward exclusion from the swap definition as well.[322] Further, the CFTC notes that it has recently issued final and interim final rules adopting a modified version of the CFTC's existing trade option exemption.[323]

(ii) Commodity Options Embedded in Forward Contracts

The CFTC is restating the interpretation regarding forwards with embedded options from the Proposing Release, but with certain modifications based on comments received. The CFTC is providing additional interpretations regarding forwards with embedded volumetric optionality, optionality in the form of evergreen and renewal provisions, and optionality with respect to delivery points and delivery dates.

As was noted in the Proposing Release, the question of the application of the forward exclusion from the swap definition with respect to nonfinancial commodities, where commodity options are embedded in forward contracts (including embedded options to cash settle such contracts), is similar to that arising under the CEA's existing forward contract exclusion from the definition of the term ''future delivery.'' [324] The CFTC's Office of General Counsel addressed forward contracts that contained embedded options in the 1985 CFTC OGC Interpretation,[325] which recently was adhered to by the CFTC in its adjudicatory Order in the *Wright* case.[326] While both were issued prior to the effective date of the Dodd-Frank Act, the CFTC believes that, as was stated in the Proposing Release, it is appropriate to apply this interpretation to the treatment of forward contracts in nonfinancial commodities that contain embedded options under the Dodd-Frank Act.[327]

In *Wright,* the CFTC stated that it traditionally has engaged in a two-step analysis of ''embedded options'' in which the first step focuses on whether the option operates on the price or the delivery term of the forward contract and the second step focuses on secondary trading.[328] As was stated in the Proposing Release, these same principles can be applied with respect to the forward contract exclusion from the swap definition for nonfinancial commodities in the Dodd-Frank Act, too.[329] Utilizing these principles, the CFTC is providing a final interpretation that a forward contract that contains an embedded commodity option or options [330] will be considered an excluded nonfinancial commodity forward contract (and not a swap) if the embedded option(s):

1. May be used to adjust the forward contract price,[331] but do not undermine the overall nature of the contract as a forward contract;

2. Do not target the delivery term, so that the predominant feature of the contract is actual delivery; and

3. Cannot be severed and marketed separately from the overall forward contract in which they are embedded.[332]

In evaluating whether an agreement, contract, or transaction qualifies for the forward contract exclusions from the swap definition for nonfinancial commodities, the CFTC will look to the specific facts and circumstances of the transaction as a whole to evaluate whether any embedded optionality operates on the price or delivery term of the contract, and whether an embedded commodity option is marketed or traded separately from the underlying contract.[333] Such an approach will help

[317] *See Commodity Options,* 77 FR 25320 (Apr. 27, 2012).

[318] *See* Letter from Brian Knapp, Policy Advisor, American Petroleum Institute (''API''), dated January 31, 2012 (''API Letter''); BGA Letter; COPE Letter; ETA Letter; Just Energy Letter; NGSA/NCGA Letter; and WGCEF Letter.

[319] For example, one commenter asserted that, similar to a forward contract on a nonfinancial commodity, a commodity option conveys no ability for a party to unilaterally require a financial settlement. Reasoning that both commodity options and forward contracts on nonfinancial commodities are intended to settle by physical delivery, this commenter contended that they should have the same regulatory treatment. *See* COPE Letter. Similarly, another commenter argued that the forward exclusion ''plainly covers'' commodity options because they are: (i) Contracts for the sale of physical, nonfinancial commodities, (ii) for deferred delivery, and (iii) intended to be physically settled, given that purchasers have an absolute right to physical delivery and sellers have an absolute obligation to physically deliver the amounts called for by the purchasers if the option is exercised. *See* NGSA/NCGA Letter. A third commenter recommended that the CFTC interpret the forward exclusion ''broadly'' to include options that, if exercised, become forwards in nonfinancial commodities in light of the particular circumstances of the electricity industry, where electric companies use commodity options to efficiently meet the demands of electric customers by hedging or mitigating commercial risks due to seasonal and geographically unique weather and load patterns and fluctuations. *See* ETA letter. In the alternative, a fourth commenter requested that the CFTC exercise its plenary options authority under CEA section 4c(b), 7 U.S.C. 6c(b), to establish a separate regulatory regime for commodity options analogous to the trade option exemption under former CFTC Rule 32.4. *See* WGCEF Letter. *See* 17 CFR 32.4 (2011).

[320] *See* CEA section 1a(47)(A)(i), 7 U.S.C. 1a(47)(A)(i) (defining a swap as, among other things, ''a put, call * * * or option of any kind * * * for the purchase or sale * * * of * * * commodities'') and CEA section 1a(47)(B), 7 U.S.C. 1a(47)(B) (not excluding commodity options from the swap definition).

[321] *See* 1985 CFTC OGC Interpretation, *supra* note 245. In this regard, an option cannot be a forward under the CFTC's precedent, because under the terms of the contract the optionee has the right, but not the obligation, to make or take delivery, while under a forward contract, both parties must have binding delivery obligations: one to make delivery and the other to take delivery.

[322] *See supra* part II.B.2(a)(i)(A).

[323] *See supra* note 317.

[324] *See* Proposing Release at 29830.

[325] *See* 1985 CFTC OGC Interpretation, *supra* note 245.

[326] *Wright, supra* note 214.

[327] *See* Proposing Release at 29830.

[328] *Wright, supra* note 214, at n.5. In *Wright,* the CFTC affirmed the Administrative Law Judge's holding that an option embedded in a hedge-to-arrive contract did not violate CFTC rules regarding the sale of agricultural trade options. The CFTC first concluded that the puts at issue operated to adjust the forward price and did not render the farmer's overall obligation to make delivery optional. Then, turning to the next step of the analysis, the CFTC explained that ''the put and [hedge-to-arrive contract] operated as a single contract, and in most cases were issued simultaneously * * *. We do not find that any put was severed from its forward or that either of [the put or the hedge-to-arrive contract] was traded separately from the other. We hold that in these circumstances, no freestanding option came into being * * *.'' *Id.* at *7.

[329] *See* Proposing Release at 29830.

[330] Options in the plural would include, for example, a situation in which the embedded optionality involves option combinations, such as costless collars, that operate on the price term of the agreement, contract, or transaction.

[331] For example, a forward with an embedded option with a formulaic strike price based on an index value that may not be known until after exercise would be a forward if it meets the rest of the 3 components of this interpretation. Triggering an option to buy or sell one commodity based on the price of a different commodity reaching a specified level, such as in a cross-commodity transaction, does not constitute an adjustment to the forward contract price within the meaning of this 3-part interpretation.

[332] *See Wright, supra* note 214, at **6–7.

[333] This facts and circumstances approach to determining whether a particular embedded option

Continued

assure that commodity options that should be regulated as swaps do not circumvent the protections established in the Dodd-Frank Act through the forward contract exclusion for nonfinancial commodities instead.

The CFTC also is providing an interpretation, in response to commenters,[334] with respect to forwards with embedded volumetric optionality.[335] Several commenters asserted that agreements, contracts, and transactions that contain embedded ''volumetric options,'' and that otherwise satisfy the terms of the forward exclusions, should qualify as excluded forwards, notwithstanding their embedded optionality.[336] The CFTC believes that agreements, contracts, and transactions with embedded volumetric optionality may satisfy the forward exclusions from the swap and future delivery definitions under certain circumstances. Accordingly, the CFTC is providing an interpretation that an agreement, contract, or transaction falls within the forward exclusion from the swap and future delivery definitions, notwithstanding that it contains embedded volumetric optionality, when:

1. The embedded optionality does not undermine the overall nature of the agreement, contract, or transaction as a forward contract;

2. The predominant feature of the agreement, contract, or transaction is actual delivery;

3. The embedded optionality cannot be severed and marketed separately from the overall agreement, contract, or transaction in which it is embedded; [337]

4. The seller of a nonfinancial commodity underlying the agreement, contract, or transaction with embedded volumetric optionality intends, at the time it enters into the agreement, contract, or transaction to deliver the underlying nonfinancial commodity if the optionality is exercised;

5. The buyer of a nonfinancial commodity underlying the agreement, contract or transaction with embedded volumetric optionality intends, at the time it enters into the agreement, contract, or transaction, to take delivery of the underlying nonfinancial commodity if it exercises the embedded volumetric optionality;

6. Both parties are commercial parties; [338] and

7. The exercise or non-exercise of the embedded volumetric optionality is based primarily on physical factors,[339] or regulatory requirements,[340] that are outside the control of the parties and are influencing demand for, or supply of, the nonfinancial commodity.[341]

The first two elements of the interpretation for embedded volumetric optionality, which mirror the CFTC's historical embedded option interpretation discussed above, have been modified to reflect that embedded volumetric optionality relates to delivery rather than price. As noted above, the predominant feature of a forward contract is a binding, albeit deferred, delivery obligation. It is essential that any embedded option in a forward contract as to volume must not undermine a forward contract's overall purpose.[342] The CFTC recognizes that the nature of commercial operations are such that supply and demand requirements cannot always be accurately predicted and that forward contracts that allow for some optionality as to the amount of a nonfinancial commodity actually delivered offer a great deal of value to commercial

takes a transaction out of the forward contract exclusion for nonfinancial commodities is consistent with the CFTC's historical approach to determining whether a particular embedded option takes a transaction out of the forward contract exclusion from the definition of the term ''future delivery'' in the CEA. *See id.* at *5 (''As we have held since *Stovall,* the nature of a contract involves a multi-factor analysis * * *.'').

[334] The CFTC requested comment on, among other things: whether there are other factors that should be considered in determining how to characterize forward contracts with embedded options with respect to nonfinancial commodities; and whether there are provisions in forward contracts with respect to nonfinancial commodities, other than delivery and price, containing embedded optionality. *See* Proposing Release at 29832.

[335] One commenter characterized ''volumetric optionality'' as the optionality in a contract settling by physical delivery and used to meet varying customer demand for a commodity.'' *See* WGCEF Letter. *See also* BGA Letter (stating that ''it is commonplace for energy suppliers to enter into commercial transactions with customers (local distribution companies, electric utility companies, industrial, commercial and residential customers, power plants, etc.), which provide volumetric, price and delivery-related flexibility and variability''). BGA claims that commercial transactions containing embedded volumetric optionality ''include, but are not limited to, full requirements contracts, interruptible load agreements, capacity contracts, tolling agreements, energy management agreements, natural gas transportation contracts and natural gas storage contracts.'' *Id.*

[336] *See, e.g.,* WGCEF Letter (submitting that '''volumetric optionality' is [a] separate and distinct concept from 'deliverability optionality'''); BGA Letter; AGA Letter; Letter from Jeffrey Perryman, Director, Contracts and Compliance, Atmos Energy Holdings, Inc. (''Atmos''), dated July 22, 2011 (''Atmos Letter''); NGSA/NCGA Letter; Letter from Paul M. Architzel, Wilmer Hale LLP on behalf of ONEOK, Inc. (''ONEOK''), dated July 22, 2011 (''ONEOK Letter''); COPE Letter.

[337] When a forward contract includes an embedded option that is severable from the forward contract, the forward can remain subject to the forward contract exclusion, if the parties document the severance of the embedded option component and the resulting transactions, i.e. a forward and an option. Such an option would be subject to the CFTC's regulations applicable to commodity options.

[338] *See* discussion in section II.B.2.(a)(i)(B), *supra.*

[339] *See, e.g.,* BGA Letter (advising that ''[v]ariability associated with an energy customer's physical demand is influenced by factors outside the control of * * * energy suppliers (and sometimes * * * consumers) * * * including, but not limited to, load growth, weather and certain operational considerations (*e.g.,* available transportation capacity to deliver physical natural gas purchased on the spot market)'').

[340] Volumetric optionality in this category would include, for example, a supply contract entered into to satisfy a regulatory requirement that a supplier procure, or be able to provide upon demand, a specified volume of commodity (*e.g.,* electricity). To the extent the optionality covers an amount of the commodity in excess of the regulatory requirement, such optionality would not necessarily be covered by this aspect of the guidance, though it may nevertheless be covered by the guidance if such excess volumetric optionality is based on physical factors within the meaning of the guidance. For example, the California Utilities explained that the California Public Utilities Commission (''CPUC'') requires them to file a supply plan with the CPUC demonstrating that they have procured sufficient capacity resources (including reserves) needed to serve their aggregate system load on a monthly and yearly basis. *See* California Utilities Letter. Each utility's system requirement is 100 percent of its peak-hourly forecast load plus a 15–17 percent reserve margin. The California Utilities enter into resource adequacy agreements to procure electric power generating capacity to meet these requirements. The ability to call on the additional 15 to 17% reserve reflected in such an agreement is covered by the regulatory requirements part of this element. To the extent the California Utilities may have a business need to procure additional capacity resources beyond the foregoing regulatory requirement (*e.g.,* because they wish to maintain a slightly larger reserve margin than required due to a recent upswing in unscheduled plant outages due to aging plants), that may be covered under the interpretation if the additional capacity is required due to physical factors beyond the control of the parties (i.e., the unscheduled outage, in the foregoing example).

[341] In other words, the predominant basis for failing to exercise the option would be that the demand or supply (as applicable) that the optionality was intended to satisfy, if needed, never materialized, materialized at a level below that for which the parties contracted or changed due to physical factors or regulatory requirements outside the parties' control. Such failure to exercise, or an exercise for a reduced amount of the underlying commodity, could, for example, be due to colder than expected weather during the summer decreasing demand for air conditioning, in turn decreasing demand for power to run the air conditioning. The Commission does not interpret this to mean that absolutely all factors involved in the decision to exercise an option must be beyond the parties' control, but rather the decision must be predominantly driven by factors affecting supply and demand that are beyond a parties control. This also means that the forward contract with embedded volumetric optionality needs to be a commercially appropriate method for securing the purchase or sale of the nonfinancial commodity for deferred shipment at the time it is entered into. The CFTC cautions market participants that, to the extent a party relies on the forward exclusion from the swap or future delivery definitions, notwithstanding that there is volumetric optionality, if that volumetric optionality is inconsistent with the seventh element of the interpretation, the agreement, contract or transaction may be an option.

[342] *See* discussion in part II.B.2.(a)(i)(B), *supra. See also supra* note 321.

participants. Where an agreement, contract, or transaction requires delivery of a non-nominal volume of a nonfinancial commodity, even if an embedded volumetric option is exercised, the CFTC believes that the predominant feature of the contract, notwithstanding the embedded volumetric optionality, is actual delivery. This is the case in many forward contracts that have an embedded option that allows a party to buy or sell an additional amount of a commodity beyond the fixed amount called for in the underlying forward contract. For instance, a forward contract could call for the delivery of 10,000 bushels of wheat and include an option for an additional 5,000 bushels of wheat.[343]

The third element is substantially the same as the third element of the interpretation above with respect to commodity options embedded in forward contracts generally.

The fourth and fifth elements are designed to ensure that both parties intend to make or take delivery (as applicable), subject to the relevant physical factors or regulatory requirements, which may lead the parties to deliver more or less than originally intended. This distinguishes a forward contract from a commodity option, where only the option seller must at all times be prepared to deliver during the term of the option. The sixth element is intended to ensure that the interpretation is not abused by market participants not engaged in a commercial business involving the nonfinancial commodity underlying the embedded volumetric optionality.[344]

The seventh element is based on comments stating that parties to agreements, contracts, and transactions with embedded volumetric optionality intend to make or take delivery (as applicable) of a commodity, and that it is merely the volume of a commodity that would be required to be delivered if the option is exercised, that varies. It is designed to ensure that the volumetric optionality is primarily driven by physical factors or regulatory requirements that influence supply and demand and that are outside the parties' control, and that the optionality is a commercially reasonable way to address uncertainty associated with those factors.[345] Element seven must be interpreted with the other elements set forth here. For instance, even if the optionality is consistent with element seven, such optionality cannot undermine the overall nature of the contract as a forward contract as discussed above.

As discussed in the interpretation regarding forwards with embedded optionality discussed above, in evaluating whether an agreement, contract or transaction with embedded volumetric optionality qualifies for the forward exclusions, the CFTC will look to the relevant facts and circumstances of the transaction as a whole to evaluate whether the transaction qualifies for the forward exclusions from the definitions of the terms ''swap'' and ''future delivery.''

The CFTC is providing further interpretations to explain how it would treat some of the specific contracts described in the comment letters. According to one commenter, a ''full requirements contract'' can be described as a ''contract where the seller agrees to provide all requirements for a specific customer's location or delivery point.'' [346] According to another commenter, ''[a] full requirements contract * * * is a well-established concept in contract law'' and ''[i]n a requirements contract, the purchaser * * * deals exclusively with one supplier.'' [347] This commenter added that, while the amount of commodity delivered can vary, it is based on an objective need and that the Uniform Commercial Code imposes on the buyer ''an obligation to act in good faith with respect to the varying amount that is called for delivery.'' [348] Based upon this description, the CFTC believes that a going commercial concern with an exclusive supply contract has no option but to get its supply requirements met through that exclusive supplier consistent with the terms of the contract. Any instance where nominal or zero delivery occurred would have to be because the commercial requirements changed or did not materialize. Furthermore, any variability in delivery amounts under the contract appears to be driven directly by the buyer's commercial requirements and is not dependent upon the exercise of any commodity option by the contracting parties.

Accordingly, full requirements contracts, as described above, appear not to contain embedded volumetric options. Therefore, a full requirements contract may qualify for the forward exclusion under the same facts and circumstances analysis applicable to all other agreements, contracts, and transactions that might be forwards. The same analysis would apply to an output

[343] In evaluating whether the predominant feature of a transaction is actual delivery, the CFTC will look at the contract as a whole. Thus, with respect to this contract, the CFTC would consider the intent element of the forward exclusions to be satisfied because the contract requires the seller to deliver a non-nominal volume of a commodity (i.e., 10,000 bushels of wheat), viewing the contract as a whole. As a result, if the other elements of the guidance above are satisfied, this contract would be a forward contract, even if the party did not exercise the option for the additional 5,000 bushels.

[344] The fact that the CFTC is expressly including the fourth through sixth elements in the embedded optionality guidance for volumetric options but not elsewhere does not mean that intent to deliver and the ability to make or take delivery expressed in these elements are not part of the facts and circumstances the CFTC will consider in the context of determining whether other agreements, contracts, and transactions qualify for the forward exclusions. Intent to deliver and the ability to make or take delivery have long been a part of the CFTC's facts-and-circumstances approach to making that determination, and they remain so. The CFTC is emphasizing these elements in this guidance because the CFTC has not previously expressed the view that an agreement, contract, or transaction with embedded volumetric optionality which affects the delivery term may qualify as a forward if these facts and circumstances are present.

[345] *See, e.g.,* AGA Letter (advising that ''[i]n general, retail demand for natural gas is weather driven * * * as a result [of which], a gas utility's peaking supplies must have significant flexibility * * * [and g]as utilities * * * use a variety of contracts with gas suppliers to physically deal with peak periods of demand''); BGA Letter (citing gas supply curtailment due to a pipeline outage and power generation curtailment by an Independent System Operator for operational reasons as factors outside the control of energy suppliers and which could impact the amount of a commodity delivered). The CFTC understands BGA's comment to address involuntary curtailments, but also recognizes that power buyers may agree in advance that the relevant Regional Transmission Organization or Independent System Operator may, in order to maintain system reliability, curtail power deliveries to the buyers. While voluntary curtailments are within the control of the power buyer, the potential system reliability issue is not. Therefore, such voluntary curtailments would be within the guidance because, if triggered, they would be based on a physical factor (*e.g.,* supply constraints).

[346] *See* Letter from Keith M. Sappenfield, II, Director, US Regulatory Affairs, Encana Marketing (USA) Inc. (''Encana''), dated July 22, 2011 (''Encana Letter'').

[347] *See* ONEOK Letter. The CFTC notes that this commenter discussed full requirements contracts in the context of supply agreements between one of its affiliates and retail customers. If such customers are non-commercial customers, such contracts are not forwards, but nevertheless they may not be swaps under the Commissions' guidance regarding the non-exhaustive list of consumer transactions, or otherwise if they have characteristics or factors described under the consumer transaction interpretation, *see infra* part II.B.3.

[348] *See, e.g.,* NY UCC § 2–306(1) (stating that ''[a] term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith.* * *''). This commenter cited Corbin on Contracts for the proposition that the mere fact that the quantity term of the contract is ''the buyer's needs or requirements'' does not render the requirements contract ''a mere options contract'' because ''the buyer's promise is not illusory * * * [but] is conditional upon the existence of an objective need for the commodity.'' *See* ONEOK Letter (citing Corbin on Contracts § 6.5 at 240–53 (1995)).

contract satisfying the terms of this interpretation.[349]

With respect to capacity contracts, transmission (or transportation) services agreements, and tolling agreements, the CFTC understands that: (i) Capacity contracts are generally products designed to ensure that sufficient physical generation capacity is available to meet the needs of an electrical system;[350] (ii) transmission (or transportation) services agreements are generally agreements for the use of electricity transmission lines (or gas pipelines) that allow a power generator to transmit electricity (or gas supplier to transport gas) to a specific location;[351] and (iii) tolling agreements, as described by commenters, provide a purchaser the right to the capacity, energy, ancillary services and any other product derived from a specified generating unit, all based upon a delivered fuel price and agreed heat rate.[352]

Such agreements, contracts and transactions, may have features that will satisfy the ''forwards with embedded volumetric optionality'' interpretation discussed above, or, like full requirements contracts, may not contain embedded volumetric options and may satisfy other portions of the forward interpretations herein. For example, according to one commenter, the delivery obligations in some tolling agreements are not optional which is indicative that the predominant feature of such tolling agreements is actual delivery.[353] It is also possible, based on descriptions provided to the CFTC, that tolling agreements could fit within the interpretation concerning certain physical agreements, contracts, or transactions,[354] or other interpretations herein.

Some commenters focused on forwards with embedded volumetric optionality in the natural gas industry. For example, one commenter stated that ''peaking supply'' natural gas contracts do not render delivery optional. Although the purchaser has the option to specify when and if the quantity of gas will be delivered on any given day, this commenter asserted that there is no cash settlement alternative. If the purchaser does not exercise the right to purchase, then the right is terminated. The seller under the transaction must deliver the entire quantity of gas that the purchaser specifies, or pay liquidated damages. Moreover, the option is not severable and cannot be marketed separately from the supply agreement itself.[355] Similarly, another commenter said that there is no ability to sever an embedded option from a natural gas forward contract. Moreover, it stated that the ability for a gas purchaser to specify a quantity of gas for a certain day is not to encourage speculative activity; rather, it is because the exact quantity of gas to be needed on that future day is unknown, and many gas purchasers have weather-dependent needs that cannot accurately be predicted in advance.[356]

Depending on the relevant facts and circumstances, these types of agreements, contracts, and transactions—capacity contracts, transmission (or transportation) services agreements, tolling agreements, and peaking supply contracts—may satisfy the elements of the ''forwards with embedded volumetric options'' interpretation set forth above, or may satisfy other portions of this interpretation. If they do, they would fall within the forward exclusions from the swap and future delivery definitions.

In addition, the CFTC is providing an interpretation in response to a comment that contracts with evergreen or extension terms should be considered forwards.[357] The CFTC is clarifying that an extension term in a commercial contract, such as a renewal term in a five year power purchase agreement (which, due to the renewal, would require additional deliveries), is not an option on the delivery term within the meaning of the CFTC's interpretation, and consequently would not render such a contract ineligible for the forward exclusions from the definitions of the terms ''swap'' and ''future delivery.'' Similarly, an evergreen provision, which automatically renews a contract (and, as such, would require additional deliveries)[358] absent the parties affirmatively terminating it, would not render such a contract ineligible for the forward exclusions from the swap or future delivery definitions.[359] When the Proposing Release stated that a forward contract containing an embedded option that does not ''target the delivery term'' is an excluded forward contract,[360] it meant that the embedded option does not affect the delivery amount.[361]

Also, in response to a commenter,[362] the CFTC clarifies that embedded optionality as to delivery points and delivery dates will not cause a transaction that otherwise qualifies as a forward contract to be considered a swap. The CFTC emphasizes, however, that delivery must occur at some delivery point and on some date, or the lack of delivery must be due to the transaction being booked out or otherwise be consistent with the CFTC's interpretation regarding the forward exclusions from the swap and future delivery definitions.

Comments

Commenters generally supported the CFTC's proposed interpretation regarding forwards with embedded options, but many believed that it should be modified or expanded. As noted above, several commenters believed that forward contracts with embedded options that contain optionality as to the quantity/volume of the nonfinancial commodity to be delivered should qualify as forwards, and that the CFTC's proposed interpretation (which only mentions price optionality) should be modified accordingly.[363] In this regard, several commenters focused on forwards with embedded volumetric options in the natural gas industry.[364] One commenter noted that, although the 1985 CFTC OGC Interpretation distinguishes forward contracts from trade options, it is based on a limited number of agricultural contract examples, so additional guidance is needed, particularly in light of the wide range of cash market and commercial merchandising contracting practices in

[349] *See* Letter from Phillip g. Lookadoo, Esq., Reed Smith LLP and Jeremy D. Weinstein, Esq. on behalf of IECA dated May 23, 2012 (suggesting that output contracts, in addition to full requirements contracts, should be within the forward exclusion). An output contract has been defined as ''a contract pursuant to which the obligor's duty to supply the promised commodity is quantified (and therefore limited) by reference to its production thereof.'' *See Boyd* v. *Kmart* Corp., 110 F.3d 73 (10th Cir. 1997).

[350] *See* California Utilities Letter.

[351] *See* NEMA Letter.

[352] *See* California Utilities Letter.

[353] *Id.*

[354] *See infra* part II.B.2.(b)(iii).

[355] *See* AGA Letter.

[356] *See* Atmos Letter.

[357] *See* IECA Letter.

[358] The CFTC refers in this and the prior sentence to ''additional deliveries'' because the IECA's example involves an agreement calling for delivery of a physical nonfinancial commodity.

[359] Using extension or evergreen provisions to avoid delivery, however, as was the case with the ''rolling spot'' contracts at issue in *CFTC* v. *Zelener,* 373 F.3d 861 (7th Cir. 2004), could constitute evasion or violate other provisions of the CEA (*e.g.,* CEA section 4(a), 7 U.S.C. 6(a)). This interpretation does not limit the CFTC's other interpretations in this release regarding when delivery does not occur (*e.g.,* the Brent Interpretation).

[360] *See* NGSA/NCGA Letter (requesting clarification of the phrase ''target the delivery term.'').

[361] *See* Proposing Release at 29830, n.81.

[362] *See* COPE Letter.

[363] *See* AGA Letter; API Letter; Atmos Letter; ONEOK Letter; NGSA/NCGA Letter; WGCEF Letter.

[364] *See* AGA Letter; Atmos Letter.

which delivery terms and amounts vary.[365]

In addition, another commenter requested more generally that any embedded option (for example, price, quantity, delivery point, delivery date, contract term) that does not permit a unilateral election of financial settlement based upon the value change in an underlying cash market should not render the contract a swap.[366]

As discussed above, the CFTC has provided an additional interpretation with respect to forwards with embedded volumetric options to address commenters' concerns. The CFTC also has provided an interpretation above, regarding price optionality, optionality with respect to delivery points and delivery dates specifically in response to this commenter, and optionality as to certain contract terms (such as evergreen and renewal provisions) to address particular concerns raised by commenters. The CFTC declines to adopt a more expansive approach with respect to ''any'' embedded option.

One commenter requested that an option to purchase or sell a physical commodity, whether embedded in a forward contract or stand alone, should either (i) fall within the statutory forward exclusion from the swap definition, or (ii) alternatively, if deemed by the CFTC to be a swap, should be exempt from the swap definition pursuant to a modified trade option exemption pursuant to CEA section 4c(b).[367] The CFTC has modified its proposed interpretation regarding forwards with embedded options as discussed above; contracts with embedded options that are swaps under this final interpretation may nevertheless qualify for the modified trade option exemption recently adopted by the CFTC and discussed above.[368]

Another commenter urged the CFTC to broadly exempt commercial forward contracting from swap regulation by generally excluding from the swap definition any forward contract with embedded optionality between end users ''whose primary purpose is consistent with that of an 'end user', and in which any embedded option is directly related to 'end use.' '' [369] The CFTC believes that this interpretation is vague and overbroad, and declines to adopt it.

Another commenter believed that the CFTC's ''facts and circumstances'' approach to forwards with embedded options does not provide the legal certainty required by nonfinancial entities engaging in commercial contracts in the normal course of business.[370] This commenter further argued that many option-like contract terms could be determined to ''target the delivery term'' under a facts and circumstances analysis.[371]

The CFTC has long applied a facts-and-circumstances approach to the forward exclusion, including with respect to forwards with embedded options, and thus it is an approach with which market participants are familiar. That approach balances the need for legal certainty against the risk of providing opportunities for evasion.[372] The CFTC's additional interpretation noted above, including clarification about the meaning of the phrase ''target the delivery term,'' and forwards with embedded volumetric optionality, provides enhanced legal certainty in response to the commenter's concerns.[373]

Request for Comment

The CFTC's interpretation regarding forwards with volumetric options is an interpretation of the CFTC and may be relied upon by market participants. However, the CFTC believes that it would benefit from public comment about its interpretation, and therefore requests public comment on all aspects of its interpretation regarding forwards with embedded volumetric options,[374] and on the following questions:

1. Are the elements set forth in the interpretation to distinguish forwards with embedded volumetric optionality from commodity options appropriate? Why or why not?

2. Are there additional elements that would be appropriate? Please describe and provide support for why such elements would serve to distinguish forwards with embedded volumetric optionality from commodity options.

3. Is the seventh element that, to ensure that an agreement, contract, or transaction with embedded volumetric optionality is a forward and not an option, the volumetric optionality is based primarily on physical factors, or regulatory requirements, that are outside the control of the parties and are influencing demand for, or supply of, the nonfinancial commodity, necessary and appropriate? Why or why not? Is the statement of this element sufficiently clear and unambiguous? If not, what adjustments would be appropriate?

4. Are there circumstances where volumetric optionality is based on other factors? Please describe. Would such factors, if made a part of the interpretation, serve to distinguish forwards with embedded volumetric optionality from commodity options? If so, how?

5. Does the interpretation provide sufficient guidance as to whether agreements, contracts, or transactions

[365] *See* ONEOK Letter. This commenter noted that it offers its customers a number of types of contracts for delivery of natural gas under which the amount called for delivery may vary. In each of these types of contracts, this commenter stated that both parties intend the contracts to result in delivery of the commodity, as needed. The purpose of these contracts is to ensure that customers, most of which are gas or electric utilities, have an adequate supply of natural gas regardless of day-to-day changes in demand that may be caused by variation in weather, operational considerations, or other factors. They are not designed for one-way price protection as would be the case with an option. *See* ONEOK Letter.

[366] *See* COPE Letter, Appendix.

[367] *See* WGCEF Letter; 7 U.S.C. 6c(b).

[368] 77 FR 25320 (Aug. 27, 2012). Encana believed that the guidance on forwards with embedded options should include embedded physical delivery options because it asserted that many of the contracts currently used by participants in the wholesale natural gas market contain an option for the physical delivery of natural gas. *See* Encana Letter. To the extent that Encana's comment goes beyond volumetric optionality, commodity options are discussed *supra* in section II.B.2(b).

[369] *See* Letter from Roger Cryan, Vice President for Milk Marketing and Economics, National Milk Producers Federation (''NMPF''), dated July 22, 2011 (''NMPF Letter'').

[370] *See* ETA Letter. Similarly, COPE comments that a nonfinancial commodity forward contract that, ''by its terms,'' is intended to settle physically should be permitted to contain optionality without being transformed into a swap unless such optionality negates the physical settlement element of the contract. That is, if one party can exercise an option to settle the contract financially based upon the value change in an underlying cash market, then the intent for physical settlement is not contained in ''the four corners of the contract'' and may render the contract a swap. *See* COPE Letter. As discussed elsewhere in this release, the CFTC historically has eschewed approaches to the forward exclusion that rely on the ''four corners of the contract,'' which can provide a roadmap to evasion of statutory requirements.

[371] Accordingly, this commenter believed that the CFTC should provide in its rules that an embedded option or embedded optionality will not result in a nonfinancial forward being a swap unless: (i) Delivery is optional; (ii) financial settlement is allowed; and (iii) transfer and trading of the option separately from the forward is permitted. *See* ETA Letter.

[372] *See also* NCFC Letter (supporting the CFTC's guidance because it provides legal certainty).

[373] *See also Commodity Options,* 77 FR 25320, 25324 n. 25 (Apr. 27, 2012) (discussing the CFTC's conclusion that an ''option[] to redeem'' under the USDA Commodity Credit Corporation's marketing loan program constitutes a cotton producer's contractual right to repay its marketing loan and ''redeem'' the collateral (cotton) to sell in the open market).

[374] Separately, it is expected that CFTC staff will be issuing no-action relief with respect to the conditions of the modified trade option exemption (except the enforcement provisions retained in § 32.3(d)) until December 31, 2012. This extension will afford the CFTC an opportunity to review and evaluate the comments received on both the interpretation above regarding embedded volumetric optionality, and the modified trade option exemption, in order to determine whether any changes thereto are appropriate.

with embedded volumetric optionality permitting a nominal amount, or no amount, of a nonfinancial commodity to be delivered are forwards or options, viewing the agreements, contracts, or transactions as a whole, if they satisfy the seven elements of the interpretation? Why or why not? Does this interpretation encourage evasion, or do the seven elements sufficiently distinguish forwards from agreements, contracts, and transactions that may evade commodity options regulation?

6. Is the interpretation sufficiently clear with respect to capacity contracts, transmission (or transportation) services agreements, peaking supply contracts, or tolling agreements? Why or why not? Do capacity contracts, transmission (or transportation) services agreements, peaking supply contracts, or tolling agreements generally have features that satisfy the forwards with volumetric options interpretation included in this release? If so, which ones? If not, why not? Could these types of agreements, contracts, and transactions qualify for the forward exclusions under other parts of the interpretation set forth above? Are there material differences in the structure, operation, or economic effect of these types of agreements, contracts, and transactions as compared to full requirements contracts that are relevant to whether such agreements, contracts, and transactions are options under the CEA? Please explain. If so, what are the material differences?

7. Do the agreements, contracts, and transactions listed in question No. 6 above have embedded optionality in the first instance? Based on descriptions by commenters, it appears that they may have a binding obligation for delivery, but have no set amount specified for delivery. Instead, delivery (including the possibility of nominal or zero delivery) is determined by the terms and conditions contained within the agreement, contract, or transaction (including, for example, the satisfaction of a condition precedent to delivery, such as a commodity price or temperature reaching a level specified in the agreement, contract, or transaction). That is, the variation in delivery is not driven by the exercise of embedded optionality by the parties. Do the agreements, contracts, and transactions listed in question No. 6 exhibit these kinds of characteristics? If so, should the CFTC consider them in some manner other than its forward interpretation? Why or why not?

(iii) Certain Physical Commercial Agreements, Contracts or Transactions

The CFTC is providing an interpretation in response to comments regarding certain physical commercial agreements for the supply and consumption of energy that provide flexibility, such as tolls on power plants, transportation agreements on natural gas pipelines, and natural gas storage agreements.[375] Commenters recognized that these types of agreements, contracts or transactions may have option-like features, but analogized them to leases and concluded that they were forwards rather than swaps. One commenter, for example, characterized taking power produced pursuant to a physical tolling agreement—which can involve one party thereto providing fuel for a generation plant and having the exclusive right to take the power produced by that plant from the fuel provided—thus, in effect, ''renting'' the plant to the extent the plant is used to produce power from the fuel provided—as more akin to a lease than to an option.[376]

The CFTC will interpret an agreement, contract or transaction not to be an option if the following three elements are satisfied: (1) The subject of the agreement, contract or transaction is usage of a specified facility or part thereof rather than the purchase or sale of the commodity that is to be created, transported, processed or stored using the specified facility; (2) the agreement, contract or transaction grants the buyer the exclusive use of the specified facility or part thereof during its term, and provides for an unconditional obligation on the part of the seller to grant the buyer the exclusive use of the specified facility or part thereof; [377] and (3) the payment for the use of the specified facility or part thereof represents a payment for its use rather than the option to use it. In such agreements, contracts and transactions, while there is optionality as to whether the person uses the specified facility, the person's right to do so is legally established, does not depend upon any further exercise of an option and merely represents a decision to use that for which the lessor already has paid. In this context, the CFTC would not consider actions such as scheduling electricity transmission, gas transportation or injection of gas into storage to be exercising an option if all three elements of the interpretation above are satisfied. As with the interpretation regarding forwards with embedded options generally, discussed above, in evaluating whether flexible physical commercial agreements that meet the 3-part test qualify for the forward exclusions, the CFTC will look to the specific facts and circumstances of the agreement, contract or transaction as a whole to evaluate whether the agreement, contract or transaction qualifies for the forward exclusions from the definitions of ''swap'' and ''future delivery.''

However, in the alternative, if the right to use the specified facility is only obtained via the payment of a demand charge or reservation fee, and the exercise of the right (or use of the specified facility or part thereof) entails the further payment of actual storage fees, usage fees, rents, or other analogous service charges not included in the demand charge or reservation fee, such agreement, contract or transaction is a commodity option subject to the swap definition.

Comments

Two commenters addressed ''lease-like'' physical agreements, contracts or transactions.[378] One of these commenters asserted that there are many physical commercial agreements for the supply and consumption of energy that effectively provide leases on flexible energy assets, such as tolls on power plants, transportation agreements on natural gas pipelines and natural gas storage agreements.[379] According to this commenter, these assets have the capability to be turned on and off to meet fluctuating demand due to weather and other factors; physical contracts around these assets transfer that delivery flexibility to the contract holder. The commenter believed that these types of commercial arrangements should not be considered commodity options, but rather should be excluded forwards. The other commenter described tolling agreements as having the characteristics of a lease, in that the

[375] *See* BGA Letter and California Utilities Letter. This interpretation also may apply to firm transmission agreements pursuant to which transmission service may not be interrupted for any reason except during an emergency when continued delivery of power is not possible. *See http://www.interwest.org/wiki/index.php?title=Firm_transmission_service.*

[376] *See* California Utilities Letter.

[377] In this regard, the usage rights offered for sale should be limited to the capacity of the specified facility. While overselling such capacity would not per se be inconsistent with satisfying the terms of this interpretation, the CFTC cautions market participants that overselling not based on reasonable commercial expectations of the use of the specified facility could lead the contract to be deemed evasion and lead to an agreement, contract or transaction being considered a swap, as it would undermine the ''right'' being offered. For example, given physical constraints of the power grid and gas pipelines, overselling transmission or transportation capacity would be per se inconsistent with satisfying the terms of this interpretation.

[378] *See* BGA Letter and California Utilities Letter.

[379] *See* BGA Letter.

purchasing entity obtains the exclusive right to the use of the power plant during the term of the agreement.[380] This commenter asserted that such agreements should not be considered commodity options, but rather forwards because the obligations are not contingent. The CFTC is providing the above interpretation that these types of agreements, contracts and transactions are not commodity options if the above conditions are satisfied, but may qualify for the forward exclusions under the facts and circumstances, in response to these commenters' concerns.

(iv) Effect of Interpretation on Certain Agreements, Contracts and Transactions

In the Proposing Release,[381] the CFTC requested comment regarding how its proposed interpretation concerning the forward contract exclusion would affect full requirements contracts, reserve sharing agreements, tolling agreements, energy management agreements and ancillary services. The CFTC asked whether such agreements, contracts or transactions have optionality as to delivery and, if so, whether they, or any other agreement, contract or transaction in a nonfinancial commodity, should be excluded from the swap definition.[382]

Commenters generally believed that such types of agreements, contracts and transactions, although they may contain delivery optionality, should be considered forwards rather than swaps or commodity options.[383] By contrast, one commenter believed that traded power markets involve many types of contracts that are actually exchanges of cash flows based on referenced values and that have no relevant characteristics of physical delivery.[384]

With the exception of energy management agreements, which are discussed below, the interpretations that the CFTC has already provided above may apply to such types of agreements, contracts and transactions. Specifically, to the extent that such types of agreements, contracts and transactions are forwards with embedded volumetric options, the CFTC has provided an additional interpretation in section II.B.2.b(iii) above. To the extent such types of agreements, contracts or transactions are physical commercial agreements, contracts or transactions discussed in section II.B.2.b(iii), *supra,* the CFTC has provided an interpretation in that section. To the extent such types of agreements, contracts and transactions are considered commodity options, the CFTC has addressed commodity options under the separate rulemaking establishing a modified trade option exemption.[385] And to the extent that such types of agreements, contracts, and transactions, such as ancillary services, occur in Regional Transmission Organizations or Independent System Operators, or entered into between entities described in section 201(f) of the Federal Power Act,[386] they may be addressed through the public interest waiver process in CEA section 4(c)(6).[387]

With regard to Energy Management Agreements (''EMAs''), in general, commenters expressed the view that EMAs are forwards, and not swaps, although they did not provide analysis to support that conclusion.[388] They also did not provide a working definition of EMAs. The CFTC understands that EMAs can cover a number of services and transactions, which can include spot, forward and swap transactions. EMAs can include services such as: (i) Acting as a financial intermediary by substituting one party's credit and liquidity for those of a less credit worthy owner of illiquid energy producing assets (i.e. the other party to the EMA) to facilitate the owner's purchase of fuel and sale of power; [389] (ii) providing market information to assist the owner in developing and refining a risk-management plan for the plant; [390] and (iii) procuring fuel, arranging delivery and storage, selling excess power not needed to serve load for another party.[391] The entity carrying out these activities may receive a portion of the revenue generated from such activities as compensation for its efforts. Because commenters did not provide a working definition of EMAs, the CFTC cannot state categorically that EMAs are or are not swaps. However, if the fuel acquisition, sales of excess generation and any other transactions executed under the auspices of an EMA are not swaps, nothing about the fact that the transactions are executed as a result of or pursuant to an EMA transforms the transactions into swaps. For example, if one party hires another party to enter into spot or forward transactions on its behalf, the fact that their relationship is governed by an EMA does not render those transactions swaps.[392] Conversely, were swaps to be executed by one party on behalf of another party as a result of, or pursuant to, an EMA, the parties thereto would need to consider their respective roles thereunder (*e.g.* principal versus agent) and whether commodity trading advisor, introducing broker, futures commission merchant, or other registration or other elements of the Dodd-Frank Act regime were implicated. At a minimum, the fact that a swap was executed would implicate

[380] *See* California Utilities Letter.

[381] *See* Request for Comment 35, which stated: How would the proposed interpretive guidance set forth in this section affect full requirements contracts, capacity contracts, reserve sharing agreements, tolling agreements, energy management agreements, and ancillary services? Do these agreements, contracts, or transactions have optionality as to delivery? If so, should they—or any other agreement, contract, or transaction in a nonfinancial commodity that has optionality as to delivery—be excluded from the swap definition? If so, please provide a detailed analysis of such agreements, contracts, or transactions and how they can be distinguished from options that are to be regulated as swaps pursuant to the Dodd-Frank Act. To what extent are any such agreements, contracts, or transactions in the electric industry regulated by the Federal Energy Regulatory Commission (''FERC''), State regulatory authorities, regional transmission organizations (''RTOs''), independent system operators (''ISOs'') or market monitoring units associated with RTOs or ISOs?

See Proposing Release at 29832.

[382] *Id.*

[383] *See* Atmos Letter; BGA Letter; California Utilities Letter; COPE Letter; ETA Letter; Encana Letter; FERC Staff Letter; IECA Letter; NEMA Letter; ONEOK Letter; and Letter from Kenneth R. Carretta, General Regulatory Counsel—Markets, PSEG Services Corp., on behalf of the Public Service Electric and Gas Company, PSEG Power LLC, and PSEG Energy Resources & Trade LLC (''PSEG Companies''), dated July 22, 2011 (''PSEG Letter'').

[384] *See* Better Markets Letter. This commenter stated that ancillary services are in substance swaps based on congestion costs between two transmission points, measured by the difference between actual prices assigned at those points by the grid operator. Capacity contracts are often documented using trading agreements for transactions in physicals, but this commenter believed that they constitute swaps that are used to hedge the price risk associated with periodic auctions of the contracts to provide reliable capacity to the grid operator. This commenter asserted that such contracts do not meet the CFTC's appropriate tests to exclude them, which should be made explicit in the guidance. This commenter stated that basic power contracts often do not meet the intent to deliver test because power buyers and sellers each schedule delivery to/from the grid, and such transactions can be settled based on readily available price differentials rather than scheduling capacity and load as a pair. At a minimum, this commenter believed that guidance should be provided to require that, in order to demonstrate intent to deliver, secondary delivery-related costs (*e.g.,* congestion charges and penalties to which those scheduling capacity and load on the grid are subject) must be allocated by contract. *Id.*

[385] *See supra* note 317.

[386] 16 U.S.C. 824(f).

[387] 7 U.S.C. 6(c)(6).

[388] *See, e.g.,* Encana Letter and BGA Letter.

[389] *See, e.g.,* The Royal Bank of Scotland Group plc, Order Approving Notice To Engage in Activities Complementary to a Financial Activity, 2008 Federal Reserve Bulletin volume 94.

[390] *Id.*

[391] *See, e.g.,* Energy Management Agreement between Long Island Lighting Company and Long Island Power Authority, available at *http://www.lipower.org/pdfs/company/papers/contract/energy.pdf.*

[392] Similarly, using an EMA would not render swaps entered as a result of or pursuant to an EMA spot or forward transactions.

reporting and recordkeeping requirements.[393]

(v) Liquidated Damages Provisions

The Commissions also received several comments discussing contractual liquidated damages provisions. The CFTC is clarifying that the presence, in an agreement, contract, or transaction involving physical settlement of a nonfinancial commodity, of a liquidated damages provision (which may be referred to by another name, such as a ''cover costs'' or ''cover damages'' provision) does not necessarily render such an agreement, contract, or transaction ineligible for the forward exclusion.[394] Such a provision in an agreement, contract, or transaction is consistent with the use of the forward exclusion, provided that the parties intend the transaction to be physically settled.[395] However, liquidated damages provisions can be used to mask a lack of intent to deliver.[396] In light of the possibility for evasion of the Dodd-Frank Act, the CFTC will continue to utilize its historical facts-and-circumstances approach in determining whether the parties to a particular agreement, contract, or transaction with a liquidated damage provision have the requisite intent to deliver.

Comments

One commenter notes that a commercial merchandising arrangement involving a nonfinancial commodity may provide that the remedy for a failure to make or take delivery is the payment of a market-rate replacement price, a payment on a performance guaranty, or ''cover damages'' to compensate the non-breaching party for the failure of the other party to fulfill its contractual obligations.[397] Such a contractual damages or remedy provision, this commenter contended, is not analogous to a financial settlement option in a trading instrument.[398] This commenter further asserted that one party or the other may be unable to perform, or excused or prevented for commercial reasons from performing, its contractual obligations to make or take delivery of a nonfinancial commodity, and therefore may be liable to the other party for a monetary payment, calculated in accordance with the contract.[399]

Another commenter noted that physically settled gas contracts, including peaking contracts (both for daily and monthly supply), bullet day contracts and weather contracts, use the NAESB Base Contract, which does not provide for financial settlement other than a liquidated damages provision, which would compensate a utility for its cost of obtaining alternative supply at the prevailing market price if the seller fails to deliver.[400] This commenter stated its view that the seller has no real opportunity to arbitrage its obligation to deliver based on changes in price, and the purchaser has no incentive to fail to take delivery of its specified quantities of gas, because they are needed for the physical operations of its system.[401]

The CFTC generally agrees with these comments regarding liquidated damages provisions, and has provided the final interpretation described above to address them.

(c) Security Forwards [402]

As the Commissions stated in the Proposing Release, the Commissions believe it is appropriate to address how the exclusions from the swap and security-based swap definitions apply to security forwards and other purchases and sales of securities.[403] The Commissions are restating the interpretation set out in the Proposing Release without modification.

The Dodd-Frank Act excludes purchases and sales of securities from the swap and security-based swap definitions in a number of different clauses.[404] Under these exclusions, purchases and sales of securities on a fixed or contingent basis [405] and sales of securities for deferred shipment or delivery that are intended to be physically delivered [406] are explicitly excluded from the swap and security-based swap definitions.[407] The exclusion from the swap and security-based swap definitions of a sale of a security for deferred shipment or delivery involves an agreement to purchase one or more securities, or groups or indexes of securities, at a future date at a certain price.

As with other purchases and sales of securities, security forwards are

[393] This interpretation is limited to the facts and circumstances described herein; the CFTC is not opining on different facts or circumstances, which could change the CFTC's interpretation.

[394] With respect to performance guarantees, the fact that a failure to deliver a nonfinancial commodity triggers a payment under a performance guaranty does not excuse the performance, nor render delivery optional. Accordingly, such a payment trigger would not itself preclude an agreement, contract, or transaction from being covered by the forward exclusion from the swap or future delivery definitions. *But see supra* part II.B.1.g, which provides that the CFTC is interpreting the term ''swap'' (that is not a security-based swap or mixed swap) to include a guarantee of such swap, to the extent that a counterparty to a swap position would have recourse to the guarantor in connection with the position.

[395] *See* 1985 CFTC OGC Interpretation, *supra* note 245 (stating generally that while ''[s]ome contracts provide for a liquidated damages of penalty clause if the producer fails to deliver, the presence of such clauses in a contract does not change the analysis of the nature of the contract [if] * * * it is intended that delivery of the physical crop occur, absent destruction of all or a portion of the crop by forces which neither party can control''). *See generally* Corbin on Contracts § 58.1 (characterizing liquidated damages provisions as designed to ''[d]etermin[e] the amount of damages that are recoverable for a breach of contract'').

[396] In that regard, *see* 1985 CFTC OGC Interpretation, *supra* note 245 (stating that ''a contract provision which permitted a producer to avoid delivery for a reason other than for an intervening condition not in the control of either party could change any conclusion about the nature of the contract'').

[397] *See* ETA Letter.

[398] *Id.* This commenter cited FERC Order No. 890, which recognizes that ''[w]hile any party to any contract can choose to fail to perform, that does not convey a contractual right to fail to perform'' and that the Edison Electric Institute Master Power Purchase and Sale Agreement (''EEI MPPSA'') clearly obligates the supplier to provide power, except in cases of force majeure. As the ETA explains, ''[t]he EEI MPPSA is a master agreement frequently used to document transactions for deferred delivery and receipt of nonfinancial electric energy, and the terms of the ISDA North American Power Annex contain substantially identical master agreement provisions * * *.'' *Id.*

[399] According to this commenter, parties typically include liquidated damages provisions in their agreements, contracts and transactions to address situations in which ''one party or the other may be unable, excused or prevented for commercial reasons from performing its contractual obligations to deliver or receive [the relevant commodity],'' not to serve as ''a financial settlement 'option' analogous to a financial settlement option in a trading instrument.'' *Id.*

[400] *See* AGA Letter.

[401] *Id. See also* Atmos Letter (stating that there is no financial incentive for a seller to fail to deliver natural gas under contracts used in the natural gas industry, as the standard remedy for such a failure to deliver is to pay liquidated damages sufficient to compensate the purchaser for having to obtain its required natural gas).

[402] The discussion above regarding the exclusion from the swap definition for forward contracts on nonfinancial commodities does not apply to the exclusion from the swap and security-based swap definitions for security forwards or to the distinction between security forwards and security futures products.

[403] *See* Proposing Release at 29830.

[404] *See* sections 1a(47)(B)(ii), (v), and (vi) of the CEA, 7 U.S.C. 1a(47)(B)(ii), (v), and (vi).

[405] *See* section 1a(47)(B)(v) of the CEA, 7 U.S.C. 1a(47)(B)(v) (excluding from the swap and security-based swap definitions ''any agreement, contract, or transaction providing for the purchase or sale of 1 or more securities on a fixed basis that is subject to [the Securities Act and Exchange Act]''); and section 1a(47)(B)(vi) of the CEA, 7 U.S.C. 1a(47)(B)(vi) (excluding from the swap and security-based swap definitions ''any agreement, contract, or transaction providing for the purchase or sale of 1 or more securities on a contingent basis that is subject to [the Securities Act and Exchange Act], unless the agreement, contract, or transaction predicates the purchase or sale on the occurrence of a bona fide contingency that might reasonably be expected to affect or be affected by the creditworthiness of a party other than a party to the agreement, contract, or transaction'').

[406] *See* section 1a(47)(B)(ii) of the CEA, 7 U.S.C. 1a(47)(B)(ii).

[407] The Commissions note that calling an agreement, contract, or transaction a swap or security-based swap does not determine its status. *See supra* part II.D.1.

excluded from the swap and security-based swap definitions. The sale of the security in this case occurs at the time the forward contract is entered into with the performance of the contract deferred or delayed.[408] If such agreement, contract, or transaction is intended to be physically settled, the Commissions believe it would be within the security forward exclusion and therefore outside the swap and security-based swap definitions.[409] Moreover, as a purchase or sale of a security, the Commissions believe it also would be within the exclusions for the purchase or sale of one or more securities on a fixed basis (or, depending on its terms, a contingent basis) and, therefore, outside the swap and security-based swap definitions.[410]

In the Proposing Release, the Commissions provided the following specific interpretation in the context of forward sales of mortgage-backed securities (''MBS'') guaranteed or sold by the Federal National Mortgage Association (''Fannie Mae''), the Federal Home Loan Mortgage Corporation (''Freddie Mac''), and the Government National Mortgage Association (''Ginnie Mae'').[411] The Commissions are restating their interpretation regarding such forward sales.

MBS guaranteed or sold by Fannie Mae, Freddie Mac and Ginnie Mae are eligible to be sold in the ''To-Be-Announced'' (''TBA'') market, which is essentially a forward or delayed delivery market.[412] The TBA market has been described as one that ''allows mortgage lenders essentially to sell the loans they intend to fund even before the loans are closed.'' [413] In the TBA market, the lender enters into a forward contract to sell MBS and agrees to deliver MBS on the settlement date in the future. The specific MBS that will be delivered in the future may not yet be created at the time the forward contract is entered into.[414] In a TBA transaction, the seller and the buyer agree to five terms before entering into the transaction: (i) The type of security, which will usually be a certain type of MBS guaranteed or sold by Fannie Mae, Freddie Mac or Ginnie Mae and the type of mortgage underlying the MBS; (ii) the coupon or interest rate; (iii) the face value (the total dollar amount of MBS the purchaser wishes to purchase); (iv) the price; and (v) the settlement date.[415] The purchaser will contract to acquire a specified dollar amount of MBS, which may be satisfied when the seller delivers one or more MBS pools at settlement.[416]

The Commissions are confirming that such forward sales of MBS in the TBA market would fall within the exclusion for sales of securities on a deferred settlement or delivery basis even though the precise MBS are not in existence at the time the forward MBS sale is entered into.[417] Moreover, as the purchase or sale of a security, the Commissions also are confirming that such forward sales of MBS in the TBA market would fall within the exclusions for the purchase or sale of one or more securities on a fixed basis (or, depending on its terms, a contingent basis) and therefore would fall outside the swap and security-based swap definitions.[418]

Comments

The Commissions received two comments on the interpretation regarding security forwards. One commenter recommended that the Commissions codify in the text of the final rules the interpretation regarding forward sales of MBS in the TBA market.[419] The Commissions are not codifying the interpretation because codification will create a bright-line test. The Commissions note that the analysis as to whether any product falls within the exclusion for sales of securities on a deferred settlement or delivery basis requires flexibility, including the consideration of applicable facts and circumstances. Because the interpretation regarding forward sales of MBS in the TBA market is based on particular facts and circumstances, the Commissions do not believe that a bright-line test is appropriate.

Another commenter suggested that the Commissions narrow the exclusion for contracts for the purchase and sale of securities for subsequent delivery as applied to security-based swaps because parties can use the formal characterization of a delivery contract for securities to disguise a transaction that is substantively a security-based swap.[420] This commenter was concerned because this commenter believes that the securities subject to such a delivery obligation are often easily convertible into cash, which facilitates cash settlement without actual delivery.[421] As such, this commenter suggested that the Commissions should provide a test for determining whether parties have a bona fide intent to deliver.[422] This commenter recommended that such test should prohibit cash settlement options in contracts for subsequent delivery and should not consider a party that frequently unwinds physical positions with cash settlements using side agreements as having the requisite intent to deliver.[423] The Commissions are not providing a test at this time for determining whether parties have a bona fide intent to deliver because the analysis as to whether sales of securities for deferred shipment or delivery are intended to be physically delivered is a facts and circumstances determination and a bright-line test will not allow for the flexibility needed in such analysis. Further, the Commissions note that the purchase and sale of a security occurs at the time the forward contract is entered into.[424]

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[408] A purchase or sale of a security occurs at the time the parties become contractually bound, not at the time of settlement (regardless of whether cash or physically settled). *See Securities Offering Reform,* 70 FR 44722 (Aug. 3, 2005).

[409] *See* section 1a(47)(B)(ii) of the CEA, 7 U.S.C. 1a(47)(B)(ii).

[410] *See* sections 1a(47)(B)(v) and (vi) of the CEA, 7 U.S.C. 1a(47)(B)(v) and (vi).

[411] The Commissions provided the interpretation in the Proposing Release in response to commenters on the ANPR. *See* Proposing Release at 29830. These commenters requested clarification that forward sales of MBS guaranteed or sold by Fannie Mae, Freddie Mac and Ginnie Mae would not be included in the swap and security-based swap definitions in order to provide the certainty needed to avoid unnecessary disruption of this market. *Id.*

[412] Task Force on Mortgage-Backed Securities Disclosure, ''Staff Report: Enhancing Disclosure in the Mortgage-Backed Securities Markets,'' part II.E.2 (Jan. 2003), which is available at *http://www.sec.gov/news/studies/mortgagebacked.htm* (''MBS Staff Report'').

[413] *Id.*

[414] *Id.*

[415] *Id.*

[416] *Id.* The good delivery guidelines, titled ''Uniform Practices for the Clearance and Settlement of Mortgage-Backed Securities and Other Related Securities,'' which govern the mechanics of trading and settling MBS, contain specific guidelines for trading and settling MBS guaranteed or sold by Fannie Mae, Freddie Mac and Ginnie Mae in the TBA market. The good delivery guidelines outline the basic terms and conditions for trading, confirming, delivering and settling MBS. The good delivery guidelines set forth the basic characteristics that MBS guaranteed or sold by Fannie Mae, Freddie Mac and Ginnie Mae must have to be able to be delivered to settle an open TBA transaction. *Id.* The Securities Industry and Financial Markets Association (''SIFMA'') is the successor to the Bond Market Association and publishes the good delivery guidelines, which are available at *http://www.sifma.org/services/standard-forms-and-documentation/securitized-products/*.

[417] *See* section 1a(47)(B)(ii) of the CEA, 7 U.S.C. 1a(47)(B)(ii).

[418] *See* sections 1a(47)(B)(v) and (vi) of the CEA, 7 U.S.C. 1a(47)(B)(v) and (vi).

[419] *See* Letter from Lisa M. Ledbetter, Vice President and General Counsel, Legislative & Regulatory Affairs, Freddie Mac, Jul. 21, 2011.

[420] *See* Better Markets Letter.

[421] *Id.*

[422] *Id.*

[423] *Id.*

[424] *See supra* note 408.

3. Consumer and Commercial Agreements, Contracts, and Transactions

The Commissions noted in the Proposing Release that ''[c]onsumers enter into various types of agreements, contracts, and transactions as part of their household and personal lives that may have attributes that could be viewed as falling within the swap or security-based swap definition.[425] Similarly, businesses and other entities, whether or not for profit, also enter into agreements, contracts, and transactions as part of their operations relating to, among other things, acquisitions or sales of property (tangible and intangible), provisions of services, employment of individuals, and other matters that could be viewed as falling within the definitions.'' [426]

Commenters on the ANPR pointed out a number of areas in which a broad reading of the swap and security-based swap definitions could cover certain consumer and commercial arrangements that historically have not been considered swaps or security-based swaps.[427] Examples of such instruments cited by those commenters included evidences of indebtedness with a variable rate of interest; commercial contracts containing acceleration, escalation, or indexation clauses; agreements to acquire personal property or real property, or to obtain mortgages; employment, lease, and service agreements, including those that contain contingent payment arrangements; and consumer mortgage and utility rate caps.[428]

The Commissions also stated in the Proposing Release that they ''do not believe that Congress intended to include these types of customary consumer and commercial agreements, contracts, or transactions in the swap or security-based swap definition, to limit the types of persons that can enter into or engage in them, or to otherwise to subject these agreements, contracts, or transactions to the regulatory scheme for swaps and security-based swaps.'' [429]

Accordingly, the Commissions proposed an interpretation in the Proposing Release to assist consumers and commercial and non-profit entities in understanding whether certain agreements, contracts, or transactions that they enter into would be regulated as swaps or security-based swaps.[430] The Commissions are adopting the interpretation set out in the Proposing Release with certain modifications in response to commenters.[431]

With respect to consumers, the Commissions have determined that the types of agreements, contracts, or transactions that will not be considered swaps or security-based swaps when entered into by consumers (natural persons) as principals (or by their agents)[432] primarily for personal, family, or household purposes, include:[433]

- Agreements, contracts, or transactions to acquire or lease real or personal property, to obtain a mortgage, to provide personal services, or to sell or assign rights owned by such consumer (such as intellectual property rights);
- Agreements, contracts, or transactions to purchase products or services for personal, family or household purposes at a fixed price or a capped or collared price, at a future date or over a certain time period (such as agreements to purchase for personal use or consumption nonfinancial energy commodities, including agreements to purchase home heating fuel or agreements involving residential fuel storage, in either case, where the consumer takes delivery of and uses the fuel, and the counterparty is a merchant that delivers in the service area where the consumer resides);[434]
- Agreements, contracts, or transactions that provide for an interest rate cap or lock on a consumer loan or mortgage, where the benefit of the rate cap or lock is realized only if the loan or mortgage is made to the consumer;
- Consumer loans or mortgages with variable rates of interest or embedded interest rate options, including such loans with provisions for the rates to change upon certain events related to the consumer, such as a higher rate of interest following a default; [435]
- Service agreements, contracts, or transactions that are consumer product warranties, extended service plans, or buyer protection plans, such as those purchased with major appliances and electronics; [436]
- Consumer options to acquire, lease, or sell real or personal property, such as options to lease apartments or purchase rugs and paintings, and purchases made through consumer layaway plans; [437]
- Consumer agreements, contracts, or transactions where, by law or regulation, the consumer may cancel the transaction without legal cause; [438] and

[425] *See* Proposing Release at 29832.

[426] *Id.*

[427] *Id.*

[428] *Id.*

[429] *Id.* If these types of arrangements were subject to Title VII, the persons that could enter into or engage in them could be restricted because Title VII imposes restrictions on entering into swaps and security-based swaps with persons who are not eligible contract participants (''ECPs''). *See* sections 723(1), 763(e), and 768(b) of the Dodd-Frank Act. The Dodd-Frank Act amended the Securities Act and the Exchange Act to require that security-based swap transactions involving a person that is not an ECP must be registered under the Securities Act and effected on a national securities exchange, and also amended the CEA to require that swap transactions involving a person that is not an ECP must be entered into on, or subject to the rules of, a board of trade designated as a contract market. *Id.* The Commissions note that many consumers and commercial and non-profit entities may not be ECPs. *See* section 1a(18) of the CEA, 7 U.S.C. 1a(18). Further, if these types of arrangements were subject to Title VII, they would be subject to the full regulatory scheme for swaps and security-based swaps created by Title VII. These requirements could increase costs for consumers and commercial and non-profit entities and potentially disrupt their ability to enter into these arrangements.

[430] *See* Proposing Release at 29832–33.

[431] *See infra* note 447 and accompanying text.

[432] For example, a mortgage broker may arrange a rate lock on behalf of a consumer borrower.

[433] The Commissions are not addressing here the applicability of any other provisions of the CEA, the Federal securities laws or the Commissions' regulations to such agreements, contracts or transactions.

[434] These agreements, contracts, or transactions require the parties respectively to make and take delivery of the underlying commodity to each other directly; delivery may be deferred for convenience or necessity. *But see* section 2(c)(2)(D) of the CEA, 7 U.S.C. 2(c)(2)(D), generally prohibiting certain leveraged, margined or financed agreements, contracts and transactions with non-ECPs when actual delivery does not occur within 28 days). The Commissions view consumer agreements, contracts, and transactions involving periodic or future purchases of consumer products and services as transactions that are not swaps. This interpretation does not extend to consumer agreements, contracts or transactions containing embedded optionality or embedded derivatives other than those discussed in the text associated with this footnote. This analysis of consumer contracts is separate from the forward contract analysis for commercial merchandising transactions discussed in *supra* part II.B.2. The CFTC continues to view the forward contract exclusion for nonfinancial commodities as limited to commercial merchandising transactions.

[435] An example of a consumer loan with a variable rate of interest is credit card debt that includes a ''teaser'' rate. The teaser rate is a low, adjustable introductory interest rate that is temporary.

[436] One commenter indicated that such service agreements, contracts, or transactions may be regulated as insurance in some but not all states. However, the Commissions believe that it is appropriate to address these agreements, contracts, or transactions in the context of their guidance regarding consumer and commercial arrangements. *See* NAIC Letter.

[437] The Commissions believe that options entered into by consumers that result in physical delivery of the commodity, if exercised, are not the type of agreements, contracts or transactions that Congress intended to regulate as swaps or security-based swaps. Conversely, options entered into by consumers that cash settle based on the difference between the market price and the contract price of a commodity are not within the scope of this interpretation.

[438] Examples of these types of transactions include consumer transactions that may be cancelled pursuant to the Federal Reserve Board's Regulation Z, 12 CFR Part 226 (*i.e.* certain consumer credit transactions that involve a lien on the consumer's principal dwelling), consumer mail/telephone orders that may be cancelled when orders have not been filled under 16 CFR Part 435, and other consumer transactions that have cancellations rights conferred by statute or regulation.

• Consumer guarantees of credit card debt, automobile loans, and mortgages of a friend or relative.

The Commissions have included in the interpretation above several additional examples of consumer arrangements that the Commissions do not consider to be swaps or security-based swaps. These additional examples have been included in response to commenters [439] and the Commissions' determination that such additional examples would assist consumers in identifying other agreements, contracts, or transactions that they enter into that would not be regulated as swaps or security-based swaps.[440]

The types of commercial agreements, contracts, or transactions that involve customary business arrangements (whether or not involving a for-profit entity) and will not be considered swaps or security-based swaps under this interpretation include:

• Employment contracts and retirement benefit arrangements;

• Sales, servicing, or distribution arrangements;

• Agreements, contracts, or transactions for the purpose of effecting a business combination transaction; [441]

• The purchase, sale, lease, or transfer of real property, intellectual property, equipment, or inventory;

• Warehouse lending arrangements in connection with building an inventory of assets in anticipation of a securitization of such assets (such as in a securitization of mortgages, student loans, or receivables); [442]

• Mortgage or mortgage purchase commitments, or sales of installment loan agreements or contracts or receivables;

• Fixed or variable interest rate commercial loans or mortgages entered into by banks [443] and non-banks, including the following:

• Fixed or variable interest rate commercial loans or mortgages entered into by the Farm Credit System institutions and Federal Home Loan Banks;

• Fixed or variable interest rate commercial loans or mortgages with embedded interest rate locks, caps, or floors, provided that such embedded interest rate locks, caps, or floors are included for the sole purpose of providing a lock, cap, or floor on the interest rate on such loan or mortgage and do not include additional provisions that would provide exposure to enhanced or inverse performance, or other risks unrelated to the interest rate risk being addressed;

• Fixed or variable interest rate commercial loans or mortgages with embedded interest rate options, including such loans or mortgages that contain provisions causing the interest rate to change upon certain events related to the borrower, such as a higher rate of interest following a default, provided that such embedded interest rate options do not include additional provisions that would provide exposure to enhanced or inverse performance, or other risks unrelated to the primary reason the embedded interest rate option is included; and

• Commercial agreements, contracts, and transactions (including, but not limited to, leases, service contracts, and employment agreements) containing escalation clauses linked to an underlying commodity such as an interest rate or consumer price index.

In response to commenters,[444] the Commissions have included in the interpretation above several additional examples of commercial arrangements that the Commissions do not consider to be swaps or security-based swaps.

The Commissions intend for this interpretation to enable consumers to engage in transactions relating to their households and personal or family activities without concern that such arrangements would be considered swaps or security-based swaps. Similarly, with respect to commercial business arrangements, this interpretation should allow commercial and non-profit entities to continue to operate their businesses and operations without significant disruption and provide that the swap and security-based swap definitions are not read to include commercial and non-profit operations that historically have not been considered to involve swaps or security-based swaps.

The types of agreements, contracts, and transactions discussed above are not intended to be exhaustive of the customary consumer or commercial arrangements that should not be considered to be swaps or security-based swaps. There may be other, similar types of agreements, contracts, and transactions that also should not be considered to be swaps or security-based swaps. In determining whether similar types of agreements, contracts, and transactions entered into by consumers or commercial entities are swaps or security-based swaps, the Commissions intend to consider the characteristics and factors that are common to the consumer and commercial transactions listed above:

• They do not contain payment obligations, whether or not contingent, that are severable from the agreement, contract, or transaction;

• They are not traded on an organized market or over-the-counter; and

• In the case of consumer arrangements, they:

—Involve an asset of which the consumer is the owner or beneficiary, or that the consumer is purchasing, or they involve a service provided, or to be provided, by or to the consumer, or

• In the case of commercial arrangements, they are entered into:

—By commercial or non-profit entities as principals (or by their agents) to serve an independent commercial, business, or non-profit purpose, and

—Other than for speculative, hedging, or investment purposes.

Two of the key components reflected in these characteristics that distinguish these agreements, contracts, and transactions from swaps and security-based swaps are that: (i) The payment provisions of the agreement, contract, or transaction are not severable; and (ii)

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[439] *See supra* note 96 and accompanying text. *See also infra* notes 436, 454 and 455 and accompanying text.

[440] The additional example regarding consumer options to acquire, lease, or sell real or personal property was added in response to a commenter on the ANPR. *See* Letter from White & Case LLP, dated September 20, 2010. The Commissions also are providing as additional examples consumer agreements, contracts, or transactions where, by law or regulation, the consumer may cancel the transaction without legal cause, and consumer guarantees of credit card debt, automobile loans, and mortgages of a friend or relative.

[441] These business combination transactions include, for example, a reclassification, merger, consolidation, or transfer of assets as defined under the Federal securities laws or any tender offer subject to section 13(e) and/or section 14(d) or (e) of the Exchange Act, 15 U.S.C. 78m(e) and/or 78n(d) or (e). These business combination agreements, contracts, or transactions can be contingent on the continued validity of representations and warranties and can contain earn-out provisions and contingent value rights.

[442] The Commissions believe that such lending arrangements included in this category are traditional borrower/lender arrangements documented using, for example, a loan agreement or indenture, as opposed to a synthetic lending arrangement documented in the form of, for example, a total return swap. The Commissions also note that securitization transaction agreements also may contain contingent obligations if the representations and warranties about the underlying assets are not satisfied.

[443] While the Commissions have included fixed or variable interest rate commercial loans entered into by banks, the Commissions understand that the CEA does not apply to, and the CFTC may not exercise regulatory authority over, identified banking products, and that the definitions of the terms ''security-based swap'' and ''security-based swap agreement'' do not include identified banking products. *See infra* note 488, regarding identified banking products. However, such loans and mortgages provided by certain banks may not qualify as identified banking products because those banks may not satisfy the definition of ''bank'' for purposes of the ''identified banking products'' definition. *See* 7 U.S.C. 27(a).

[444] *See infra* notes 456 and 461 and accompanying text.

the agreement, contract, or transaction is not traded on an organized market or over-the-counter, and therefore such agreement, contract, or transaction does not involve risk-shifting arrangements with financial entities, as would be the case for swaps and security-based swaps.[445] In response to commenters,[446] the Commissions clarify that merely because an agreement, contract, or transaction is assignable does not mean that it is ''traded'' or that the agreement, contract, or transaction is a swap or security-based swap. An assignment of a contractual obligation must be analyzed to assure that the result is not to sever the payment obligations.

This interpretation is not intended to be the exclusive means for consumers and commercial or non-profit entities to determine whether their agreements, contracts, or transactions fall within the swap or security-based swap definition. If there is a type of agreement, contract, or transaction that is not enumerated above, or does not have all the characteristics and factors that are listed above (including new types of agreements, contracts, or transactions that may be developed in the future), the agreement, contract, or transaction will be evaluated based on its particular facts and circumstances. Parties to such an agreement, contract or transaction may also seek an interpretation from the Commissions as to whether the agreement, contract or transaction is a swap or security-based swap.

Comments

Eleven commenters provided comments on the proposed interpretation set forth in the Proposing Release regarding consumer and commercial arrangements.[447] While most commenters supported the proposed interpretation, these commenters suggested certain changes.

Four commenters recommended that the Commissions codify the proposed interpretation regarding consumer and commercial arrangements.[448] The Commissions are not codifying the interpretation. The interpretation is intended to provide guidance to assist consumers and commercial and non-profit entities in evaluating whether certain arrangements that they enter into will be regulated as swaps or security-based swaps. The interpretation is intended to allow the flexibility necessary, including the consideration of the applicable facts and circumstances by the Commissions, in evaluating consumer and commercial arrangements to ascertain whether they may be swaps or security-based swaps. The representative characteristics and factors taken together are indicators that a consumer or commercial arrangement is not a swap or security-based swap and the Commissions have provided specific examples demonstrating how these characteristics and factors apply to some common types of consumer and commercial arrangements. However, as the interpretation is not intended to be a bright-line test for determining whether a particular consumer or commercial arrangement is a swap or security-based swap, if the particular arrangement does not meet all of the identified characteristics and factors, the arrangement will be evaluated based on its particular facts and circumstances.

One commenter was concerned that the interpretation itself implicitly suggests that many types of consumer and commercial arrangements could be swaps, although none of these arrangements historically has been considered a swap.[449] The Commissions do not intend to suggest that many types of consumer and commercial arrangements that historically have not been considered swaps are within the swap or security-based swap definitions. The Commissions provided the interpretation in response to comments received on the ANPR. Commenters on the ANPR identified areas in which a broad reading of the swap and security-based swap definitions could cover certain consumer and commercial arrangements that historically have not been considered swaps or security-based swaps.[450] The Commissions believe it is appropriate to provide the interpretation to allow consumers and commercial and non-profit entities to engage in such transactions without concern that such arrangements would be considered swaps or security-based swaps.

One commenter requested that the Commissions remove the term ''customary'' from the description of consumer and commercial arrangements in the interpretation.[451] The Commissions note that the use of the term ''customary'' was not intended to limit the interpretation, but rather was used to describe certain types of arrangements that consumers and businesses may normally or generally enter into. The Commissions also note that the term ''customary'' is itself not a separate representative characteristic or factor for purposes of the interpretation.

This commenter also requested that specific examples of consumer and commercial arrangements that are not swaps or security-based swaps include ''any other similar agreements, contracts, or transactions.''[452] The specific examples are not intended to be an exhaustive list and the Commissions do not believe that it is necessary to include a general catchall provision. The interpretation also includes a list of representative characteristics and factors to be used to analyze other consumer and commercial arrangements.

Several commenters suggested additional examples of consumer and commercial arrangements that the Commissions should not consider to be swaps or security-based swaps.[453] One commenter suggested that the Commissions should expand the example of ''consumer agreements, contracts, or transactions to purchase products or services at a fixed price or a capped or collared price, at a future date or over a certain time period (such as agreements to purchase home heating fuel)'' to include all nonfinancial energy commodities in the parenthetical example.[454] The Commissions have modified the identified consumer example to include all nonfinancial energy commodities. The parenthetical example was not intended to be limited to agreements to purchase home heating fuel.

One commenter suggested that the Commissions should include as an

[445] There also are alternative regulatory regimes that have been enacted as part of the Dodd-Frank Act specifically to provide enhanced protections to consumers relating to various consumer transactions. *See, e.g.,* the Consumer Financial Protection Act of 2010, Public Law 111–203, tit. X, 124 Stat. 1376 (Jul. 21, 2010) (establishing the Bureau of Consumer Financial Protection to regulate a broad category of consumer products and amending certain laws under the jurisdiction of the Federal Trade Commission); the Mortgage Reform and Anti-Predatory Lending Act, Public Law 111–203, tit. XIV, 124 Stat. 1376 (Jul. 21, 2010) (amending existing laws, and adding new provisions, related to certain mortgages). Some of these agreements, contracts, or transactions are subject to regulation by the Federal Trade Commission and other Federal financial regulators and state regulators.

[446] *See infra* note 470.

[447] *See* BGA Letter; Letter from The Coalition for Derivatives End-Users, Jul. 22, 2011, (''CDEU Letter''); ETA Letter; Letter from Robbie Boone, Vice President, Government Affairs, Farm Credit Council, Jul. 22, 2011 (''FCC Letter''); FERC Staff Letter; Letter from Warren N. Davis, Of Counsel, Sutherland Asbill & Brennan LLP, on behalf of the Federal Home Loan Banks, Jul. 22, 2011 (''FHLB Letter''); IECA Letter; ISDA Letter; Just Energy Letter; PMAA/NEFI Letter; and SEIA Letter.

[448] *See* ETA Letter; FERC Letter; IECA Letter; and Just Energy Letter.

[449] *See* IECA Letter.

[450] *See* Proposing Release at 29832.

[451] *See* ISDA Letter.

[452] *Id.*

[453] *See* CDEU Letter; FCC Letter; FERC Letter; FHLB Letter; ISDA Letter; Just Energy Letter; PMAA/NEFI Letter; and SEIA Letter.

[454] *See* Just Energy Letter.

additional example residential fuel storage contracts.[455] The Commissions agree that these arrangements should not be considered swaps or security-based swaps, provided that they are residential fuel storage contracts where the consumer takes delivery of and consumes the fuel, and the counterparty is a merchant (or agent of a merchant) that delivers in the service area where the consumer's residence is located. Although the consumer may not immediately consume the fuel contracted for, because it will ultimately consume the fuel for personal, family, or household purposes, such a transaction is a type of customary consumer transaction excluded from the swap and security-based swap definitions.

Three commenters requested clarification that commercial loans and mortgages would fall within the interpretation regardless of whether entered into by a bank or non-bank.[456] Two of these commenters were concerned that the specific example was limited to commercial loans and mortgages entered into by non-banks and did not address commercial loans and mortgages entered into by financial institutions that are banks but whose loans and mortgages do not qualify as identified banking products.[457] The Commissions are revising the example to clarify that it includes fixed or variable interest rate commercial loans or mortgages entered into by both banks and non-banks, including such loans and mortgages entered into by the Farm Credit System institutions and Federal Home Loan Banks. The Commissions understand that the CEA does not apply to, and the CFTC may not exercise regulatory authority over, and the definitions of the terms ''security-based swap'' and ''security-based swap agreement'' do not include, any fixed or variable interest rate commercial loan or mortgage entered into by a bank that is an identified banking product.[458] However, loans and mortgages provided by certain banks may not qualify as identified banking products because those banks do not satisfy the definition of ''bank'' for purposes of the ''identified banking products'' definition.[459] According to commenters,[460] while this definition of ''bank'' includes insured depository institutions, certain foreign banks, credit unions, institutions regulated by the Federal Reserve and trust companies, it does not include certain other financial institutions that provide commercial loans or mortgages, such as government-sponsored enterprises (including the Federal Home Loan Banks) and certain cooperatives (including the Farm Credit System institutions).

Three commenters suggested that the Commissions should include as additional examples commercial rate lock agreements and commercial loans with interest rate caps, floors, or options.[461] The Commissions agree that these arrangements should not be considered swaps or security-based swaps, provided that the interest rate locks, caps, or floors, or interest rate options are embedded in the commercial loans or mortgages and not entered into separately from the commercial loans and mortgages, and are including these arrangements as examples in the interpretation. However, the Commissions are limiting the interpretation to embedded interest rate locks, caps, or floors, and interest rate options because interest rate locks, caps, or floors, or interest rate options that are entered into separately from the commercial loans and mortgages fall within the swap definition.[462] In order to further distinguish these arrangements from swaps and security-based swaps, the interpretation provides the following: (i) The embedded interest rate lock, cap, or floor must be included for the sole purpose of providing a lock, cap, or floor on the interest rate on such loan or mortgage and may not include additional provisions that would provide exposure to enhanced or inverse performance, or other risks unrelated to the interest rate risk being addressed, and (ii) the embedded interest rate option may not include additional provisions that would provide exposure to leverage, inverse performance, or other risks unrelated to the primary reason the embedded interest rate option is included in the commercial loan or mortgage.

Four commenters suggested additional examples of commercial arrangements that relate to nonfinancial energy commodities.[463] These arrangements are more appropriately addressed in the context of the forward contract exclusion for nonfinancial commodities[464] or the trade option exemption.[465]

One commenter supported the representative characteristics and factors the Commissions set forth to distinguish consumer and commercial arrangements from swaps and security-based swaps.[466] Two commenters were concerned with certain of these characteristics and factors because these commenters believed that such characteristics and factors are common in a wide variety of consumer and commercial arrangements.[467] Both commenters suggested that the Commissions remove ''for other than speculative, hedging or investment purposes'' from the interpretation because many of the types of transactions listed as examples may be undertaken for speculative, hedging or investment purposes and because all commercial merchandising transactions are ''risk-shifting'' of commercial obligations and risks, and ''hedge'' the enterprise's commercial risks.[468] The Commissions are not revising the interpretation to remove or otherwise modify this representative characteristic and factor. The Commissions believe that commercial arrangements undertaken for speculative, hedging or investment purposes may be a swap or a security-based swap depending on the particular facts and circumstances of the arrangement.

[455] *See* PMAA/NEFI Letter.

[456] *See* CDEU Letter; FCC Letter; and FHLB Letter.

[457] *See* FCC Letter and FHLB Letter.

[458] *See infra* note 488, regarding identified banking products.

[459] *See* 7 U.S.C. 27(a). *See also* FCC Letter and FHLB Letter.

[460] *See supra* note 457.

[461] *See* CDEU Letter; FCC Letter; and FHLB Letter. These commenters indicated that such arrangements are similar to the arrangements included in the list of examples of consumer arrangements that the Commissions would not consider to be swaps or security-based swaps.

[462] *See* section 1a(47)(A)(i) of the CEA, 7 U.S.C. 1a(47)(A)(i). Similarly, with respect to consumer agreements, contracts and transactions providing for an interest rate cap or an interest rate lock on a consumer loan or mortgage, the Commissions are limiting this example to interest rate caps and interest rate locks entered into in connection with the consumer loan or mortgage and prior to closing on the loan or mortgage. For this purpose, both because obtaining a consumer loan or mortgage can involve a great deal of documentation, which can be entered into at different times during the process, and because consumers may have some flexibility as to their deadline for deciding when to include or exclude an interest rate cap or lock in their consumer loans or mortgages, the Commissions will consider an interest rate cap or lock to be entered into in connection with a consumer loan or mortgage if it is included in the final terms of the loan at closing.

[463] *See* BGA Letter (commercial physical transactions in the natural gas and electric power markets should also fall under the category of exemptions from the swap definition); FERC Letter (commercial transactions executed or traded on RTOs/ISOs should be included in the interpretation); Just Energy Letter (commercial arrangements to purchase products or services at a fixed price or a capped or collared price, at a future date or over a certain time period); and PMAA/NEFI Letter (petroleum fuel and gas storage contracts between bona fide commercial market participants or entities other than financial entities).

[464] *See supra* part II.B.2. The Commissions note that they provided the interpretation regarding consumer arrangements because the CFTC in the past has not interpreted the forward contract exclusion for nonfinancial commodities to apply to consumer arrangements. *See supra* note 434.

[465] *See supra* note 317 and accompanying text.

[466] *See* FCC Letter.

[467] *See* ETA Letter and ISDA Letter.

[468] *Id.*

One of these commenters also suggested the Commissions remove ''do not contain payment obligations that are severable'' from the interpretation because assignment of rights and delegation of obligations are common in a wide variety of consumer and commercial transactions.[469] The Commissions are not revising the interpretation to remove or otherwise modify this representative characteristic and factor. The Commissions believe that the severability of payment obligations could be indicative of a consumer or commercial arrangement that may be a swap or a security-based swap depending on the particular facts and circumstances of the arrangement because the severability of payment obligations could be indicative of an instrument that is merely an exchange of payments, such as is the case with swaps and security-based swaps.

One of these commenters also suggested that the Commissions remove ''not traded on an organized market or over the counter'' from the interpretation because many of the types of contracts listed as examples are assignable and frequently assigned or traded.[470] The other commenter did not suggest removing this factor, but requested that the factor be modified to provide that the arrangement is not traded on a ''registered entity'' in order not to include transactions on organized wholesale electricity markets.[471] The Commissions are not revising the interpretation to remove or otherwise modify this representative characteristic and factor. The Commissions believe that the trading of an instrument on an organized market or over the counter could be indicative of a consumer or commercial arrangement that may be a swap or a security-based swap depending on the particular facts and circumstances of the arrangement. However, as noted above, the Commissions are clarifying that merely because an arrangement is assignable does not mean that it is ''traded'' or that the arrangement is a swap or security-based swap. An assignment of a contractual obligation must be analyzed to assure that the result is not to sever the payment obligations.

Further, as noted above, the representative characteristics and factors are not intended to be a bright-line test for determining whether a particular consumer or commercial arrangement is a swap or security-based swap. These representative characteristics and factors taken together are indicators that a consumer or commercial arrangement is not a swap or security-based swap. These representative characteristics and factors also do not imply or presume that a consumer or commercial arrangement that does not meet all of these characteristics and factors is a swap or security-based swap. As noted above, if a particular arrangement does not meet all of these characteristics and factors, the parties will need to evaluate the arrangement based on the particular facts and circumstances. Moreover, as noted above, if there is a type of consumer or commercial arrangement that does not meet all of these characteristics and factors, a party to the arrangement can seek an interpretation from the Commissions as to whether the arrangement is outside the scope of the swap and security-based swap definitions.

Residential Exchange Program

One commenter requested that the CFTC further define the term ''swap'' to exclude consumer benefits under the Pacific Northwest Electric Power Planning and Conservation Act of 1980 (''Northwest Power Act'')[472] and transactions under the ''Residential Exchange Program'' (''REP'').[473] According to this commenter, the REP was established by Congress ''[t]o extend the benefits of low cost Federal System hydro power to residential and small farm electric power consumers throughout the Pacific Northwest Region.''[474] Based on the commenter's description, REP transactions do not appear to be among the types of transactions historically considered swaps or security-based swaps. Although the REP transactions described by the commenter share some features with spread options (*e.g.,* they settle in cash based on the difference between two price sources),[475] in both swaps and security-based swaps, each party assumes market risk.[476] By contrast, neither party assumes or hedges risk in an REP transaction.[477] Instead, the Commissions view an REP transaction essentially as a subsidy provided to residential and small farm utility customers.[478] Accordingly, the Commissions do not consider the REP transactions described by the commenter to be swaps or security-based swaps.

Loan Participations

The Commissions provided an interpretation in the Proposing Release regarding the treatment of loan participations.[479] The Commissions are

[469] *See* ISDA Letter.

[470] *Id.*

[471] *See* ETA Letter.

[472] 16 U.S.C. Chapter 12H.

[473] Letter from Virginia K. Schaeffer, Attorney, Office of General Counsel, Bonneville Power Administration, Jul. 22, 2011 (''BPA Letter''). This commenter refers to the implementation of Section 5(c) of the Northwest Power Act, 16 U.S.C. 839c(c), as the ''Residential Exchange Program.'' *See Id.*

[474] *See* BPA Letter. This commenter explained that, under the REP: ''A Pacific Northwest electric utility has a right to * * * sell power to Bonneville at the utility's average system cost (ASC) of providing that power * * * Bonneville[] is required to purchase that power at the utility's ASC, and then sell an equivalent amount of power back to the utility at Bonneville's rates[,] which are based in substantial part on low cost Federal hydro power. As required by the Residential Exchange Statute, the amount of such power ''exchanged'' is based on the related utility's residential and small farm customer's power needs (also known as ''loads'') in the Pacific Northwest Region. Under this ''exchange,'' no actual power is transferred to or from Bonneville. Instead, consistent with Congressional intent, the exchange transaction is implemented as an accounting device that avoids the costs and burdens associated with a physical exchange of power and that results in the payment of funds by Bonneville to the REP exchanging utilities. Reduced to the essentials, the Residential Exchange Statute as implemented in * * * REP contracts results in Bonneville making cash payments for the positive difference between the utility's ASC and Bonneville's lower rate multiplied by the qualifying residential and small farm loads. And, as required under the Residential Exchange Statute, the entire monetary benefit Bonneville provides to the REP exchanging utilities is in turn passed through to the residential and small farm power consumers of that utility.'' *Id.*

[475] A spread option is ''an option in which the payout is based on the difference in performance between two assets.'' Superderivatives, ''Spread option in EQ'' definition, available at *http://www.sdgm.com/Support/Glossary.aspx?letter=S. See also S.J. Denga and S.S. Oren,* Electricity derivatives and risk management, Science Direct at 945 (2006), available at *http://www.ieor.berkeley.edu/~oren/pubs/Deng%20and%20Oren-86.pdf* (defining a spark spread options as ''cross-commodity options paying out the difference between the price of electricity sold by generators and the price of the fuels used to generate it''); Chicago Mercantile Exchange, Soybean-Corn Price Ratio Options Fact Card (describing its soybean-corn price ratio option contract as ''an option on the ratio between the price of the referencing Soybean futures contract and the price of the referencing Corn futures contract * * *''), available at *http://www.cmegroup.com/trading/agricultural/files/AC-440-Soybean-CornRatioOptionsFC.pdf.*

[476] Even a hedging party assumes the risk that the market can move against its hedging position, causing the hedge to reduce the profit it otherwise would have made on an unhedged position.

[477] The fact that the Commissions are relying in part on this aspect of REP transactions to interpret such transactions to be neither swaps nor security-based swaps does not mean that market participants should conclude, in other contexts, that a lack of market risk removes an agreement, contract, or transaction from the swap and security-based swap definitions. The Commissions' conclusion as to REP transactions is based on the unique facts and circumstances presented by the commenter.

[478] *See, e.g.,* Paul M. Murphy, Northwest Public Power Association, Background and Summary of the Residential Exchange Program Settlement Agreement, March 16, 2011, available at *http://www.nwppa.org/cwt/external/wcpages/wcmedia/documents/background_and_summary_of_rep_settlement_agreement.pdf* (characterizing the REP as ''require[ing] BPA to subsidize the residential and small farm consumers of the higher cost utilities in the Pacific Northwest'').

[479] *See* Proposing Release at 29834.

restating the interpretation set out in the Proposing Release with certain modifications in response to commenters.[480]

Loan participations arise when a lender transfers or offers a participation in the economic risks and benefits of all or a portion of a loan or commitment it has entered into with a borrower to another party as an alternative or precursor to assigning to such person the loan or commitment or an interest in the loan or commitment.[481] The Commissions understand that two types of loan participations exist in the market today,[482] LSTA-style participations[483] and LMA-style participations.[484] LSTA-style participations transfer a beneficial ownership interest in the underlying loan or commitment to the participant.[485] LMA-style participations do not transfer a beneficial ownership interest in the underlying loan or commitment to the participant, but rather create a debtor-creditor relationship between the grantor and the participant under which a future beneficial ownership interest is conveyed.[486]

Depending on the facts and circumstances, a loan participation may be a security under the Federal securities laws and, as such, the loan participation would be excluded from the swap definition as the purchase and sale of a security on a fixed or contingent basis.[487] In addition, depending on the facts and circumstances, a loan participation may be an identified banking product and, as such, would be excluded from CFTC jurisdiction and from the security-based swap and security-based swap agreement definitions.[488]

The Commissions believe it is important to provide further guidance as to the other circumstances in which certain loan participations would not fall within the swap and security-based swap definitions. Consistent with the proposal, the Commissions do not interpret the swap and security-based swap definitions to include loan participations that reflect an ownership interest in the underlying loan or commitment. The Commissions believe that for a loan participation to not be considered a swap or security-based swap, the loan participation must represent a current or future direct or indirect ownership interest in the loan or commitment that is the subject of the loan participation.

In evaluating whether the loan participation represents such an ownership interest, the Commissions believe the following characteristics should be present:

- The grantor of the loan participation is a lender under, or a participant or sub-participant in, the loan or commitment that is the subject of the loan participation.
- The aggregate participation in the loan or commitment that is the subject of the loan participation does not exceed the principal amount of such loan or commitment. Further, the loan participation does not grant, in the aggregate, to the participant in such loan participation a greater interest than the grantor holds in the loan or commitment that is the subject of the loan participation.
- The entire purchase price for the loan participation is paid in full when acquired and not financed. The Commissions believe a purchase price would not be paid in full if the grantor of the loan participation extends financing to the participant or if such participant levers its purchase, including by posting collateral to secure a future payment obligation.
- The loan participation provides the participant all of the economic benefit and risk of the whole or part of the loan or commitment that is the subject of the loan participation.

These characteristics, which were identified by commenters,[489] are intended to distinguish loan participations from swaps and security-based swaps based on loans. The first characteristic above addresses the ownership of the underlying loan or commitment. Swaps and security-based swaps may be created using a synthetic or derivative structure that does not require ownership of the underlying loan.[490] The second characteristic above addresses the ratio of the participation to the underlying loan or commitment. Swaps and security-based swaps based on loans may involve synthetic exposure to a loan that is a multiple of the principal amount.[491] The third characteristic above addresses leverage in the financing of a loan participation. Leverage could be indicative of an instrument that is merely an exchange of payments and not a transfer of the ownership of the underlying loan or commitment, such as may be the case with a swap or security-based swap.[492] The fourth characteristic above addresses the level of participation in the economic benefits and risks of the underlying loan or commitment. This characteristic is indicative of ownership when analyzed with the other characteristics and, as noted above, swaps and security-based swaps may be created using a synthetic or derivative structure that does not require ownership of the underlying loan.

The Commissions agree with commenters that the loan participation does not have to be a ''true participation,'' as the Commissions had stated in their interpretation in the Proposing Release,[493] in order for the loan participation to fall outside the swap and security-based swap definitions.[494] The Commissions note that the ''true participation'' analysis is used to determine whether a transaction has resulted in the underlying assets being legally isolated from a transferor's creditors for U.S. bankruptcy law

[480] *See infra* note 504 and accompanying text.

[481] *See* Loan Market Association, ''Guide to Syndicated Loans,'' section 6.2.4 (''A [loan] participation * * * is made between the existing lender and the participant. This creates new contractual rights between the existing lender and the participant which mirror existing contractual rights between the existing lender and the borrower. However this is not an assignment of those existing rights and the existing lender remains in a direct contractual relationship with the borrower.''), available at *http://www.lma.eu.com/uploads/files/Introductory_Guides/Guide_to_Par_Syndicated_Loans.pdf.*

[482] *See* Letter from R. Bram Smith, Executive Director, The Loan Syndications and Trading Association, Jan. 25, 2011 (''January LSTA Letter''); Letter from Elliot Ganz, General Counsel, The Loan Syndications and Trading Association, Mar. 1, 2011 (''March LSTA Letter''); and Letter from Clare Dawson, Managing Director, The Loan Market Association, Feb. 23, 2011. The Commissions understand that neither type of loan participation is a ''synthetic'' transaction. *See* March LSTA Letter. Both types of loan participations are merely transfers of cash loan positions and the ratio of underlying loan to participation is always one to one. *Id.*

[483] The LSTA is The Loan Syndications and Trading Association.

[484] The LMA is The Loan Market Association.

[485] *See* Letter from Clare Dawson, Managing Director, The LMA, Jul. 22, 2011 (''July LMA Letter'').

[486] *See Id.* The participant may exercise an ''elevation'' right and request that the grantor use commercially reasonable efforts to cause the participant to become the legal owner, by assignment, of the underlying loan or commitment. *Id.*

[487] *See* sections 1a(47)(B)(v) and (vi) of the CEA, 7 U.S.C. 1a(47)(b)(v) and (vi), as amended by section 721(a)(21) of the Dodd-Frank Act (excluding purchases and sales of a security on a fixed or contingent basis, respectively from the swap definition).

[488] *See* section 403(a) of the Legal Certainty for Bank Products Act of 2000, 7 U.S.C. 27a(a), as amended by section 725(g)(2) of the Dodd-Frank Act (providing that, under certain circumstances, the CEA shall not apply to, and the CFTC shall not exercise regulatory authority over, identified banking products, and the definitions of the terms ''security-based swap'' and ''security-based swap agreement'' shall not include identified banking products).

[489] *See infra* note 504 and accompanying text. *See also infra* notes 490, 491, and 492 and accompanying text.

[490] *See* July LMA Letter.

[491] *Id.*

[492] *Id.*

[493] Proposing Release at 29834.

[494] *See infra* note 503 and accompanying text.

purposes.[495] This analysis is unrelated to and does not inform whether a loan participation is a swap or security-based swap. This analysis also may be subject to varying interpretations.[496] Further, the Commissions understand that this analysis could result in certain loan participations that reflect an ownership interest in the underlying loan or commitment being included in the swap and security-based swap definitions, which the Commissions do not intend.[497]

Rather, as noted above, the Commissions believe that the analysis as to whether a loan participation is outside the swap and security-based swap definitions should be based on whether the loan participation reflects an ownership interest in the underlying loan or commitment. The Commissions understand that the characteristics noted above are indicative, based on comments received,[498] of whether a loan participation represents such an ownership interest. Further, in response to commenters,[499] the Commissions are clarifying that the interpretation applies to loan participations that are entered into both with respect to outstanding loans and with respect to a lender's commitments to lend and fund letters of credit (*e.g.,* under a revolving credit facility).

The Commissions believe that the interpretation will prevent disruption in the syndicated loan market for loan participations. Loan participations facilitate a lender's diversification of its portfolio holdings, provide a key component of the efficient settlement process, and enhance liquidity in the global syndicated loan market.[500] The interpretation will enable this market to continue operating as it did prior to the enactment of Title VII.

Comments

Commenters supported the interpretation that certain loan participations should not be included in the swap and security-based swaps definitions.[501] Commenters agreed with the proposal that a loan participation should represent a current and future direct or indirect ownership interest in the loan or commitment that is the subject of the loan participation.[502] However, commenters disagreed with the proposal that a loan participation should be required to be a ''true participation'' in order for the loan participation to fall outside the swap and security-based swap definitions because LMA-style participations do not represent a beneficial ownership in the underlying loan or commitment such that they would be considered a true participation.[503] Commenters requested that the Commissions remove this factor and instead recognize additional factors.[504] The Commissions agree that a loan participation does not have to be a true participation in order for the loan participation to fall outside the swap and security-based swap definitions and are revising the interpretation as noted above.

One commenter also indicated that loan participations are entered into both with respect to outstanding loans and with respect to a lender's commitments to lend and fund letters of credit (*e.g.,* under a revolving credit facility).[505] This commenter requested that the Commissions revise the proposed interpretation to reflect both outstanding loans and a lender's commitments.[506] The Commissions agree and are revising the interpretation to reflect both outstanding loans and loan commitments as noted above.

C. Final Rules and Interpretations Regarding Certain Transactions Within the Scope of the Definitions of the Terms ''Swap'' and ''Security-Based Swap''

1. In General

In light of provisions in the Dodd-Frank Act that specifically address certain foreign exchange products, the Commissions in the Proposing Release proposed rules to clarify the status of products such as foreign exchange forwards, foreign exchange swaps, foreign exchange options, non-deliverable forwards involving foreign exchange (''NDFs''), and cross-currency swaps. The Commissions also proposed a rule to clarify the status of forward rate agreements and provided interpretations regarding: (i) Combinations and permutations of, or options on, swaps or security-based swaps; and (ii) contracts for differences (''CFDs'').

The Commissions are adopting the rules as proposed without modification and are restating the interpretations provided in the Proposing Release without modification. In addition, the Commissions are providing additional interpretations regarding foreign exchange spot transactions and retail foreign currency options.

As adopted, rule 1.3(xxx)(2) under the CEA and rule 3a69–2 under the Exchange Act explicitly define the term ''swap'' to include certain foreign exchange-related products and forward rate agreements unless such products are excluded by the statutory exclusions in subparagraph (B) of the swap definition.[507] In adopting these rules, the Commissions do not mean to suggest that the list of agreements, contracts, and transactions set forth in rule 1.3(xxx)(2) under the CEA and rule

[495] *Id.*

[496] *Id.*

[497] *Id.*

[498] *See supra* note 482. *See infra* note 501.

[499] *See infra* note 506 and accompanying text.

[500] *See* January LSTA Letter.

[501] *See* FCC Letter; Letter from Richard M. Whiting, Executive Director and General Counsel, Financial Services Roundtable, Jul. 22, 2011 (''FSR Letter''); July LMA Letter; Letter from R. Bram Smith, Executive Director, The LSTA, Jul. 22, 2011 (''July LSTA Letter''); MFA Letter; and Letter from Kenneth E. Bentsen, Jr., Executive Vice President, Public Policy and Advocacy, SIFMA, Jul. 22, 2011 (''SIFMA Letter'').

[502] *See* FSR Letter; July LMA Letter; July LSTA Letter; MFA Letter; and SIFMA Letter. Commenters indicated that both LSTA-style participations and LMA-style participations represent a current or future direct or indirect ownership interest in the related loan or commitment. *Id.*

[503] *See* July LMA Letter; July LSTA Letter; MFA Letter; and SIFMA Letter. These commenters indicated that neither LMA-style participations nor certain LSTA-style participations are true participations. *See* July LMA Letter; July LSTA Letter; and SIFMA Letter. Further, according to the July LSTA Letter, ''[l]oan market participants in the United States will likely interpret the 'true participation' requirement as a requirement that loan participations must qualify for 'true sale' treatment in order to avoid classification as a 'swap.' A 'true sale' or 'true participation' analysis is a test aimed at determining whether a transaction has resulted in the underlying assets being legally isolated from the transferor's creditors for U.S. bankruptcy law purposes. Its underlying purpose is to distinguish between a sale and a financing, not between a sale and a swap.'' If this is the case, certain LSTA-style participations, which typically are offered in the United States, could be determined under a ''true sale'' analysis to be a financing and not a true participation. *See* July LSTA Letter.

[504] *See* July LMA Letter; July LSTA Letter; MFA Letter; and SIFMA Letter. Commenters recommended that the Commissions revise the interpretation by providing that the Commissions do not interpret the swap and security-based swap definitions to include loan participations in which (1) the participant is acquiring a current or future direct or indirect ownership interest in the related loan or commitment, and (2) the agreement pursuant to which the participant is acquiring such an interest (i) is a participation agreement that is, or any similar agreement of a type that has been, is presently, or in the future becomes, customarily entered into in the primary or secondary loan markets, (ii) requires the grantor to represent that it is a lender under, or a participant or sub-participant in, the loan or commitment, (iii) provides that the participant is entitled to receive from the grantor all of the economic benefit of the whole or part of a loan or commitment to the extent of payments received by the grantor in respect of such loan or commitment, and (iv) requires that 100% of the purchase price calculated with respect to the loan or commitment is paid on the settlement date. *See id.* The characteristics identified by these commenters are reflected in the Commission's revised interpretation.

[505] *See* July LMA Letter.

[506] *Id.*

[507] *See* section 1a(47)(B) of the CEA, 7 U.S.C. 1a(47)(B).

3a69–2(b) under the Exchange Act is an exclusive list.

2. Foreign Exchange Products

(a) Foreign Exchange Products Subject to the Secretary's Swap Determination: Foreign Exchange Forwards and Foreign Exchange Swaps

The CEA, as amended by the Dodd-Frank Act, provides that ''foreign exchange forwards'' and ''foreign exchange swaps'' shall be considered swaps under the swap definition unless the Secretary of the Treasury (''Secretary'') issues a written determination that either foreign exchange swaps, foreign exchange forwards, or both: (i) Should not be regulated as swaps; and (ii) are not structured to evade the Dodd-Frank Act in violation of any rule promulgated by the CFTC pursuant to section 721(c) of the Dodd-Frank Act.[508] A foreign exchange forward is defined in the CEA as ''a transaction that solely involves the exchange of two different currencies on a specific future date at a fixed rate agreed upon on the inception of the contract covering the exchange.'' [509] A foreign exchange swap, in turn, is defined as ''a transaction that solely involves an exchange of 2 different currencies on a specific date at a fixed rate that is agreed upon on the inception of the contract covering the exchange; and a reverse exchange of the 2 currencies described in subparagraph (A) at a later date and at a fixed rate that is agreed upon on the inception of the contract covering the exchange.'' [510]

Under the Dodd-Frank Act, if foreign exchange forwards or foreign exchange swaps are no longer considered swaps due to a determination by the Secretary, nevertheless, certain provisions of the CEA added by the Dodd-Frank Act would continue to apply to such transactions.[511] Specifically, those transactions still would be subject to certain requirements for reporting swaps, and swap dealers and major swap participants engaging in such transactions still would be subject to certain business conduct standards.[512]

The Commissions are adopting the rules as proposed to explicitly define by rule the term ''swap'' to include foreign exchange forwards and foreign exchange swaps (as those terms are defined in the CEA),[513] in order to include in one rule the definitions of those terms and the related regulatory authority with respect to foreign exchange forwards and foreign exchange swaps.[514] The final rules incorporate the provision of the Dodd-Frank Act that foreign exchange forwards and foreign exchange swaps will no longer be considered swaps if the Secretary issues the written determination described above to exempt such products from the swap definition.[515] The final rules also reflect the continuing applicability of certain reporting requirements and business conduct standards in the event that the Secretary makes such a determination.[516]

Comments

Two commenters recommended that the Commissions defer action on defining foreign exchange swaps and foreign exchange forwards in their regulations until the Secretary has made his final determination about whether to exempt them.[517] One commenter believed that finalizing the Commissions' proposal prior to the Secretary's final determination would be ''premature.'' [518] The other commenter believed that the industry will be ''better positioned'' to assess the need to clarify the scope of the swap definition with respect to foreign exchange derivatives after the Secretary has made his determination.[519] The Commissions understand that, if the final rules are effective before the Secretary issues a written determination, market participants entering into foreign exchange forwards and foreign exchange swaps might incur costs in order to comply with the requirements of the CEA (as amended by the Dodd-Frank Act) that could be rendered unnecessary if the Secretary subsequently were to issue a written determination to exempt.[520] The Commissions, however, believe the final rules are necessary because in the event the Secretary issues a written determination to exempt, certain reporting requirements and business conduct standards will continue to apply to the exempted instruments, and the final rules set forth those requirements that will continue to apply.

Further, the Commissions do not believe that adopting the rules is premature, as the Secretary may issue a determination at any time, and the Secretary's authority to do so is independent of the Commissions' authority to issue these rules to further define the term ''swap.'' [521] The

[508] *See* section 1a(47)(E)(i) of the CEA, 7 U.S.C. 1a(47)(E)(i). The Secretary published in the **Federal Register** a request for comment as to whether an exemption from the swap definition for foreign exchange swaps, foreign exchange forwards, or both, is warranted, and on the application of the statutory factors that the Secretary must consider in making a determination regarding whether to exempt these products. *See Determinations of Foreign Exchange Swaps and Forwards,* 75 FR 66829 (Oct. 28, 2010). Subsequently, the Secretary published in the **Federal Register** a proposed determination to exempt both foreign exchange swaps and foreign exchange forwards from the definition of the term ''swap'' in the CEA. *See Determination of Foreign Exchange Swaps and Foreign Exchange Forwards Under the Commodity Exchange Act, Notice of Proposed Determination,* 76 FR 25774 (May 5, 2011) (''Notice of Proposed Determination''). The comment period on the Secretary's proposed determination closed on June 6, 2011. A final determination has not yet been issued.

[509] *See* section 1a(24) of the CEA, 7 U.S.C. 1a(24).

[510] *See* section 1a(25) of the CEA, 7 U.S.C. 1a(25).

[511] The Secretary's determination also does not affect the CFTC's jurisdiction over retail foreign currency agreements, contracts, or transactions pursuant to section 2(c)(2) of the CEA, 7 U.S.C. 2(c)(2). *See* section 1a(47)(F)(ii) of the CEA, 7 U.S.C. 1a(47)(F)(ii).

[512] *See, e.g.,* sections 1a(47)(E)(iii) and (iv) of the CEA, 7 U.S.C. 1a(47)(E)(iii) and (iv) (reporting and business conduct standards, respectively). In addition, a determination by the Secretary does not exempt any foreign exchange forward or foreign exchange swap traded on a designated contract market or a swap execution facility, or cleared by a derivatives clearing organization, from any applicable antifraud or anti-manipulation provision under the CEA. *See* sections 1a(47)(F)(i) and 1b(c) of the CEA, 7 U.S.C. 1a(47)(F)(i) and 1b(c).

[513] *See* rules 1.3(xxx)(3)(iii) and (iv) under the CEA and rule 3a69–2(c)(3) and (4) under the Exchange Act.

[514] *See* rules 1.3(xxx)(2)(i)(C) and (D) under the CEA and rules 3a69–2(b)(1)(iii) and (iv) under the Exchange Act. The rules further provide that foreign exchange forwards and forward exchange swaps are not swaps if they fall within one of the exclusions set forth in subparagraph (B) of the statutory swap definition. *See* rule 1.3(xxx)(2)(ii) under the CEA and rule 3a69–2(b)(2) under the Exchange Act.

[515] *See* rule 1.3(xxx)(3) under the CEA and rule 3a69–2(c) under the Exchange Act.

[516] *See* rule 1.3(xxx)(3)(ii) under the CEA and rule 3a69–2(c)(2) under the Exchange Act. The exclusion of foreign exchange forwards and foreign exchange swaps would become effective upon the Secretary's submission of the determination to exempt to the appropriate Congressional Committees. *See* sections 1a(47)(E)(ii) and 1b of the CEA, 7 U.S.C. 1a(46)(E)(ii) and 1b.

[517] *See* CME Letter and SIFMA Letter.

[518] *See* CME Letter. This commenter also believes that if the Secretary exempts foreign exchange swaps and foreign exchange forwards from the swap definition, it would create an ''awkward'' situation both for the CFTC and market participants, given that options on such products would be swaps but the products into which they exercise would not be swaps, and would result in a lack of clarity and consistency for market participants. *Id.*

[519] *See* SIFMA Letter.

[520] These costs market participants may incur relate to the upfront and ongoing costs associated with the regulation of Title VII instruments generally. *See infra* parts X and XI, for a discussion of these costs. The Commissions also note that the final rules will reduce (and may eliminate), the costs of determining whether foreign exchange swaps and foreign exchange forwards are subject to Title VII, as well as the costs associated with determining which provisions of the new Title VII regulatory regime will apply to these instruments. *Id.*

[521] Compare section 712(d)(1) of the CEA (Commissions' joint rulemaking authority to further define the term ''swap''), with section 1a(47)(E) and 1b of the CEA (Secretary's authority to determine to exempt foreign exchange swaps and foreign exchange forwards from the definition of ''swap.'').

Commissions' final rules are consistent with this statutory framework by specifically providing that, in the event a determination to exempt is issued, foreign exchange swaps and foreign exchange forwards will not be considered swaps, and will be subject only to those CEA requirements that are specified in the statute.[522] As such, the final rules accommodate the possibility of (rather than the certainty of) an exemptive determination made by the Secretary.

Moreover, commenters provided no support for the assertion that the situation would be awkward for market participants because options on foreign exchange forwards and foreign exchange swaps will be swaps, regardless of whether the Secretary determines to exempt the underlying transactions from the swap definition. The Commissions note that Congress drew the distinction in the statute between foreign currency options and foreign exchange forwards and foreign exchange swaps. The Commissions conclude that adopting these final rules would not contribute to a lack of clarity or consistency for market participants, regardless of any determination the Secretary makes.

(b) Foreign Exchange Products Not Subject to the Secretary's Swap Determination

The Commissions are adopting rules as proposed stating that a determination by the Secretary that foreign exchange forwards or foreign exchange swaps, or both, should not be regulated as swaps would not affect certain other products involving foreign currency, such as foreign currency options, NDFs, currency swaps and cross-currency swaps.[523] The rules explicitly define the term ''swap'' to include such products, irrespective of whether the Secretary makes a determination to exempt foreign exchange forwards or foreign exchange swaps from the swap definition.[524]

(i) Foreign Currency Options [525]

As discussed above, the statutory swap definition includes options, and it expressly enumerates foreign currency options. It encompasses any agreement, contract, or transaction that is a put, call, cap, floor, collar, or similar option of any kind that is for the purchase or sale, or based on the value, of 1 or more interest or other rates, currencies, commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind.[526] Foreign exchange options traded on a national securities exchange (''NSE''), however, are securities under the Federal securities laws and not swaps or security-based swaps.[527]

Any determination by the Secretary, discussed above, that foreign exchange forwards or foreign exchange swaps should not be regulated as swaps would not impact foreign currency options because a foreign currency option is neither a foreign exchange swap nor a foreign exchange forward, as those terms are defined in the CEA. The Commissions did not receive any comments either on the proposed rule further defining the term ''swap'' to include foreign currency options or the proposed rule clarifying that foreign currency options are not subject to the Secretary's determination to exempt foreign exchange swaps and foreign exchange forwards.[528] Consequently, the Commissions are adopting rules to explicitly define the term ''swap'' to include foreign currency options (other than foreign currency options traded on an NSE).[529] The rules also state that foreign currency options are not foreign exchange forwards or foreign exchange swaps under the CEA.[530]

(ii) Non-Deliverable Forward Contracts Involving Foreign Exchange

As explained by the Commissions in the Proposing Release,[531] an NDF generally is similar to a forward foreign exchange contract,[532] except that at maturity the NDF does not require physical delivery of currencies; rather, the contract typically is settled in a reserve currency, such as U.S. dollars. One of the currencies involved in the transaction, usually an emerging market currency, may be subject to capital controls or similar restrictions, and is therefore said to be ''nondeliverable.'' [533] If the spot market exchange rate on the settlement date is greater (in foreign currency per dollar terms) than the previously agreed forward exchange rate, the party to the contract that is long the nondeliverable (*e.g.* emerging market) currency must pay its counterparty the difference between the contracted forward price and the spot market rate, multiplied by the notional amount.[534]

NDFs are not expressly enumerated in the swap definition, but as was stated in the Proposing Release,[535] they satisfy clause (A)(iii) of the swap definition because they provide for a future

[522] *See* rule 1.3(xxx)(3)(ii) under the CEA and rule 3a69–2(c)(2) under the Exchange Act. The statutory requirements that remain applicable, notwithstanding a written determination by the Secretary to exempt, are that foreign exchange swaps and foreign exchange forwards shall be reported to either a swap data repository, or, if there is no swap data repository that would accept such swaps or forwards, to the CFTC pursuant to section 4r of the CEA, 7 U.S.C. 6r, within such time period as the CFTC may by rule or regulation prescribe, and any party to a foreign exchange swap or forward that is a swap dealer or major swap participant shall conform to the business conduct standards contained in section 4s(h) of the CEA, 7 U.S.C. 6s(h). Section 1a(47)(E)(iii) and (iv) of the CEA, 7 U.S.C. 1a(47)(E)(iii) and (iv).

[523] *See* rule 1.3(xxx)(3)(v) under the CEA and rule 3a69–2(c)(5) under the Exchange Act.

[524] *See* rule 1.3(xxx)(2)(i) under the CEA and rule 3a69–2(b)(1) under the Exchange Act. The final rules provide, however, that none of these products are swaps if they fall within one of the exclusions set forth in subparagraph (B) of the statutory swap definition. *See* rule 1.3(xxx)(2)(ii) under the CEA and rule 3a69–2(b)(2) under the Exchange Act. Also, the rules do not define the term ''swap'' to include currency swaps because they are already included in the statutory definition, but the rules clarify that currency swaps are not subject to the Secretary's determination. *See* section 1a(47)(A)(iii)(VII) of the CEA, 7 U.S.C. 1a(47)(A)(iii)(VII); rule 1.3(xxx)(3)(v)(A) under the CEA; and rule 3a69–2(c)(5)(i) under the Exchange Act.

[525] This discussion is not intended to address, and has no bearing on, the CFTC's jurisdiction over foreign currency options in other contexts. *See, e.g.*, CEA sections 2(c)(2)(A)(iii) and 2(c)(2)(B)–(C), 7 U.S.C. 2(c)(2)(A)(iii) and 2(c)(2)(B)–(C) (off-exchange options in foreign currency offered or entered into with retail customers).

[526] *See* section 1a(47)(A)(i) of the CEA, 7 U.S.C. 1a(47)(A)(i).

[527] *See* section 1a(47)(B)(iv) of the CEA, 7 U.S.C. 1a(47)(B)(iv).

[528] A comment regarding the CFTC's jurisdiction over retail foreign currency options is discussed below.

[529] *See* rule 1.3(xxx)(2)(ii) under the CEA and rule 3a69–2(b)(1) under the Exchange Act. The final rules treat the terms foreign currency options, currency options, foreign exchange options, and foreign exchange rate options as synonymous. Moreover, for purposes of the final rules, foreign currency options include options to enter into or terminate, or that otherwise operate on, a foreign exchange swap or foreign exchange forward, or on the terms thereof. As discussed above, foreign exchange options traded on an NSE are securities and therefore are excluded from the swap definition. *See supra* note 527 and accompanying text.

[530] *See* rule 1.3(xxx)(3)(v) under the CEA and rule 3a69–2(c)(5) under the Exchange Act.

[531] *See* Proposing Release at 29836.

[532] A deliverable forward foreign exchange contract is an obligation to buy or sell a specific currency on a future settlement date at a fixed price set on the trade date. *See* Laura Lipscomb, Federal Reserve Bank of New York, ''An Overview of Non-Deliverable Foreign Exchange Forward Markets,'' 1 (May 2005) (citation omitted) (''Fed NDF Overview'').

[533] *See id.* at 1–2 (citation omitted).

[534] *See id.* at 2. Being long the emerging market currency means that the holder of the NDF contract is the ''buyer'' of the emerging market currency and the ''seller'' of dollars. Conversely, if the emerging market currency appreciates relative to the previously agreed forward rate, the holder of the contract that is short the emerging market currency must pay its counterparty the difference between the spot market rate and the contracted forward price, multiplied by the notional amount. *See id.* at 2, n.4.

[535] *See* Proposing Release at 29836.

(executory) payment based on an exchange rate, which is an ''interest or other rate[ ]'' within the meaning of clause (A)(iii).[536] Each party to an NDF transfers to its counterparty the risk of the exchange rate moving against the counterparty, thus satisfying the requirement that there be a transfer of financial risk associated with a future change in rate. This financial risk transfer in the context of an NDF is not accompanied by a transfer of an ownership interest in any asset or liability. Thus, an NDF is a swap under clause (A)(iii) of the swap definition.[537]

Moreover, the Commissions have determined that NDFs do not meet the definitions of ''foreign exchange forward'' or ''foreign exchange swap'' set forth in the CEA.[538] NDFs do not involve an ''exchange'' of two different currencies (an element of the definition of both a foreign exchange forward and a foreign exchange swap); instead, they are settled by payment in one currency (usually U.S. dollars).[539]

Notwithstanding their ''forward'' label, NDFs also do not fall within the forward contract exclusion of the swap definition because currency is outside the scope of the forward contract exclusion for nonfinancial commodities.[540] Nor have NDFs traditionally been considered commercial merchandising transactions. Rather, as the Commissions observed in the Proposing Release,[541] NDF markets appear to be driven in large part by speculation [542] and hedging,[543] which features are more characteristic of swap markets than forward markets.

Comments

Commenters who addressed the nature of NDFs believed that NDFs should not be considered swaps, but rather should be categorized as foreign exchange forwards. In general, commenters maintained that NDFs are functionally and economically equivalent to foreign exchange forwards, and therefore should be treated in the same manner for regulatory purposes.[544] In support of this view, commenters made several arguments, including that both NDFs and foreign exchange forwards require the same net value to be transferred between counterparties; the purpose for using them is the same—to cover foreign currency exchange risk; both are typically short term transactions; and both may be cleared by CLS Bank.[545]

In addition, commenters believed that not treating NDFs as foreign exchange forwards or foreign exchange swaps would be contrary to both domestic and international market practices. As specific examples, commenters noted that NDFs typically are traded as part of a bank's or broker's foreign exchange desk; the Federal Reserve Bank of New York has described an NDF in a 1998 publication as an instrument ''similar to an outright forward,'' except that there is no physical delivery or transfer of the local currency; the Bank for International Settlements (''BIS'') categorizes NDFs in its ''outright forward'' category; various European regulations do not distinguish between the two transaction types; standard foreign exchange trading documentation includes both net- and physically-settled foreign exchange transactions in general definitions of foreign exchange transactions; and special rules under the U.S. tax code apply equally to physically settled and cash settled foreign exchange forwards.[546]

Commenters also raised potential negative consequences to certain U.S. market participants if NDFs are not considered to be foreign exchange forwards. For example, one commenter argued that treating NDFs as swaps will put U.S. corporations doing business in emerging markets at a disadvantage relative to U.S. corporations doing business solely in developed markets.[547] This commenter stated that NDFs are widely used by U.S. corporations that do business in emerging markets to hedge their exposure to the currencies of those markets, and that regulating NDFs as swaps would significantly increase the cost of hedging those exposures.[548]

With respect to the Commissions' legal conclusion that NDFs are not foreign exchange forwards, and thus are not subject to the Secretary's determination, one commenter stated that the Commissions' reading of the definition of the term ''foreign exchange forward'' as not including NDFs is ''too restrictive.'' [549] In this regard, this commenter believed that the term ''exchange'' should be read to include ''the economic exchange that occurs in net settlement rather than being narrowly read as the physical 'exchange' of two different currencies.''

One commenter, in contrast, agreed with the Commissions' interpretation that NDFs are not encompassed within the definition of the term ''foreign

[536] *See* section 1a(47)(A)(iii) of the CEA, 7 U.S.C. 1a(47)(A)(iii) (providing that a swap is an agreement, contract, or transaction ''that provides on an executory basis for the exchange, on a fixed or contingent basis, of 1 or more payments based on the value or level of 1 or more interest or other rates, currencies, commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind, or any interest therein or based on the value thereof, and that transfers, as between the parties to the transaction, in whole or in part, the financial risk associated with a future change in any such value or level without also conveying a current or future direct or indirect ownership interest in an asset (including any enterprise or investment pool) or liability that incorporates the financial risk so transferred * * * .'').

[537] In addition, as was noted in the Proposing Release, at least some market participants view NDFs as swaps today, and thus NDFs also may fall within clause (A)(iv) of the swap definition as ''an agreement, contract, or transaction that is, or in the future becomes, commonly known to the trade as a swap.'' *See* Proposing Release at 29836. *See also* section 1a(47)(A)(iv) of the CEA, 7 U.S.C. 1a(47)(A)(iv). *Cf.* rule 35.1(b)(1)(i) under the CEA, 17 CFR 35.1(b)(1)(i) (providing that the definition of ''swap agreement'' includes a ''forward foreign exchange agreement,'' without reference to convertibility or delivery).

[538] In the Notice of Proposed Determination, the Secretary stated that his authority to issue a determination ''is limited to foreign exchange swaps and forwards and does not extend to other foreign exchange derivatives'' and noted that ''NDFs may not be exempted from the CEA's definition of ''swap'' because they do not satisfy the statutory definitions of a foreign exchange swap or forward.'' *See* Notice of Proposed Determination.

[539] Likewise, the Commissions have determined that a foreign exchange transaction, which initially is styled as or intended to be a ''foreign exchange forward,'' and which is modified so that the parties settle in a reference currency (rather than settle through the exchange of the 2 specified currencies), does not conform with the definition of ''foreign exchange forward'' in the CEA. *See infra* note 626.

[540] Currency is an excluded commodity under the CEA. *See* section 1a(19)(i) of the CEA, 7 U.S.C. 1a(19)(i). In accordance with the interpretation regarding nonfinancial commodities, which as discussed above, *see supra* part II.B.2(a), are exempt and agricultural commodities that can be physically delivered, currency does not qualify as a nonfinancial commodity for purposes of the forward exclusion from the swap definition.

[541] *See* Proposing Release at 29836.

[542] *See* Fed NDF Overview at 5 (''[E]stimates vary but many major market participants estimate as much as 60 to 80 percent of NDF volume is generated by speculative interest, noting growing participation from international hedge funds.'') and 4 (''[D]ealers note that much of the volume in Chinese *yuan* NDFs is generated by speculative positioning based on expectations for an alteration in China's current, basically fixed exchange rate.'') (italics in original).

[543] *See id.* at 4 (noting that ''[much of the] Korean won NDF volume[,] * * * estimated to be the largest of any currency, * * * is estimated to originate with international investment portfolio managers hedging the currency risk associated with their onshore investments'').

[544] *See* CDEU Letter; Letter from The Committee on Investment of Employee Benefit Assets, dated Jul. 22, 2011 (''CIEBA Letter''); Letter from Bruce C. Bennett, Covington & Burling LLP, dated Jul. 22, 2011 (''Covington Letter''); and Letter from Karrie McMillan and Cecelia Calaby, the Investment Company Institute/American Bar Association Securities Association, dated Jul. 22, 2011 (''ICI/ABASA Letter'').

[545] *See* Covington Letter and ICI/ABASA Letter. CLS Bank operates the largest multi-currency cash settlement system to eliminate settlement risk in the foreign exchange market.

[546] *See* Covington Letter and ICI/ABASA Letter.

[547] *See* Covington Letter.

[548] *See supra* note 520.

[549] *See* ICI/ABASA Letter.

exchange forward.'' [550] This commenter requested, though, that the CFTC exempt NDFs from the swap definition, using its exemptive authority under section 4(c) of the CEA.[551]

While commenters raised a number of objections to the Commissions' proposal to define NDFs as swaps, these objections primarily raise policy arguments. No commenter has provided a persuasive, alternative interpretation of the statute's plain language in the definition of the term ''foreign exchange forward'' to overcome the Commissions' conclusion that, under the CEA, NDFs are swaps, not foreign exchange forwards.

One commenter believed that the Commissions' interpretation of ''exchange of 2 different currencies'' as used in the foreign exchange forward definition is too restrictive, and that the phrase should be read broadly to mean an economic exchange of value in addition to physical exchange; the Commissions believe that this contention is misplaced.[552] This commenter essentially asks the Commissions to interpret the statutory language to mean an exchange of foreign currencies themselves, as well as an exchange based on the value of such currencies. However, only the word ''exchange'' appears in the relevant definitions, reinforcing the conclusion that Congress intended the definition of ''foreign exchange forward'' to be distinct from other types of transactions covered by the definition of ''swap'' in the CEA. Moreover, the language of each definition emphasizes that these transactions may ''solely'' involve an exchange. The ordinary meaning of the verb ''exchange'' is to ''barter'' [553] or ''part with, give or transfer for an equivalent,'' [554] *i.e.,* each party is both giving to and receiving from the other party. This does not occur under an NDF, in which only a single party makes a payment.

Elsewhere in the CEA, Congress used explicit language that potentially could provide support for a broader interpretation of the type advocated by this commenter, but such language is absent from the definition of the term ''foreign exchange forward.'' For example, section 2(a)(1)(C)(ii) confers exclusive jurisdiction on the CFTC over ''contracts of sale for future delivery of a group or index of securities (or any interest therein or based upon the value thereof) [that meet certain requirements]''. If the phrase ''exchange of 2 different currencies'' had been intended to include economic exchanges of value, as suggested by this commenter, that phrase would have included language similar to ''based on the value thereof'' to indicate that other mechanisms of transferring value may occur in these particular types of transactions. Instead, as noted above, Congress limited the scope of each of these particular transactions by using the words ''solely involves the exchange of 2 different currencies''. The Commissions conclude that the use of the word ''solely'' provides further support for the Commissions' interpretation that exchange means an actual interchange of the 2 different currencies involved in the transaction.[555]

(iii) Currency Swaps and Cross-Currency Swaps

A currency swap [556] and a cross-currency swap [557] each generally can be described as a swap in which the fixed legs or floating legs based on various interest rates are exchanged in different currencies. Such swaps can be used to reduce borrowing costs, to hedge currency exposure, and to create synthetic assets [558] and are viewed as an important tool, given that they can be used to hedge currency and interest rate risk in a single transaction.

Currency swaps and cross-currency swaps are not foreign exchange swaps as defined in the CEA because, although they may involve an exchange of foreign currencies, they also require contingent or variable payments in different currencies. Because the CEA defines a foreign exchange swap as a swap that ''solely'' involves an initial exchange of currencies and a reversal thereof at a later date, subject to certain parameters, currency swaps and cross-currency swaps would not be foreign exchange swaps. Similarly, currency swaps and cross-currency swaps are not foreign exchange forwards because foreign exchange forwards ''solely'' involve an initial exchange of currencies, subject to certain parameters, while currency swaps and cross-currency swaps contain additional elements, as discussed above.

Currency swaps are expressly enumerated in the statutory definition of the term ''swap.'' [559] Cross-currency swaps, however, are not.[560] Accordingly, based on the foregoing considerations, the Commissions are adopting rules explicitly defining the term ''swap'' to include cross-currency swaps.[561] The rules also state that neither currency swaps nor cross-currency swaps are foreign exchange forwards or foreign exchange swaps as those terms are defined in the CEA. The Commissions did not receive any comments either on the rule further defining the term ''swap'' to include cross-currency swaps or the rule clarifying that cross-currency swaps and currency swaps are not subject to the Secretary's determination to exempt foreign exchange swaps and foreign exchange forwards.

(c) Interpretation Regarding Foreign Exchange Spot Transactions

The CEA generally does not confer regulatory jurisdiction on the CFTC with respect to spot transactions.[562] In

[550] *See* CIEBA Letter.

[551] 7 U.S.C. 6(c).

[552] *See* ICI/ABASA Letter.

[553] *See* Webster's New World Dictionary (3d College Ed. 1988).

[554] *See* Black's Law Dictionary.

[555] This commenter's request that the CFTC exempt NDFs from the swap definition using its exemptive authority under section 4(c) of the CEA, 7 U.S.C. 6(c), and that the SEC exercise its exemptive authority under section 36 of the Exchange Act, 78 U.S.C. 78mm, with respect to NDFs, is beyond the scope of this rulemaking.

[556] A swap that exchanges a fixed rate against a fixed rate is known as a currency swap. *See* Federal Reserve System, ''Trading and Capital-Markets Activities Manual,'' section 4335.1 (Jan. 2009).

[557] Cross-currency swaps with a fixed leg based on one rate and a floating leg based on another rate, where the two rates are denominated in different currencies, are generally referred to as cross-currency coupon swaps, while those with a floating leg based on one rate and another floating leg based on a different rate are known as cross-currency basis swaps. *Id.* Cross-currency swaps also include annuity swaps and amortizing swaps. In cross-currency annuity swaps, level cash flows in different currencies are exchanged with no exchange of principal; annuity swaps are priced such that the level payment cash flows in each currency have the same net present value at the inception of the transaction. An amortizing cross-currency swap is structured with a declining principal schedule, usually designed to match that of an amortizing asset or liability. *Id.*

See also Derivatives ONE, ''Cross Currency Swap Valuation'' (''A cross currency swap is swap of an interest rate in one currency for an interest rate payment in another currency * * * This could be considered an interest rate swap with a currency component.''), available at *http://www.derivativesone.com/cross-currency-swap-valuation/*; Financial Accounting Standards Board, ''Examples Illustrating Application of FASB Statement No. 138,'' Accounting for Certain Derivative Instruments and Certain Hedging Activities, section 2, Example 1, at 3 (''The company designates the cross-currency swap as a fair value hedge of the changes in the fair value of the loan due to both interest and exchange rates.''), available at *http://www.fasb.org/derivatives/examples.pdf*.

[558] BMO Capital Markets, ''Cross Currency Swaps,'' available at *http://www.bmocm.com/products/marketrisk/intrderiv/cross/default.aspx*.

[559] *See* section 1a(47)(A)(iii)(VII) of the CEA, 7 U.S.C. 1a(47)(A)(iii)(VII).

[560] Clause (A)(iii) of the swap definition expressly refers to a cross-currency rate swap. *See* section 1a(47)(A)(iii)(V) of the CEA, 7 U.S.C. 1a(47)(A)(iii)(V). Although the swap industry appears to use the term ''cross-currency swap,'' rather than ''cross-currency rate swap'' (the term used in section 1a(47)(A)(iii)(V) of the CEA), the Commissions interpret these terms as synonymous.

[561] *See* rule 1.3(xxx)(2)(i)(A) under the CEA and rule 3a69–2(b)(1)(i) under the Exchange Act.

[562] *But see supra* note 227.

the context of foreign currency, spot transactions typically settle within two business days after the trade date (''T+2'').[563] The accepted market practice of a two-day settlement for spot foreign currency transactions has been recognized by the CFTC[564] and the courts.[565]

The Commissions recognize that the new foreign exchange forward definition in the CEA, which was added by the Dodd-Frank Act and which applies to an exchange of two different currencies ''on a specific future date,'' could be read to apply to any foreign exchange transaction that does not settle on the same day. Such a reading could render most foreign exchange spot transactions foreign exchange forwards under the CEA; as a result, such transactions would be subject to the CEA reporting and business conduct standards requirements applicable to foreign exchange forwards even if the Secretary determines to exempt foreign exchange forwards from the definition of ''swap.'' The Commissions do not believe that Congress intended, solely with respect to foreign exchange transactions, to extend the reach of the CEA to transactions that historically have been considered spot transactions. At the same time, however, the Commissions do not want to enable market participants simply to label as ''spot'' foreign exchange transactions that regularly settle after the relevant foreign exchange spot market settlement deadline, or with respect to which the parties intentionally delay settlement, both of which would be properly categorized as foreign exchange forwards, or CEA section 2(c)(2) transactions (discussed separately below), in order to avoid applicable foreign exchange regulatory requirements.

Accordingly, the Commissions are providing an interpretation that a bona fide foreign exchange spot transaction, *i.e.,* a foreign exchange transaction that is settled on the customary timeline of the relevant spot market, is not within the definition of the term ''swap.'' In general, a foreign exchange transaction will be considered a bona fide spot transaction if it settles via an actual delivery of the relevant currencies within two business days. In certain circumstances, however, a foreign exchange transaction with a longer settlement period concluding with the actual delivery of the relevant currencies may be considered a bona fide spot transaction depending on the customary timeline of the relevant market.[566] In particular, as discussed below, the Commissions will consider a foreign exchange transaction that is entered into solely to effect the purchase or sale of a foreign security to be a bona fide spot transaction where certain conditions are met.

The CFTC will consider the following to be a bona fide spot foreign exchange transaction: An agreement, contract or transaction for the purchase or sale of an amount of foreign currency equal to the price of a foreign security with respect to which (i) the security and related foreign currency transactions are executed contemporaneously in order to effect delivery by the relevant securities settlement deadline and (ii) actual delivery of the foreign security and foreign currency occurs by such deadline (such transaction, a ''Securities Conversion Transaction'').[567] For Securities Conversion Transactions, the CFTC will consider the relevant foreign exchange spot market settlement deadline to be the same as the securities settlement deadline. As noted above, while the CFTC will look at the relevant facts and circumstances, it does not expect that an unintentional settlement failure or delay for operational reasons or due to a market disruption will undermine the character of a bona fide spot foreign exchange transaction as such.

The CFTC also will interpret a Securities Conversion Transaction as not leveraged, margined or financed within the meaning of section 2(c)(2)(C) of the CEA.[568] While it is possible to view the fact that the buyer of a currency in such a transaction does not pay for the currency until it is delivered as leverage (in that the buyer puts nothing down until taking delivery, thus achieving 100% leverage) or a financing arrangement, the CFTC does not interpret it as such for purposes of CEA section 2(c)(2)(C).[569] Congress recognized that settlement of bona fide spot foreign exchange transactions typically takes two days.[570] The fact that Congress expressly excluded these types of bona fide spot foreign exchange transactions does not mean that Congress intended to subject Security Conversion Transactions to regulation under the retail foreign exchange regime.[571] For the foregoing reasons, the CFTC will interpret a Securities Conversion Transaction as not leveraged, margined or financed within the meaning of section 2(c)(2)(C) of the CEA.[572]

Comments

One commenter requested clarification regarding the status of foreign exchange spot transactions.[573] This commenter recommended that the Commissions clarify that foreign exchange spot transactions, which this commenter defined as ''transactions of

[563] Bank for International Settlements, Triennial Central Bank Survey, Report on Global Foreign Exchange Market Activity in 2010 at 32 (Dec. 2010) (defining a foreign exchange spot transaction to provide for cash settlement within 2 business days); Sam Y. Cross, Federal Reserve Bank of New York, ''All About * * *. The Foreign Exchange Market in the United States'' at 31–32 (1998).

[564] *See* CFTC Division of Trading and Markets, Report on Exchange of Futures for Physicals at 124–127 (1987) (noting that foreign currency spot transactions settle in 2 days).

[565] *See CFTC* v. *Frankwell Bullion, Ltd.,* 99 F.3d 299, 300 (9th Cir. 1996) (''Spot transactions in foreign currencies call for settlement within two days.''); *CFTC* v. *Int'l Fin. Servs. (NewYork), Inc.,* 323 F. Supp. 2d 482, 495 (S.D.N.Y. 2004) (noting that spot transactions ordinarily call for settlement within two days); *Bank Brussels Lambert, S.A.* v. *Intermetals Corp.,* 779 F.Supp. 741, 742 (S.D.N.Y. 1991) (same). But the Commissions understand that the settlement cycle for spot transactions exchanging Canadian dollars for U.S. dollars (or vice versa) is T+1. *See* Cross, *supra* 563, at 31.

[566] In this regard, while the Commissions will look at the relevant facts and circumstances, they will not expect that an unintentional settlement failure or delay for operational reasons or due to a market disruption will undermine the character of a bona fide spot foreign exchange transaction as such.

[567] The interpretation herein with respect to Security Conversion Transactions is limited to such transactions.

[568] 7 U.S.C. 2(c)(2)(C). Similarly, a Securities Conversion Transaction is not an option, option on a futures contract or futures contract and thus would not be subject to CEA section 2(c)(2)(B), 7 U.S.C. 2(c)(2)(B). Of course, optionality as to settlement would render the transaction an option and is inconsistent with a ''spot'' characterization.

[569] *Cf.* 12 CFR 220.8(b)(1) under Regulation T (12 CFR Part 220) (generally permits a customer to purchase a security (including a foreign security) in a cash account, rather than a margin account, even if the customer has no collateral in the account, if payment for the security is made within the appropriate payment period). Similarly, if a foreign exchange buyer in a Securities Conversion Transaction posts no margin or collateral on the trade date, the CFTC does not consider that transaction to be ''margined'' within the meaning of 7 U.S.C. 2(c)(2)(C)(i)(I)(bb).

[570] *See* section 2(c)(2)(C)(i)(II) of the CEA, 7 U.S.C. 2(c)(2)(C) (''[s]ubclause (I) of this clause shall not apply to * * * a contract of sale that * * * results in delivery within 2 days'').

[571] The CFTC notes, for example, that Congress recognized that settlement in various spot markets in commodities other than foreign exchange can be longer than two days. *See* CEA section 2(c)(2)(D)(ii)(III)(aa) (disapplying the DCM-trading requirement for certain commodity transactions with non-ECPs when the contract ''results in actual delivery within 28 days or such other longer period as the [CFTC] may determine by rule or regulation based on the typical commercial practice in cash or spot markets for the commodity involved'').

[572] This interpretation is not intended to address, and has no bearing on, the CFTC's interpretation of the term ''actual delivery'' as set forth in section 2(c)(2)(D)(ii)(III)(aa), 7 CFR 2(c)(2)(D)(ii)(III)(aa). *See* Retail Commodity Transactions under the Commodity Exchange Act, 76 FR 77670, Dec. 14, 2011.

[573] *See* SIFMA Letter.

one currency into another that settle within a customary settlement cycle,'' are neither foreign exchange forwards nor swaps.[574] Another commenter indicated that the customary settlement cycle for purchases of most non-U.S. denominated securities is ''T+3'' (in some securities markets, such as South Africa, the settlement cycle can take up to seven days), and requires the buyer to pay for the foreign securities in the relevant foreign currency.[575] Typically, according to this commenter, a broker-dealer or bank custodian acting on behalf of the buyer or seller will enter into a foreign currency transaction to settle on a T+3 basis (or the relevant settlement period) as well. Timing the foreign exchange transaction to settle at the same time as the securities transaction benefits the customer by reducing his or her exposure to currency risk on the securities transaction between trade date and settlement date. The Commissions have provided the interpretation described above regarding the interplay between the foreign exchange forward definition, the meaning of ''leveraged, margined or financed'' under section 2(c)(2)(C) of the CEA, and bona fide foreign exchange spot transactions to address these commenters' concerns.

(d) Retail Foreign Currency Options

The CFTC is providing an interpretation regarding the status of retail foreign currency options that are described in section 2(c)(2)(B) of the CEA.[576] As noted above, the Commissions proposed to include foreign currency options generally within the definition of the term ''swap,'' subject to the statutory exclusions in subparagraph (B) of the definition. The statutory exclusions from the swap definition encompass transactions described in sections 2(c)(2)(C) and (D) of the CEA, but not those in section 2(c)(2)(B) of the CEA.[577] Section 2(c)(2)(B) of the CEA applies to futures, options on futures and options on foreign currency (other than foreign currency options executed or traded on a national securities exchange), and permits such transactions to be entered into with counterparties who are not ECPs [578] on an off-exchange basis by certain enumerated regulated entities.[579] No issue arises with respect to futures or options on futures in foreign currency that are covered by section 2(c)(2)(B) of the CEA, because they are expressly excluded from the statutory swap definition.[580] Commodity options, including options on foreign currency, however, are not excluded from the swap definition (other than foreign currency options executed or traded on a national securities exchange).

The CFTC notes that, in further defining the term ''swap'' to include foreign currency options, the Proposing Release stated that the proposal was not intended to address, and had no bearing on, the CFTC's jurisdiction over foreign currency options in other contexts, specifically citing section 2(c)(2)(B) of the CEA.[581] Nonetheless, the CFTC acknowledges the ambiguity in the statute regarding the status of off-exchange foreign currency options with non-ECPs that are subject to section 2(c)(2)(B) of the CEA. While foreign currency options are swaps, they also are subject to section 2(c)(2)(B) of the CEA when entered into off-exchange with non-ECPs, and there is no statutory exclusion from the swap definition for section 2(c)(2)(B) transactions. If foreign currency options were deemed to be swaps, then, pursuant to section 2(e) of the CEA, as added by the Dodd-Frank Act,[582] they could not be entered into by non-ECP counterparties, except on a DCM. This would render the provisions of section 2(c)(2)(B) of the CEA, permitting off-exchange foreign currency options with non-ECPs by enumerated regulated entities, a nullity.

The CFTC believes that Congress did not intend the swap definition to overrule and effectively repeal another provision of the CEA in such an oblique fashion.[583] Nor is there anything in the legislative history of the Dodd-Frank Act to suggest a congressional intent to prohibit only one type of off-exchange foreign currency transaction with non-ECPs (out of the three types of off-exchange foreign currency transactions with non-ECPs that are addressed in CEA section 2(c)(2)(B)). The omission of section 2(c)(2)(B) of the CEA from the exclusions set forth in the statutory swap definition appears to be a scrivener's error.[584] Accordingly, the CFTC is applying the exclusion from the swap definition to foreign currency options described in CEA section 2(c)(2)(B).

[574] *Id.* In this commenter's view, such clarification is necessary to avoid the statutory foreign exchange forward definition ''unwittingly captur[ing] many typical foreign exchange spot transactions * * * settl[ing] within a customary settlement cycle,'' which this commenter stated is generally ''T+2'' in the United States, but can be ''T+3'' in some other countries.

[575] *See* Letter from Phoebe A. Papageorgiou, Senior Counsel, American Bankers Ass'n and James Kemp, Managing Director, Global Foreign Exchange Division, dated April 18, 2012 (''ABA/Global FX Letter''). This commenter requested clarification that the purchase, sale or exchange of a foreign currency by a bank on behalf of a retail customer for the sole purpose of effecting a purchase or sale of a foreign security or in order to clear or settle such purchase or sale, when the settlement period for such FX transaction is within the settlement cycle for such foreign security, is excluded from the retail foreign exchange under the CEA. The CFTC has provided the clarification regarding the meaning of ''leveraged, margined or financed'' under section 2(c)(2)(C) of the CEA to address this commenter's concern.

[576] 7 U.S.C. 2(c)(2)(B).

[577] *See* section 1a(47)(B)(i) of the CEA, 7 U.S.C. 1a(47)(B)(i). Sections 2(c)(2)(B), (C), and (D) of the CEA, 7 U.S.C. 2(c)(2)(B), (C), and (D), govern certain types of off-exchange transactions in commodities, including foreign currency, in which one of the parties to the transaction is not an ECP.

[578] ECPs are defined in section 1a(18) of the CEA, 7 U.S.C. 1a(18).

[579] Section 2(c)(2)(B)(i) of the CEA provides: (i) This Act applies to, and the Commission shall have jurisdiction over, an agreement, contract, or transaction in foreign currency that—(I) is a contract of sale of a commodity for future delivery (or an option on such a contract) or an option (other than an option executed or traded on a national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78f(a)); and (II) is offered to, or entered into with, a person that is not an eligible contract participant, unless the counterparty, or the person offering to be the counterparty, of the person is [certain regulated counterparties enumerated in the statute.] 7 U.S.C. 2(c)(2)(B)(i). Thus, under section 2(c)(2)(B)(i) of the CEA, the CEA's exchange-trading requirement generally applies with respect to futures, options on futures, and options on foreign currency. *See* section 4(a) of the CEA, 7 U.S.C. 6(a) (generally requiring futures contracts to be traded on or subject to the rules of a DCM); section 4c(b) of the CEA, 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 (other than options on futures) other than on or subject to the rules of a DCM); and CFTC Rule 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). However, if the counterparty to the non-ECP is an enumerated regulated entity identified in section 2(c)(2)(B)(i)(II) of the CEA, 7 U.S.C. 2(c)(2)(B)(i)(II), the CEA's exchange-trading requirement does not apply. Accordingly, an enumerated regulated entity—including a banking institution regulated by the OCC—can, pursuant to section 2(c)(2)(B) of the CEA, lawfully enter into a future, an option on a future, or an option on foreign currency with a non-ECP counterparty on an off-exchange basis.

[580] *See* section 1a(47)(B)(i) of the CEA, 7 U.S.C. 1a(47)(B)(i).

[581] *See* Proposing Release at 29835 n.125.

[582] 7 U.S.C. 2(e).

[583] The CFTC notes in this regard that repeals by implication are strongly disfavored by the courts. *See, e.g., Village of Barrington, Ill.* v. *Surface Transp. Bd.,* 636 F.3d 650, 662 (D.C. Cir. 2011) (''Repeals by implication, however, are strongly disfavored 'absent a clearly expressed congressional intention' '') (*quoting Branch* v. *Smith,* 538 U.S. 254, 273, 123 S.Ct. 1429 (2003)); *Agri Processor Co., Inc.* v. *N.L.R.B.,* 514 F.3d 1, 4 (D.C. Cir. 2008) (''[a]mendments by implication, like repeals by implication, are not favored'' and ''will not be found unless an intent to repeal [or amend] is 'clear and manifest.' '') (*quoting United States* v. *Welden,* 377 U.S. 95, 102 n. 12, 84 S.Ct. 1082 (1964) and *Rodriguez* v. *United States,* 480 U.S. 522, 524, 107 S.Ct. 1391 (1987)).

[584] *See, e.g.,* Singer and Singer, *Sutherland Statutes and Statutory Construction* § 47:38 (7th ed. 2011) (''Words may be supplied in a statute * * * where omission is due to inadvertence, mistake, accident, or clerical error'').

3. Forward Rate Agreements

The Commissions are adopting rules as proposed to explicitly define the term ''swap'' to include forward rate agreements (''FRAs'').[585] The Commissions did not receive any comments on the proposed rules regarding the inclusion of FRAs in the swap definition.

In general, an FRA is an over-the-counter contract for a single cash payment, due on the settlement date of a trade, based on a spot rate (determined pursuant to a method agreed upon by the parties) and a pre-specified forward rate. The single cash payment is equal to the product of the present value (discounted from a specified future date to the settlement date of the trade) of the difference between the forward rate and the spot rate on the settlement date multiplied by the notional amount. The notional amount itself is not exchanged.[586]

An FRA provides for the future (executory) payment based on the transfer of interest rate risk between the parties as opposed to transferring an ownership interest in any asset or liability.[587] Thus, the Commissions believe that an FRA satisfies clause (A)(iii) of the swap definition.[588]

Notwithstanding their ''forward'' label, FRAs do not fall within the forward contract exclusion from the swap definition. FRAs do not involve nonfinancial commodities and thus are outside the scope of the forward contract exclusion. Nor is an FRA a commercial merchandising transaction, as there is no physical product to be delivered in an FRA.[589] Accordingly, the Commissions believe that the forward contract exclusion from the swap definition for nonfinancial commodities does not apply to FRAs.[590]

Based on the foregoing considerations, the Commissions are adopting rules to provide greater clarity by explicitly defining the term ''swap'' to include FRAs. As with the foreign exchange-related products discussed above, the final rules provide that FRAs are not swaps if they fall within one of the exclusions set forth in subparagraph (B) of the swap definition.

4. Combinations and Permutations of, or Options on, Swaps and Security-Based Swaps

Clause (A)(vi) of the swap definition provides that ''any combination or permutation of, or option on, any agreement, contract, or transaction described in any of clauses (i) through (v)'' of the definition is a swap.[591] The Commissions provided an interpretation regarding clause (A)(vi) in the Proposing Release.[592] The Commissions received no comments on the interpretation provided in the Proposing Release regarding combinations and permutations of, or options on, swaps and security-based swaps and are restating their interpretation of clause (A)(vi) of the swap definition with one technical correction and one clarification.

Clause (A)(vi) means, for example, that an option on a swap or security-based swap (commonly known as a ''swaption'') would itself be a swap or security-based swap, respectively. The Commissions also interpret clause (A)(vi) to mean that a ''forward swap'' would itself be a swap or security-based swap, respectively.[593] By listing examples here, the Commissions do not intend to limit the broad language of clause (A)(vi) of the swap definition, which is designed to capture those agreements, contracts and transactions that are not expressly enumerated in the CEA swap definition but that nevertheless are swaps.[594]

5. Contracts for Differences

As the Proposing Release notes, the Commissions have received inquiries over the years regarding the treatment of CFDs under the CEA and the Federal securities laws.[595] A CFD generally is an agreement to exchange the difference in value of an underlying asset between the time at which a CFD position is established and the time at which it is terminated.[596] If the value increases, the

[585] *See* rules 1.3(xxx)(2)(i)(E) under the CEA and rule 3a69–2(b)(1)(v) under the Exchange Act.

[586] *See generally* ''Trading and Capital-Markets Activities Manual,'' *supra* note 556, section 4315.1 (''For example, in a six-against-nine-month (6x9) FRA, the parties agree to a three-month rate that is to be netted in six months' time against the prevailing three-month reference rate, typically LIBOR. At settlement (after six months), the present value of the net interest rate (the difference between the spot and the contracted rate) is multiplied by the notional principal amount to determine the amount of the cash exchanged between the parties * * * . If the spot rate is higher than the contracted rate, the seller agrees to pay the buyer the differences between the prespecified forward rate and the spot rate prevailing at maturity, multiplied by a notional principal amount. If the spot rate is lower than the forward rate, the buyer pays the seller.'').

[587] It appears that at least some in the trade view FRAs as swaps today. *See, e.g.,* The Globecon Group, Ltd., ''Derivatives Engineering: A Guide to Structuring, Pricing and Marketing Derivatives,'' 45 (McGraw-Hill 1995) (''An FRA is simply a one-period interest-rate swap.''); DerivActiv, Glossary of Financial Derivatives Terms (''A swap is * * * a strip of FRAs.''), available at *http://www.derivactiv.com/definitions.aspx?search=forward+rate+agreements*. *Cf.* Don M. Chance, et al., ''Derivatives in Portfolio Management,'' 29 (AIMR 1998) (''[An FRA] involves one specific payment and is basically a one-date swap (in the sense that a swap is a combination of FRAs[,] with some variations).''). Thus, FRAs also may fall within clause (A)(iv) of the swap definition, as ''an agreement, contract, or transaction that is, or in the future becomes, commonly known to the trade as a swap.'' *See* section 1a(47)(a)(iv) of the CEA, 7 U.S.C. 1a(47)(a)(iv).

[588] *See* section 1a(47)(A)(iii) of the CEA, 7 U.S.C. 1a(47)(A)(iii). CFTC regulations have defined FRAs as swap agreements. *See* rule 35.1(b)(1)(i) under the CEA, 17 CFR 35.1(b)(1)(i); *Exemption for Certain Swap Agreements,* 58 FR 5587 (Jan. 22, 1993). The CFTC recently repealed that rule and amended Part 35 of its rules in light of the enactment of Title VII of the Dodd-Frank Act. *See Agricultural Swaps,* 76 FR 49291 (Aug. 10, 2011).

[589] *See Regulation of Hybrid and Related Instruments,* 52 FR 47022, 47028 (Dec. 11, 1987) (stating ''[FRAs] do not possess all of the characteristics of forward contracts heretofore delineated by the [CFTC]'').

[590] The Commissions note that Current European Union law includes FRAs in the definition of ''financial instruments.'' *See* Markets in Financial Instruments Directive (MiFID), ''Directive 2004/39/EC of the European Parliament and of the Council,'' Annex I(C), 4, 5, 10 (Apr. 21, 2004), available at *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2004L0039:20070921:EN:PDF*. European Commission legislation on derivatives, central clearing, and trade repositories applies to FRAs that are traded over-the-counter and, thus, would subject such transactions to mandatory clearing, reporting and other regulatory requirements. *See Regulation of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories,* tit. I, art. 2 (1(3b)), 7509/1/12 REV 1 (Mar. 19, 2012).

[591] *See* section 1a(47)(vi) of the CEA, 7 U.S.C. 1a(47)(vi). Clause (A)(vi) of the swap definition refers specifically to other types of swaps in the swap definition. However, because section 3(a)(68) of the Exchange Act defines a security-based swap as a swap [with some connection to a security], clause (A)(vi) of the swap definition is relevant to determining whether any combination or permutation of, or option on, a security-based swap is a security-based swap.

[592] *See* Proposing Release at 29838.

[593] Forward swaps are also commonly known as forward start swaps, or deferred or delayed start swaps. A forward swap can involve two offsetting swaps that both start immediately, but one of which ends on the deferred start date of the forward swap itself. For example, if a counterparty wants to hedge its risk for four years, starting one year from today, it could enter into a one-year swap and a five-year swap, which would partially offset to create a four-year swap, starting one year forward. A forward swap also can involve a contract to enter into a swap or security-based swap at a future date or with a deferred start date. A forward swap is not a nonfinancial commodity forward contract or security forward, both of which are excluded from the swap definition and discussed elsewhere in this release.

[594] This category could include categories of agreements, contracts or transactions that do not yet exist as well as more esoteric swaps that exist but that Congress did not refer to by name in the statutory swap definition.

[595] *See* Proposing Release at 29838.

[596] *See* Ontario Securities Commission, Staff Notice 91–702, ''Offerings of Contracts for Difference and Foreign Exchange Contracts to Investors in Ontario,'' at part IV.1 (defining a CFD as ''a derivative product that allows an investor to obtain economic exposure (for speculative, investment or hedging purposes) to an underlying asset * * * such as a share, index, market sector, currency or commodity, without acquiring ownership of the underlying asset''), available at

Continued

seller pays the buyer the difference; if the value decreases, the buyer pays the seller the difference. CFDs can be traded on a number of products, including treasuries, foreign exchange rates, commodities, equities, and stock indexes. Equity CFDs closely mimic the purchase of actual shares. The buyer of an equity CFD receives cash dividends and participates in stock splits.[597] In the case of a long position, a dividend adjustment is credited to the client's account. In the case of a short position, a dividend adjustment is debited from the client's account. CFDs generally are traded over-the-counter (though they also are traded on the Australian Securities Exchange) in a number of countries outside the United States.

The Commissions provided an interpretation in the Proposing Release regarding the treatment of CFDs. The Commissions are restating the interpretation set out in the Proposing Release without modification.

CFDs, unless otherwise excluded, fall within the scope of the swap or security-based swap definition, as applicable.[598] Whether a CFD is a swap or security-based swap will depend on the underlying product of that particular CFD transaction. Because CFDs are highly variable and a CFD can contain a variety of elements that would affect its characterization, the Commissions believe that market participants will need to analyze the features of the underlying product of any particular CFD in order to determine whether it is a swap or a security-based swap. The Commissions are not adopting rules or additional interpretations at this time regarding CFDs.

Comments

Two commenters requested that the Commissions clarify that non-deliverable forward contracts are not CFDs.[599] These commenters requested that the Commissions determine that NDFs involving foreign exchange are not swaps. Given that the Commissions are defining NDFs as swaps and that CFDs involving foreign currency also would be swaps, there is no need to distinguish NDFs involving foreign exchange from CFDs involving foreign exchange.

D. Certain Interpretive Issues

1. Agreements, Contracts, or Transactions That May Be Called, or Documented Using Form Contracts Typically Used for, Swaps or Security-Based Swaps

The Commissions are restating the interpretation provided in the Proposing Release regarding agreements, contracts, or transactions that may be called, or documented using form contracts typically used for, swaps or security-based swaps with one modification in response to a commenter.[600]

As was noted in the Proposing Release,[601] individuals and companies may generally use the term ''swap'' to refer to certain of their agreements, contracts, or transactions. For example, they may use the term ''swap'' to refer to an agreement to exchange real or personal property between the parties or to refer to an agreement for two companies that produce fungible products and with delivery obligations in different locations to perform each other's delivery obligations instead of their own.[602] However, the name or label that the parties use to refer to a particular agreement, contract, or transaction is not determinative of whether it is a swap or security-based swap.[603]

It is not dispositive that the agreement, contract, or transaction is documented using an industry standard form agreement that is typically used for swaps and security-based swaps,[604] but it may be a relevant factor.[605] The key question is whether the agreement, contract, or transaction falls within the statutory definitions of the term ''swap'' or ''security-based swap'' (as further defined and interpreted pursuant to the final rules and interpretations herein) based on its terms and other characteristics. Even if one effect of an agreement is to reduce the risk faced by the parties (for example, the ''swap'' of physical delivery obligations described above may reduce the risk of non-delivery), the agreement would not be a swap or security-based swap unless it otherwise meets one of those statutory definitions, as further defined by the Commissions. If the agreement, contract, or transaction satisfies the swap or security-based swap definitions, the fact that the parties refer to it by another name would not take it outside the Dodd-Frank Act regulatory regime. Conversely, if an agreement, contract, or transaction is not a swap or security-based swap, as those terms are defined in the CEA and the Exchange Act and the rules and regulations thereunder, the fact that the parties refer to it, or document it, as a swap or security-based swap will not subject that agreement, contract, or transaction to regulation as a swap or a security-based swap.

http://www.osc.gov.on.ca/documents/en/Securities-Category9/sn_20091030_91-702_cdf.pdf (Oct. 30, 2009); Financial Services Authority, Consultation Paper 7/20, ''Disclosure of Contracts for Difference—Consultation and draft Handbook text,'' at part 2.2 (defining a CFD on a share as ''a derivative product that gives the holder an economic exposure, which can be long or short, to the change in price of a specific share over the life of the contract''), available at *http://www.fsa.gov.uk/pubs/cp/cp07_20.pdf* (Nov. 2007).

[597] *See, e.g.,* Int'l Swaps and Derivatives Ass'n, ''2002 ISDA Equity Derivatives Definitions,'' art. 10 (Dividends) and 11 (Adjustments and Modifications Affecting Indices, Shares and Transactions).

[598] In some cases, depending on the facts and circumstances, the SEC may determine that a particular CFD on an equity security, for example, should be characterized as constituting a purchase or sale of the underlying equity security and, therefore, be subject to the requirements of the Federal securities laws applicable to such purchases or sales.

[599] *See* Covington Letter and ICI/ABASA Letter.

[600] *See infra* note 606.

[601] *See* Proposing Release at 29839.

[602] For example, a company obligated to deliver its product to a customer in Los Angeles would instead deliver the product in Albany to a different company's customer on behalf of that other company. In return, the company with the obligation to deliver a product to its customer in Albany would deliver the product instead in Los Angeles to the customer of the company obligated to deliver its product to that customer in Los Angeles.

[603] *See, e.g., Haekel* v. *Refco,* 2000 WL 1460078, at *4 (CFTC Sept. 29, 2000) (''[T]he labels that parties apply to their transactions are not necessarily controlling''); *Reves* v. *Ernst & Young,* 494 U.S. 56, 61 (1990) (stating that the purpose of the securities laws is ''to regulate *investments,* in whatever form they are made and by whatever name they are called'') (emphasis in original).

[604] As noted in the Proposing Release, the CFTC consistently has found that the form of a transaction is not dispositive in determining its nature, citing *Grain Land, supra* note 213, at *16 (CFTC Nov. 25, 2003) (holding that contract substance is entitled to at least as much weight as form); *In the Matter of First Nat'l Monetary Corp.,* [1984–1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,698 at 30,974 (CFTC Aug. 7, 1985) (''When instruments have been determined to constitute the functional equivalent of futures contracts neither we nor the courts have hesitated to look behind whatever self-serving labels the instruments might bear.''); *Stovall, supra* note 63 (holding that the CFTC ''will not hesitate to look behind whatever label the parties may give to the instrument''). As also noted in the Proposing Release, the form of a transaction is not dispositive in determining whether an agreement, contract, or transaction falls within the regulatory regime for securities. *See SEC* v. *Merch. Capital, LLC,* 483 F.3d 747, 755 (11th Cir. 2007) (''The Supreme Court has repeatedly emphasized that economic reality is to govern over form and that the definitions of the various types of securities should not hinge on exact and literal tests.'') (quoting *Williamson* v. *Tucker,* 645 F.2d 404, 418 (5th Cir. 1981)); *Robinson* v. *Glynn,* 349 F.3d 166, 170 (4th Cir. 2003) (''What matters more than the form of an investment scheme is the 'economic reality' that it represents. * * *'') (internal citation omitted); *Caiola* v. *Citibank, N.A., New York,* 295 F.3d 312, 325 (2d Cir. 2002) (quoting *United Housing Foundation* v. *Foreman,* 421 U.S. 837, 848 (1975) (''In searching for the meaning and scope of the word 'security' * * * the emphasis should be on economic reality'')). *See* Proposing Release at 29839 n. 152.

[605] The Commissions note, though, that documentation is not controlling in evaluating whether an agreement, contract or transaction is a swap, security-based swap, or neither.

Comments

The Commissions requested comment regarding what agreements, contracts, or transactions that are not swaps or security-based swaps are documented using industry standard form agreements that are typically used for swaps and security-based swaps, and asked for examples thereof and details regarding their documentation, including why industry standard form agreements typically used for swaps and security-based swaps are used. One commenter stated its view that documentation can be a relevant factor in determining whether an agreement, contract or transaction is a swap or security-based swap.[606] The Commissions are persuaded by the commenter and are modifying the interpretation to clarify that in determining whether an agreement, contract or transaction is a swap or security-based swap, documentation may be a relevant (but not dispositive) factor.

2. Transactions in Regional Transmission Organizations and Independent System Operators

The CFTC declines to address the status of transactions in Regional Transmission Organizations (''RTOs'') and Independent System Operators (''ISOs''), including financial transmission rights (''FTRs'') and ancillary services, within this joint definitional rulemaking. As was noted in the Proposing Release, section 722 of the Dodd-Frank Act specifically addresses certain instruments and transactions regulated by FERC that also may be subject to CFTC jurisdiction. Section 722(f) added CEA section 4(c)(6),[607] which provides that, if the CFTC determines that an exemption for FERC-regulated instruments or other specified electricity transactions would be in accordance with the public interest, then the CFTC shall exempt such instruments or transactions from the requirements of the CEA. Given that specific statutory directive, the treatment of these FERC-regulated instruments and transactions should be considered under the standards and procedures specified in section 722 of the Dodd-Frank Act for a public interest waiver, rather than through this joint rulemaking to further define the terms ''swap'' and ''security-based swap.'' [608]

The CFTC notes that it has been engaged in discussions with a number of RTOs and ISOs regarding the possibility of a petition seeking an exemption pursuant to CEA section 4(c)(6) for certain RTO and ISO transactions. The CFTC also notes that the status of some RTO and ISO transactions may have been addressed in the interpretation above regarding embedded options and the forward exclusion from the swap definition,[609] and/or indirectly through the CFTC's recent interim final rulemaking relating to trade options.[610]

Comments

The CFTC received a number of comments discussing transactions in RTOs and ISOs.[611] These commenters argued that the CFTC should further define the term ''swap'' to exclude transactions executed or traded on RTOs and ISOs.[612] One commenter argued that the CEA section 4(c)(6) exemptive approach will leave regulatory ambiguity for market participants, since the CFTC might not grant an exemption, later revoke an existing exemption, grant a partial or conditional exemption, or limit an exemption to existing products.[613] This commenter also noted that FERC has complete regulatory authority over RTOs and ISOs and their transactions, and that Congress expected the CFTC and FERC to avoid duplicative, unnecessary regulation.[614] Another commenter argued that the CFTC should exclude RTO and ISO transactions in the same manner as insurance has been excluded.[615] A third commenter stated that RTO and ISO transactions are commercial merchandising transactions and thus forwards or, alternatively, that defining them as swaps is inconsistent with the text, goals, and purpose of the Dodd-Frank Act.[616]

By contrast, one commenter asserted that FTRs are in substance swaps and should be regulated as such.[617]

Two commenters supported the CFTC's use of its section 722(f) authority to exempt FERC-regulated transactions and other transactions in RTOs or ISOs.[618] As discussed above, section 722(f) of the Dodd-Frank Act added new section 4(c)(6) to the CEA specifically addressing how the CFTC should approach certain instruments and transactions regulated by FERC that also may be subject to CFTC jurisdiction. The CFTC continues to believe, as was stated in the Proposing Release, that such an approach is the more appropriate means of considering issues relating to the instruments and transactions specified in CEA section 4(c)(6). One commenter's argument that the CEA section 4(c)(6) exemptive approach will cause regulatory ambiguity is not a convincing basis on which to forego a process specifically designated by Congress for the issue at hand.[619] The CFTC also believes that the ability to tailor exemptive relief, after notice and public comment, to the complex issues presented by transactions on RTOs and ISOs, is further reason to favor such an approach over the more general directive to further define the terms ''swap'' and ''security-based swap'' that is the subject of this rulemaking.

In response to one commenter's contentions that FERC has complete regulatory authority over RTOs and ISOs and their transactions, and that Congress expected the CFTC and FERC to avoid duplicative, unnecessary regulation, the CFTC notes that Congress addressed this issue not by excluding RTO and ISO transactions from the comprehensive regime for swap regulation, but rather by enacting the exemptive process in CEA section 4(c)(6).

And in response to another commenter's contention that the CFTC should exclude RTO and ISO transactions in the same manner as insurance has been excluded, the CFTC notes that Congress provided neither an exemptive process equivalent to CEA section 4(c)(6) for insurance, nor an energy market-equivalent to the McCarran-Ferguson Act.[620]

As noted above, FERC staff opines that defining RTO and ISO transactions as swaps would be inconsistent with the text, goals, and purpose of the Dodd-Frank Act. The CFTC can consider concerns of the sort expressed by FERC staff in connection with any petition for a CEA section 4(c)(6) exemption that

[606] *See* IECA Letter. This commenter noted that ''[e]ven though swaps are commonly documented on the ISDA Master Agreements without annexes, physical transactions under such agreements with power or natural gas annexes are not swaps because they are physically settled forward contracts that are exempt under 1a47(B)''). *Id.*

[607] 7 U.S.C. 6(c)(6).

[608] The Commissions note that this approach should not be taken to suggest any finding by the Commissions as to whether or not FTRs or any other FERC-regulated instruments or transactions are swaps (or futures contracts).

[609] *See supra* part II.B.2(a).

[610] *See supra* note 317.

[611] *See* COPE Letter; ETA Letter; and FERC Staff Letter.

[612] *Id.*

[613] *See* COPE Letter.

[614] *Id.*

[615] *See* ETA Letter.

[616] *See* FERC Staff Letter.

[617] *See* Better Markets Letter.

[618] *See* NEMA Letter and WGCEF Letter.

[619] *See* COPE Letter.

[620] 15 U.S.C. 1011–1015.

may be submitted to the CFTC.[621] Interested parties on all sides of the issue would receive an opportunity to comment on the scope and other aspects of any proposed exemptive relief at that time.

III. The Relationship Between the Swap Definition and the Security-Based Swap Definition

A. Introduction

Title VII of the Dodd-Frank Act defines the term ''swap'' under the CEA,[622] and also defines the term ''security-based swap'' under the Exchange Act.[623] Pursuant to the regulatory framework established in Title VII, the CFTC has regulatory authority over swaps and the SEC has regulatory authority over security-based swaps. The Commissions are further defining the terms ''swap'' and ''security-based swap'' to clarify whether particular agreements, contracts, or transactions are swaps or security-based swaps based on characteristics including the specific terms and conditions of the instrument and the nature of, among other things, the prices, rates, securities, indexes, or commodities upon which the instrument is based.

Because the discussion below is focused on whether particular agreements, contracts, or transactions are swaps or security-based swaps, the Commissions use the term ''Title VII instrument'' in this release to refer to any agreement, contract, or transaction that is included in either the definition of the term ''swap'' or the definition of the term ''security-based swap.'' Thus, the term ''Title VII instrument'' is synonymous with ''swap or security-based swap.'' [624]

The determination of whether a Title VII instrument is either a swap or a security-based swap should be made based on the facts and circumstances relating to the Title VII instrument prior to execution, but no later than when the parties offer to enter into the Title VII instrument.[625] If the Title VII instrument itself is not amended, modified, or otherwise adjusted during its term by the parties, its characterization as a swap or security-based swap will not change during its duration because of any changes that may occur to the factors affecting its character as a swap or security-based swap.[626]

Classifying a Title VII instrument as a swap or security-based swap is straightforward for most instruments. However, the Commissions provided an interpretation in the Proposing Release to clarify the classification of swaps and security-based swaps in certain areas and to provide an interpretation regarding the use of certain terms and conditions in Title VII instruments. The Commissions are restating the interpretation set out in the Proposing Release with certain modifications to the interpretation regarding TRS.

B. Title VII Instruments Based on Interest Rates, Other Monetary Rates, and Yields

Parties frequently use Title VII instruments to manage risks related to, or to speculate on, changes in interest rates, other monetary rates or amounts, or the return on various types of assets. Broadly speaking, Title VII instruments based on interest or other monetary rates would be swaps, whereas Title VII instruments based on the yield or value of a single security, loan, or narrow-based security index would be security-based swaps. However, market participants and financial professionals sometimes use the terms ''rate'' and ''yield'' in different ways. The Commissions proposed an interpretation in the Proposing Release regarding whether Title VII instruments that are based on interest rates, other monetary rates, or yields would be swaps or security-based swaps and are restating the interpretation, but with a modification to the list of examples of reference rates to include certain secured lending rates under money market rates.[627] The Commissions find that this interpretation is an appropriate way to address Title VII instruments based on interest rates, other monetary rates, or yields and is designed to reduce costs associated with determining whether such instruments are swaps or security-based swaps.[628]

1. Title VII Instruments Based on Interest Rates or Other Monetary Rates That Are Swaps

The Commissions believe that when payments exchanged under a Title VII instrument are based solely on the levels of certain interest rates or other monetary rates that are not themselves based on one or more securities, the instrument would be a swap and not a security-based swap.[629] Often swaps on interest rates or other monetary rates require the parties to make payments based on the comparison of a specified floating rate (such as the London Interbank Offered Rate (''LIBOR'')) to a fixed rate of interest agreed upon by the parties. A rate swap also may require payments based on the differences between two floating rates, or it may require that the parties make such payments when any agreed-upon events with respect to interest rates or other monetary rates occur (such as when a specified interest rate crosses a threshold, or when the spread between two such rates reaches a certain point). The rates referenced for the parties' obligations are varied, and examples of such rates include the following:

Interbank Offered Rates: An average of rates charged by a group of banks for lending money to each other or other banks over various periods of time, and other similar interbank rates,[630] including, but not limited to, LIBOR (regardless of currency); [631] the Euro

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[621] CEA section 4(c)(6) requires the CFTC to determine that an exemption pursuant to such section ''is consistent with the public interest and the purposes of th[e CEA].'' 7 U.S.C. 6(c)(6).

[622] *See* section 1a(47) of the CEA, 7 U.S.C. 1a(47).

[623] *See* section 3(a)(68) of the Exchange Act, 15 U.S.C. 78c(a)(68).

[624] In some cases, the Title VII instrument may be a mixed swap. Mixed swaps are discussed further in section IV below.

[625] The determination must be made no later than when the parties offer to enter into the Title VII instrument because persons are prohibited from offering to sell, offering to buy or purchase, or selling a security-based swap to any person who is not an ECP unless a registration statement is in effect as to the security-based swap. *See* section 5(e) of the Securities Act. This analysis also would apply with respect to mixed swaps and security-based swap agreements. With respect to swaps, the determination also would need to be made no later than the time that provisions of the CEA and the regulations thereunder become applicable to a Title VII Instrument. For instance, certain duties apply to swaps prior to execution. *See Daily Trading Records under Rule 23.202 under the CEA,* 17 CFR 23.202, and Subpart H of Part 23 of the CFTC's regulations, 17 CFR Part 23, Subpart H (Business Conduct Standards for Swap Dealers and Major Swap Participants Dealing with Counterparties, Including Special Entities).

[626] *See infra* part III.G.5(a), for a discussion regarding the evaluation of Title VII Instruments on security indexes that move from broad-based to narrow-based or narrow-based to broad-based.

[627] These secured lending rates are the Eurepo, The Depository Trust & Clearing Corporation's General Collateral Finance Repo Index, the Repurchase Overnight Index Average Rate and the Tokyo Repo Rate.

[628] *See supra* part I, under ''Overall Economic Considerations''.

[629] *See infra* part III.F, regarding the use of certain terms and conditions.

[630] Interbank lending rates are measured by surveys of the loan rates that banks offer other banks, or by other mechanisms. The periods of time for such loans may range from overnight to 12 months or longer.

The interbank offered rates listed here are frequently called either a ''reference rate,'' the rate of ''reference banks,'' or by a designation that is specific to the service that quotes the rate. For some of the interbank offered rates listed here, there is a similar rate that is stated as an interbank bid rate, which is the average rate at which a group of banks bid to borrow money from other banks. For example, the bid rate similar to LIBOR is called LIBID.

[631] Today, LIBOR is used as a rate of reference for the following currencies: Australian Dollar,

Interbank Offered Rate (''Euribor''); the Canadian Dealer Offered Rate (''CDOR''); and the Tokyo Interbank Offered Rate (''TIBOR'');[632]

Money Market Rates: A rate established or determined based on actual lending or money market transactions, including, but not limited to, the Federal Funds Effective Rate; the Euro Overnight Index Average (''EONIA'' or ''EURONIA'') (which is the weighted average of overnight unsecured lending transactions in the Euro-area interbank market); the EONIA Swap Index; the Eurepo (the rate at which, at 11.00 a.m. Brussels time, one bank offers, in the euro-zone and worldwide, funds in euro to another bank if in exchange the former receives from the latter the best collateral within the most actively-traded European repo market); the Australian dollar RBA 30 Interbank Overnight Cash Rate; the Canadian Overnight Repo Rate Average (''CORRA''); The Depository Trust & Clearing Corporation's General Collateral Finance (''GCF'') Repo Index (an average of repo rates collateralized by U.S. Treasury and certain other securities); the Mexican interbank equilibrium interest rate (''TIIE''); the NZD Official Cash Rate; the Sterling Overnight Interbank Average Rate (''SONIA'') (which is the weighted average of unsecured overnight cash transactions brokered in London by the Wholesale Markets Brokers' Association (''WMBA'')); the Repurchase Overnight Index Average Rate (''RONIA'') (which is the weighted average rate of all secured overnight cash transactions brokered in London by WMBA); the Swiss Average Rate Overnight (''SARON''); the Tokyo Overnight Average Rate (''TONAR'') (which is based on uncollateralized overnight average call rates for interbank lending); and the Tokyo Repo Rate (average repo rate of active Japanese repo market participants).

Government Target Rates: A rate established or determined based on guidance established by a central bank including, but not limited to, the Federal Reserve discount rate, the Bank of England base rate and policy rate, the Canada Bank rate, and the Bank of Japan policy rate (also known as the Mutan rate);

General Lending Rates: A general rate used for lending money, including, but not limited to, a prime rate, rate in the commercial paper market, or any similar rate provided that it is not based on any security, loan, or group or index of securities;

Indexes: A rate derived from an index of any of the foregoing or following rates, averages, or indexes, including but not limited to a constant maturity rate (U.S. Treasury and certain other rates),[633] the interest rate swap rates published by the Federal Reserve in its ''H.15 Selected Interest Rates'' publication, the ISDAFIX rates, the ICAP Fixings, a constant maturity swap, or a rate generated as an average (geometric, arithmetic, or otherwise) of any of the foregoing, such as overnight index swaps (''OIS'')—provided that such rates are not based on a specific security, loan, or narrow-based group or index of securities;

Other Monetary Rates: A monetary rate including, but not limited to, the Consumer Price Index (''CPI''), the rate of change in the money supply, or an economic rate such as a payroll index; and

Other: The volatility, variance, rate of change of (or the spread, correlation or difference between), or index based on any of the foregoing rates or averages of such rates, such as forward spread agreements, references used to calculate the variable payments in index amortizing swaps (whereby the notional principal amount of the agreement is amortized according to the movement of an underlying rate), or correlation swaps and basis swaps, including but not limited to, the ''TED spread'' [634] and the spread or correlation between LIBOR and an OIS.

As discussed above, the Commissions believe that when payments under a Title VII instrument are based solely on any of the foregoing, such Title VII instrument would be a swap.

Comments

Two commenters believed that constant maturity swaps always should be treated as swaps, rather than mixed swaps, because they generally are viewed by market participants as rates trades instead of trades on securities.[635] According to the commenters, the ''bulk'' of constant maturity swaps are based on exempted securities, but the commenters noted that the constant maturity leg may be based on a number of different rates or yields, including, among other things, U.S. Treasury yields, Treasury auction rates, yields on debt of foreign governments, and debt related to indices of mortgage-backed securities.[636] As discussed above, the Commissions are adopting the interpretation as proposed. The statutory language of the swap and security-based swap definitions explicitly states that a Title VII instrument that is based on a non-exempted security should be a security-based swap and not a swap.[637]

2. Title VII Instruments Based on Yields

The Commissions proposed an interpretation in the Proposing Release clarifying the status of Title VII instruments in which one of the underlying references of the instrument is a ''yield.'' The Commissions received no comments on the interpretation set out in the Proposing Release regarding Title VII instruments based on yields and are restating the interpretation without modification. In cases when a ''yield'' is calculated based on the price or changes in price of a debt security, loan, or narrow-based security index, it is another way of expressing the price or value of a debt security, loan, or narrow-based security index. For example, debt securities often are quoted and traded on a yield basis rather than on a dollar price, where the yield relates to a specific date, such as the date of maturity of the debt security (*i.e.,* yield to maturity) or the date upon which the debt security may be redeemed or called by the issuer (*e.g.,* yield to first whole issue call).[638]

Except in the case of certain exempted securities, when one of the underlying

Canadian Dollar, Danish Krone, Euro, Japanese Yen, New Zealand Dollar, Pound Sterling, Swedish Krona, Swiss Franc, and U.S. Dollar.

[632] Other interbank offered rates include the following (with the country or city component of the acronym listed in parentheses): AIDIBOR (Abu Dhabi); BAIBOR (Buenos Aires); BKIBOR (Bangkok); BRAZIBOR (Brazil); BRIBOR/BRIBID (Btatislava); BUBOR (Budapest); CHIBOR (China); CHILIBOR (Chile); CIBOR (Copenhagen); COLIBOR (Columbia); HIBOR (Hong Kong); JIBAR (Johannesburg); JIBOR (Jakarta); KAIBOR (Kazakhstan); KIBOR (Karachi); KLIBOR (Kuala Lumpur); KORIBOR ((South) Korea); MEXIBOR (Mexico); MIBOR (Mumbai); MOSIBOR (Moscow); NIBOR (Norway); PHIBOR (Philippines); PRIBOR (Prague); REIBOR/REIBID (Reykjavik); RIGIBOR/RIGIBID (Riga); SHIBOR (Shanghai); SIBOR (Singapore); SOFIBOR (Sofia); STIBOR (Stockholm); TAIBOR (Taiwan); TELBOR (Tel Aviv); TRLIBOR and TURKIBOR (Turkey); VILIBOR (Vilnius); VNIBOR (Vietnam); and WIBOR (Warsaw).

[633] A Title VII instrument based solely on the level of a constant maturity U.S. Treasury rate would be a swap because U.S. Treasuries are exempted securities that are excluded from the security-based swap definition. Conversely, a Title VII instrument based solely on the level of a constant maturity rate on a narrow-based index of non-exempted securities under the security-based swap definition would be a security-based swap.

[634] The TED spread is the difference between the interest rates on interbank loans and short-term U.S. government debt (Treasury bills or ''T-bills''). The latter are exempted securities that are excluded from the statutory definition of the term ''security-based swap.'' Thus, neither any aspect of U.S. Treasuries nor interest rates on interbank loans can form the basis of a security-based swap. For this reason, a Title VII instrument on a spread between interbank loan rates and T-bill rates also would be a swap, not a security-based swap.

[635] *See* CME Letter and SIFMA Letter.

[636] *Id.*

[637] *See supra* note 633.

[638] *See, e.g., Securities Confirmations,* 47 FR 37920 (Aug. 27, 1982).

references of the Title VII instrument is the ''yield'' of a debt security, loan, or narrow-based security index in the sense where the term ''yield'' is used as a proxy for the price or value of the debt security loan, or narrow-based security index, the Title VII instrument would be a security-based swap. And, as a result, in cases where the underlying reference is a point on a ''yield curve'' generated from the different ''yields'' on debt securities in a narrow-based security index (*e.g.,* a constant maturity yield or rate), the Title VII instrument would be a security-based swap. However, where certain exempted securities, such as U.S. Treasury securities, are the only underlying reference of a Title VII instrument involving securities, the Title VII instrument would be a swap. Title VII instruments based on exempted securities are discussed further below.

The above interpretation would not apply in cases where the ''yield'' referenced in a Title VII instrument is not based on a debt security, loan, or narrow-based security index of debt securities but rather is being used to reference an interest rate or monetary rate as outlined above in subsection one of this section. In these cases, this ''yield'' reference would be considered equivalent to a reference to an interest rate or monetary rate and the Title VII instrument would be, under the interpretation in this section, a swap (or mixed swap depending on other references in the instrument).

3. Title VII Instruments Based on Government Debt Obligations

The Commissions provided an interpretation in the Proposing Release regarding instances in which the underlying reference of the Title VII instrument is a government debt obligation. The Commissions received no comments on the interpretation provided regarding instances in which the underlying reference of the Title VII instrument is a government debt obligation and are restating such interpretation without modification.

The security-based swap definition specifically excludes any agreement, contract, or transaction that meets the definition of a security-based swap only because it ''references, is based upon, or settles through the transfer, delivery, or receipt of an exempted security under [section 3(a)(12) of the Exchange Act], as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in [section 3(a)(29) of the Exchange Act] * * *), unless such agreement, contract, or transaction is of the character of, or is commonly known in the trade as, a put, call, or other option.'' [639]

As a result of this exclusion in the security-based swap definition for ''exempted securities,''[640] if the only underlying reference of a Title VII instrument involving securities is, for example, the price of a U.S. Treasury security and the instrument does not have any other underlying reference involving securities, then the instrument would be a swap. Similarly, if the Title VII instrument is based on the ''yield'' of a U.S. Treasury security and does not have any other underlying reference involving securities, then the instrument also would be a swap, regardless of whether the term ''yield'' is a proxy for the price of the security.

Foreign government securities, by contrast, were not ''exempted securities'' as of the date of enactment of the Futures Trading Act of 1982 [641] and thus do not explicitly fall within this exclusion from the security-based swap definition. Therefore, if the underlying reference of the Title VII instrument is the price, value, or ''yield'' (where ''yield'' is a proxy for price or value) of a foreign government security, or a point on a yield curve derived from a narrow-based security index composed of foreign government securities, then the instrument is a security-based swap.

C. Total Return Swaps

The Commissions are restating the interpretation regarding TRS set out in the Proposing Release with certain changes with respect to quanto and compo equity TRS and loan TRS based on two or more loans, and to reflect that TRS can overlie reference items other than securities, loans, and indexes of securities or loans.[642] The Commissions find that this interpretation is an appropriate way to address TRS and is designed to reduce the cost associated with determining whether a TRS is a swap or a security-based swap.[643]

As was described in the Proposing Release,[644] a TRS is a Title VII instrument in which one counterparty, the seller of the TRS, makes a payment that is based on the price appreciation and income from an underlying security or security index.[645] A TRS also can overlie a single loan, two or more loans and other underliers. The other counterparty, the buyer of the TRS, makes a financing payment that is often based on a variable interest rate, such as LIBOR (or other interbank offered rate or money market rate, as described above), as well as a payment based on the price depreciation of the underlying reference. The ''total return'' consists of the price appreciation or depreciation, plus any interest or income payments.[646] Accordingly, where a TRS is based on a single security or loan, or a narrow-based security index, the TRS would be a security-based swap.[647]

In addition, the Commissions are providing a final interpretation providing that, generally, the use of a variable interest rate in the TRS buyer's payment obligations to the seller is incidental to the purpose of, and the risk that the counterparties assume in, entering into the TRS, because such payments are a form of financing reflecting the seller's (typically a security-based swap dealer) cost of financing the position or a related hedge, allowing the TRS buyer to receive payments based on the price appreciation and income of a security or security index without purchasing the security or security index. As stated in

[639] Section 3(a)(68)(C) of the Exchange Act, 15 U.S.C. 76c(a)(68)(C).

[640] As of January 11, 1983, the date of enactment of the Futures Trading Act of 1982, Public Law 97–444, 96 Stat. 2294, section 3(a)(12) of the Exchange Act, 15 U.S.C. 78c(a)(12), provided that, among other securities, ''exempted securities'' include: (i) Securities which are direct obligations of, or obligations guaranteed as to principal or interest by, the United States; (ii) certain securities issued or guaranteed by corporations in which the United States has a direct or indirect interest as designated by the Secretary of the Treasury; and (iii) certain other securities as designated by the SEC in rules and regulations.

[641] Public Law 97–444, 96 Stat. 2294 (1983).

[642] While this guidance focuses on TRS overlying securities and loans, TRS also may overlie other commodities. Such TRS may be structured differently due to the nature of the underlying.

[643] *See supra* part I, under ''Overall Economic Considerations.''

[644] *See* Proposing Release at 29842.

[645] Where the underlying security is an equity security, a TRS is also known as an ''equity swap.'' A bond may also be the underlying security of a TRS.

[646] If the total return is negative, the seller receives this amount from the buyer. TRS can be used to synthetically reproduce the payoffs of a position. For example, two counterparties may enter into a 3-year TRS where the buyer of the TRS receives the positive total return on XYZ security, if any, and the seller of the TRS receives LIBOR plus 30 basis points and the absolute value of the negative total return on XYZ security, if any.

[647] However, if the underlying reference of the TRS is a broad-based security index, it is a swap (and an SBSA) and not a security-based swap. In addition, a TRS on an exempted security, such as a U.S. Treasury, under section 3(a)(12) of the Exchange Act, 15 U.S.C. 78c(a)(12), as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in section 3(a)(29) of the Exchange Act, 15 U.S.C. 78c(a)(29), as in effect on the date of enactment of the Futures Trading Act of 1982), is a swap (and an SBSA), and not a security-based swap. Similarly, and as discussed in more detail below, an LTRS based on two or more loans that are not securities (''non-security loans'') are swaps, and not security-based swaps.

the Proposing Release, the Commissions believe that when such interest rate payments act merely as a financing component in a TRS, or in any other security-based swap, the inclusion of such interest rate terms would not cause the TRS to be characterized as a mixed swap.[648] Financing terms may also involve adding or subtracting a spread to or from the financing rate,[649] or calculating the financing rate in a currency other than that of the underlying reference security or security index.[650]

However, where such payments incorporate additional elements that create additional interest rate or currency exposures that are unrelated to the financing of the security-based swap, or otherwise shift or limit risks that are related to the financing of the security-based swap, those additional elements may cause the security-based swap to be a mixed swap. For example, where the counterparties embed interest-rate optionality (*e.g.,* a cap, collar, call, or put) into the terms of a security-based swap in a manner designed to shift or limit interest rate exposure, the inclusion of these terms would cause the TRS to be both a swap and a security-based swap (*i.e.,* a mixed swap). Similarly, if a TRS is also based on non-security-based components (such as the price of oil, or a currency), the TRS would also be a mixed swap.[651]

The Commissions also are providing an additional interpretation regarding a quanto equity swap, in response to comments raised by one commenter,[652] and for illustrative purposes, a similar but contrasting product, a compo equity swap. A quanto equity swap, which ''can provide a U.S. investor with currency-protected exposure to a non-U.S. equity index by translating the percentage equity return in the currency of such non-U.S. equity index into U.S. dollars,'' [653] can be described as:

> An equity swap in which [(1)] the underlying is denominated in a currency (the foreign currency) other than that in which the equity swap is denominated (the domestic currency) * * * [and (2) t]he final value of the underlying is denominated in the foreign currency and is converted into the domestic currency using the exchange rate prevailing at inception[,] result[ing in] the investor * * * not [being] exposed to currency risk.[654]

While a quanto equity swap, therefore, effectively ''exposes the dealer on the foreign leg of the correlation product to a variable notional principal amount that changes whenever the exchange rate or the foreign index fluctuates,'' [655] such exposure results from the choice of hedges for the quanto equity swap, not from the cash flows of the quanto equity swap itself.[656] Thus, that exposure could be viewed as created in the seller by the act of entering into the quanto equity swap, rather than as a transfer between the parties, as is required by the third prong of the statutory swap definition. Consequently, the dealer's exchange rate exposure could be seen as incidental to the securities exposure desired by the party initiating the quanto equity swap.

The Commissions view a quanto equity swap as a security-based swap, and not a mixed swap, where (i) the purpose of the quanto equity swap is to transfer exposure to the return of a security or security index without transferring exposure to any currency or exchange rate risk; and (ii) any exchange rate or currency risk exposure incurred by the dealer due to a difference in the currency denomination of the quanto equity swap and of the underlying security or security index is incidental to the quanto equity swap and arises from the instrument(s) the dealer chooses to use to hedge the quanto equity swap and is not a direct result of any expected payment obligations by either party under the quanto equity swap.[657]

By contrast, in a compo equity swap, the parties assume exposure to, and the total return is calculated based on, both the performance of specified foreign stocks and the change in the relevant exchange rate.[658] Because the counterparty initiating a transaction can choose to avoid currency exposure by entering into a quanto equity swap, the currency exposure obtained via a compo equity swap is not incidental to the equity exposure for purposes of determining mixed swap status. In fact, investors seeking synthetic exposure to foreign securities via a TRS may also be seeking exposure to the exchange rate between the currencies, as evidenced by the fact that a number of mutual funds exist in both hedged and unhedged versions to provide investors exposure to the same foreign securities with or without the attendant currency

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[648] *See infra* part IV.

[649] *See, e.g.,* Moorad Chowdry, ''Total Return Swaps: Credit Derivatives and Synthetic Funding Instruments,'' at 3–4 (noting that the spread to the TRS financing rate is a function of: The credit rating of the counterparty paying the financing rate; the amount, value, and credit quality of the reference asset; the dealer's funding costs; a profit margin; and the capital charge associated with the TRS), available at *http://www.yieldcurve.com/Mktresearch/LearningCurve/TRS.pdf.*

[650] For example, a security-based swap on an equity security priced in U.S. dollars in which payments are made in Euros based on the U.S. dollar/Euro spot rate at the time the payment is made would not be a mixed swap. As the Commissions stated in the Proposing Release, under these circumstances, the currency is merely referenced in connection with the method of payment, and the counterparties are not hedging the risk of changes in currency exchange rates during the term of the security-based swap *See* Proposing Release at 29842, n. 176.

[651] *See* Mixed Swaps, *infra* part IV.

[652] *See* SIFMA Letter.

[653] *Id.*

[654] *Handbook of Corporate Equity Derivatives and Equity Capital Markets* (''Corporate Equity Derivatives Handbook''), § 1.2.10, at 23, available at *http://media.wiley.com/product_data/excerpt/05/11199759/1119975905-83.pdf* last visited May 4, 2012.

[655] James M. Mahoney, *Correlation Products and Risk Management Issues,* FRBNY Economic Policy Review/October 1995 at 2, available at *http://www.ny.frb.org/research/epr/95v01n3/9510maho.pdf* last visited May 4, 2012.

[656] While applicable in general, this logic, which merely expands upon the principle that the character of a Title VII instrument as either a swap or a security-based swap should follow the underlying factors which are incorporated into the cash flows of the instrument—a security, yield, loan, or other trigger for SEC jurisdiction or as a commodity triggering CFTC jurisdiction (or both for joint jurisdiction), should not be extrapolated to other Title VII instruments, for which other principles may override.

[657] Although the SIFMA Letter describes quanto equity swaps in terms of equity indexes, if the underlying reference of a quanto equity swap is a single security, the result would be the same. The Commissions also note that if a security index underlying a quanto equity swap is not narrow-based, the quanto equity swap is a swap. In that event, it is not a mixed swap because no element of the quanto equity swap is a security-based swap and, to be a mixed swap, a Title VII instrument must have both swap and security-based swap components.

[658] *See generally Corporate Equity Derivatives Handbook, supra* note 654, § 1.2.9, at 21–23.

exposure.[659] Consequently, a compo equity swap is a mixed swap.[660]

In response to comments,[661] the Commissions also are providing an interpretation with respect to the treatment of loan TRS (''LTRS'') on two or more loans. As noted above, the second prong of the security-based swap definition includes a swap that is based on ''a single security or loan, including any interest therein or on the value thereof.'' Thus, an LTRS based on a single loan, as mentioned above, is a security-based swap. The Commissions believe, however, that an LTRS based on two or more non-security loans are swaps, and not security-based swaps.[662] An LTRS on a group or index of such non-security loans is not covered by the first prong of the security-based swap definition—swaps based on a narrow-based security index—because the definition of the term ''narrow-based security index'' in both the CEA and the Exchange Act only applies to securities, and not to non-security loans.[663] An LTRS, moreover, is not covered by the third prong of the security-based swap definition because it is based on the total return of such loans, and not events related thereto. Accordingly, an LTRS on two or more loans that are non-security loans is a swap and not a security-based swap.[664]

Comments

The Commissions received three comments with respect to the interpretation provided on TRS in the Proposing Release.[665] One of these commenters addressed the Commissions' interpretation on security-based TRS.[666] The other two commenters requested that the Commissions clarify the treatment of LTRS on two or more loans.[667]

One commenter asserted that the terms of a TRS that create interest rate or currency exposures incidental to the primary purpose of the TRS should not cause a transaction that otherwise would be deemed to be a security-based swap to be characterized as a mixed swap.[668] This commenter agreed with the Commissions that the scope of the mixed swap category of Title VII instruments is intended to be narrow and that, when variable interest rates are used for financing purposes incidental to counterparties' purposes, and risks assumed, in entering into a TRS, the TRS is a security-based swap and not a mixed swap.[669]

This commenter also opined that the Commissions' interpretation that ''where such payments incorporate additional elements that create additional interest rate or currency exposures * * * unrelated to the financing of the [TRS], or otherwise shift or limit risks that are related to the financing of the [TRS], those additional elements may cause the [TRS] to be a mixed swap'' could be seen as requiring a quantitative analysis to determine whether a reference to interest rates or currencies in a TRS is solely for financing purposes or creates additional exposure that might be construed as extending beyond those purposes.[670]

The Commissions are clarifying that a quantitative analysis is not necessarily required in order to determine whether a TRS is a mixed swap. Any analysis, quantitative or qualitative, clearly demonstrating the nature of a payment (solely financing-related, unrelated to financing or a combination of the two) can suffice.[671]

The Commissions also are clarifying that market participants are not necessarily required to compare their financing rates to market financing rates in order to determine whether the financing leg of a TRS is merely a financing leg or is sufficient to render the TRS a mixed swap. Because a number of factors can influence how a particular TRS is structured,[672] the Commissions cannot provide an interpretation applicable to all situations. If the financing leg of a TRS reflects the dealer's financing costs on a one-to-one basis, the Commissions would view such leg as a financing leg. Adding a spread would not alter that conclusion if the spread is consistent with the dealer's course of dealing generally, with respect to a particular type of TRS or with respect to a particular counterparty. The Commissions believe that this would be the case even if the spread is ''off-market,'' if the deviance from a market spread is explained by factors unique to the dealer (*e.g.,* the dealer has high financing costs), to the TRS (*e.g.,* the underlying securities are highly illiquid, so financing them is more costly than would be reflected in a ''typical'' market spread for other TRS) or to then-current market conditions (*e.g.,* a share repurchase might make shares harder

[659] *See, e.g.,* Descriptive Brochure: The Tweedy, Browne Global Value Fund II—Currency Unhedged at 1, available at *http://www.tweedy.com/resources/gvf2/TBGVF-II_verJuly2011.pdf* (last visited May 4, 2012) (comparing the Tweedy, Browne Global Value Fund II—Currency Unhedged and the Tweedy, Browne Global Value Fund (which hedges its currency exposure) and stating that ''[t]he only material difference [between the funds] is that the Unhedged Global Value Fund generally does not hedge currency risk [and] is designed for long-term value investors who wish to focus their investment exposure on foreign stock markets, and their associated non-U.S. currencies'' and ''[b]y establishing the Tweedy, Browne Global Value Fund II—Currency Unhedged, we were acknowledging that many investors may view exposure to foreign currency as another form of diversification when investing outside the U.S., and/or may have strong opinions regarding the future direction of the U.S. dollar.''). *See also* the PIMCO Foreign Bond Fund (Unhedged) Fact Sheet at 1 (stating that ''[t]he fund seeks to capture the returns of non-U.S. bonds including potential returns due to changes in exchange rates. In a declining dollar environment foreign currency appreciation may augment the returns generated by investments in foreign bonds.''), available at *http://investments.pimco.com/Shareholder Communications/External%20Documents/Foreign %20Bond%20Fund%20(Unhedged)%20 Institutional.pdf* last visited May 4, 2012 and the PIMCO Foreign Bond Fund (U.S. Dollar-Hedged) INSTL Fact Sheet at 1 (stating that ''[t]he fund seeks to capture the returns of non-U.S. bonds but generally hedges out most currency exposure in order to limit the volatility of returns.''), available at *http://investments.pimco.com/Shareholder Communications/External%20Documents/Foreign %20Bond%20Fund%20(U.S.%20Dollar-Hedged) %20Institutional.pdf* (last visited May 4, 2012).

[660] Such swaps are examples of swaps with payments that ''incorporate additional elements that create additional * * * currency exposures * * * unrelated to the financing of the security-based swap * * * that may cause the security-based swap to be a mixed swap.'' *See* Proposing Release at 29842.

[661] *See infra* note 667 and accompanying text.

[662] Depending on the facts and circumstances loans may be notes or evidences of indebtedness that are securities. *See* section 3(a)(10) of the Exchange Act. In this section, the Commissions address only groups or indexes of loans that are not securities.

[663] *See* CEA section 1a(35), 7 U.S.C. 1a(35), and section 3(a)(55) of the Exchange Act, 15 U.S.C. 78c(a)(55).

[664] The same would be true with respect to swaps (*e.g.,* options, CFDs, NDFs), other than LTRS or loan index credit default swaps, on two or more loans that are not securities.

[665] *See* July LSTA Letter; Letter from David Lucking, Allen & Overy LLP, dated May 26, 2011 (''Allen & Overy Letter''); and SIFMA Letter.

[666] *See* SIFMA Letter.

[667] *See* Allen & Overy Letter and July LSTA Letter.

[668] *See* SIFMA Letter.

[669] *Id.*

[670] *Id.* SIFMA added that such a determination could require market participants to determine whether a specific interest rate or spread referenced in the TRS is sufficiently in line with market rates to constitute a financing leg of a transaction under the proposed test. SIFMA continues by noting that there are a number of examples where a TRS can provide for some interest rate or currency exposure incidental to the primary purpose of the TRS, describing a quanto equity swap as an example.

[671] To the extent a market participant is uncertain as to the results of such an analysis, it may seek informal guidance from the Commissions' staffs or use the process established in this release, *see infra* part VI, for seeking formal guidance from the Commissions as to the nature of a Title VII instrument as a swap, security-based swap or mixed swap.

[672] For example, the Commissions would expect a dealer perceived by the market to constitute a higher counterparty risk to have higher funding costs generally, which might affect its TRS financing costs. To the extent such a dealer passed through its higher TRS financing costs to its TRS counterparty, such a pass-through simply would reflect the dealer's specific circumstances, and would not transform the TRS from a security-based swap into a mixed swap.

for a dealer to procure in order to hedge its obligations under a TRS to pay its counterparty the capital appreciation of a security, resulting in higher financing costs due to the decrease in shares outstanding, assuming demand for the shares does not change). If the spread is designed to provide exposure to an underlying reference other than securities, however, rather than to reflect financing costs, such a TRS is a mixed swap.

Market participants are better positioned than are the Commissions to determine what analysis, and what supporting information and materials, best establish whether the nature of a particular payment reflects financing costs alone, or something more. Moreover, the Commissions expect that a dealer would know if the purpose of the payment(s) in question is to cover its cost of financing a position or a related hedge.[673] In such cases, a detailed analysis should not be necessary.

One commenter noted the nature of quanto equity swaps as TRS and maintained that such a transaction ''is equivalent to a financing of a long position in the underlying non-U.S. equity index[]'' and that the currency protection is incidental to the financing element, which is the primary purpose of the TRS.[674] As discussed above, the Commissions have provided a final interpretation regarding the appropriate classification of Title VII instruments that are quanto equity swaps and compo equity swaps.

Two commenters requested that the Commissions clarify the status of LTRS on two or more loans.[675] Both commenters stated that while the statutory definition of the term ''security-based swap'' provides that swaps based on a single loan are security-based swaps, it does not explicitly provide whether swaps on indexes of loans are security-based swaps.[676] They requested clarification regarding the treatment of loan based swaps, including both LTRS and loan index credit default swaps.[677]

The Commissions have provided the final interpretation discussed above regarding LTRS based on two or more loans that are not securities. The Commissions acknowledge that this interpretation results in different treatment for an LTRS on two non-security loans (a swap), as opposed to a Title VII instrument based on two securities (a security-based swap). This result, however, is dictated by the statute.

D. Security-Based Swaps Based on a Single Security or Loan and Single-Name Credit Default Swaps

The Commissions provided an interpretation in the Proposing Release regarding security-based swaps based on a single security or loan and single-name CDS [678] and are restating such interpretation with certain modifications in response to commenters.[679] The second prong of the statutory security-based swap definition includes a swap that is based on ''a single security or loan, including any interest therein or on the value thereof.'' [680] The Commissions believe that under this prong of the security-based swap definition, a single-name CDS that is based on a single reference obligation would be a security-based swap because it would be based on a single security or loan (or any interest therein or on the value thereof).

In addition, the third prong of the security-based swap definition includes a swap that is based on the occurrence of an event relating to a ''single issuer of a security,'' provided that such event ''directly affects the financial statements, financial condition, or financial obligations of the issuer.'' [681] This provision applies generally to event-triggered swap contracts. With respect to a CDS, such events could include, for example, the bankruptcy of an issuer, a default on one of an issuer's debt securities, or the default on a non-security loan of an issuer.[682]

The Commissions believe that if the payout on a CDS on a single issuer of a security is triggered by the occurrence of an event relating to that issuer, the CDS is a security-based swap under the third prong of the statutory security-based swap definition.[683]

In relation to aggregations of transactions under a single ISDA Master Agreement,[684] the Commissions are revising the example that was included in the Proposing Release referring to single-name CDS to clarify that the interpretation regarding aggregations of transactions is non-exclusive and thus not limited to either CDS or single-reference instruments.[685]

The Commissions believe that each transaction under an ISDA Master Agreement would need to be analyzed to determine whether it is a swap or security-based swap. For example, the Commissions believe that a number of Title VII instruments that are executed at the same time and that are documented under one ISDA Master Agreement, but in which a separate confirmation is sent for each instrument, should be treated as an aggregation of such Title VII instruments, each of which must be analyzed separately under the swap and security-based swap definitions.[686] The Commissions believe that, as a practical and economic matter, each such Title VII instrument would be a separate and independent transaction. Thus, such an aggregation of Title VII instruments would not constitute a Title VII instrument based on one ''index or group'' [687] under the security-based swap definition but instead would constitute multiple Title VII instruments. The Commissions find that this interpretation is an appropriate way to address CDS, TRS or other Title VII instruments referencing a single security or loan or entity that is documented under a Master Agreement or Master Confirmation and is designed to reduce the cost associated with determining

[673] The Commissions expect that dealers know their financing costs and can readily explain the components of the financing leg paid by their TRS counterparties.

[674] *Id.* SIFMA distinguished quanto equity swaps from the examples of mixed swaps that the Commissions provided in the Proposing Release, characterizing them as ''very different.''

[675] *See* Allen & Overy Letter and July LSTA Letter.

[676] *See* Allen & Overy Letter. Allen & Overy notes that a Title VII Instrument that references two securities is a security-based swap. It believes that treating an LTRS on two or more loans as a swap would result in functionally and potentially economically similar products being treated in an arbitrarily different way, contrary to the spirit of the Dodd-Frank Act.

[677] The Commissions address the comments regarding loan index credit default swaps below. *See infra* note 768 and accompanying text.

[678] *See* Proposing Release at 29843.

[679] *See infra* note 689 and accompanying text.

[680] Section 3(a)(68)(A)(ii)(II) of the Exchange Act, 15 U.S.C. 78c(a)(68)(A)(ii)(II). The first prong of the security-based swap definition is discussed below. *See infra* part III.G.

[681] Section 3(a)(68)(A)(ii)(III) of the Exchange Act, 15 U.S.C. 78c(a)(68)(A)(ii)(III).

[682] The Commissions understand that in the context of credit derivatives on asset-backed securities or MBS, the events include principal writedowns, failure to pay principal and interest shortfalls.

[683] The Commissions understand that some single-name CDS now trade with fixed coupon payments expressed as a percentage of the notional amount of the transaction and payable on a periodic basis during the term of the transaction. *See* Markit, ''The CDS Big Bang: Understanding the Changes to the Global CDS Contract and North American Conventions,'' 3, available at *http://www.markit.com/cds/announcements/resource/cds_big_bang.pdf*. The Commissions are restating their view that the existence of such single-name CDS does not change their interpretation.

[684] *See* Proposing Release at 29843.

[685] *See infra* note 689 and accompanying text.

[686] *See infra* note 691.

[687] The security-based swap definition further defines ''index to include an ''index or group of securities.'' *See* section 3(a)(68)(E) of the Exchange Act, 15 U.S.C. 78c(a)(68)(E).

whether such instruments are swaps or security-based swaps.[688]

Comments

The Commissions received two comments regarding the interpretation regarding aggregation of Title VII instruments under a single ISDA Master Agreement. One commenter requested that the Commissions clarify that the interpretation applies to other types of instruments, such as TRS, in addition to CDS.[689] The commenter also stated that the interpretation should be helpful with respect to use of a ''Master Confirmation'' structure, which the commenter described as use of general terms in a ''Master Confirmation'' that apply to a number of instruments with separate underlying references but for which a separate ''Supplemental Confirmation'' is sent for each separate component.[690]

A second commenter agreed with the Commissions' interpretation that a number of single-name CDS that are executed at the same time and that are documented under one ISDA Master Agreement, but in which a separate confirmation is sent for each CDS, should not be treated as a single index CDS and stated that this approach is consistent with market practice.[691]

As discussed above, in response to comments the Commissions are expanding the example so it is clear that it applies beyond just CDS.[692]

E. Title VII Instruments Based on Futures Contracts

The Commissions proposed an interpretation in the Proposing Release regarding the treatment, generally, of swaps based on futures contracts.[693] The Commissions are restating the interpretation they provided in the Proposing Release without modification. The Commissions also discussed in the Proposing Release the unique circumstance involving certain futures contracts on foreign government debt securities and requested comment as to how Title VII instruments on these futures contracts should be treated.[694] In response to commenters,[695] the Commissions are adopting a rule regarding the treatment of Title VII instruments on certain futures contracts on foreign government debt securities.[696]

A Title VII instrument that is based on a futures contract will either be a swap or a security-based swap, or both (i.e., a mixed swap), depending on the nature of the futures contract, including the underlying reference of the futures contract. Thus, a Title VII instrument where the underlying reference is a security future is a security-based swap.[697] In general, a Title VII instrument where the underlying reference is a futures contract that is not a security future is a swap.[698] As the Commissions noted in the Proposing Release,[699] Title VII instruments involving certain futures contracts on foreign government debt securities present a unique circumstance, which is discussed below.

Rule 3a12–8 under the Exchange Act exempts certain foreign government debt securities, for purposes only of the offer, sale, or confirmation of sale of futures contracts on such foreign government debt securities, from all provisions of the Exchange Act which by their terms do not apply to an ''exempted security,'' subject to certain conditions.[700] To date, the SEC has enumerated within rule 3a12–8 the debt securities of 21 foreign governments solely for purposes of futures trading (''21 enumerated foreign governments'').[701]

The Commissions recognize that as a result of rule 3a12–8, futures contracts on the debt securities of the 21 enumerated foreign governments that satisfy the conditions of rule 3a12–8 are subject to the CFTC's exclusive jurisdiction and are not considered security futures. As a result, applying the interpretation above to a Title VII instrument that is based on a futures contract on the debt securities of these 21 enumerated foreign governments would mean that the Title VII instrument would be a swap.[702] The Commissions note, however, that the conditions in rule 3a12–8 were established specifically for purposes of the offer and sale of ''qualifying foreign futures contracts'' (as defined in rule 3a12–8) [703] on the debt securities of the 21 enumerated foreign governments,[704] not Title VII instruments based on futures contracts on the debt securities

[688] *See supra* part I, under ''Overall Economic Considerations''.

[689] *See* July LSTA Letter.

[690] *Id.*

[691] *See* Letter from Richard M. McVey, Chairman and Chief Executive Officer, MarketAxess Holdings, Inc. (''MarketAxess''), July 22, 2011 (''MarketAxess Letter'').

[692] The Commissions believe, based on the July LSTA Letter, that the ''Master Confirmation'' structure the commenter described is the same general structure as the aggregation of single-name CDS the Commissions provided as an example in the Proposing Release, but that a ''Master Confirmation'' structure may not be limited to single-reference instruments or to CDS and instead may be used for a broader range of instruments. *See* July LSTA Letter. The Commissions note that the following are examples of ''Master Confirmation'' structure to which the interpretive guidance would apply: 2009 Americas Master Equity Derivatives Confirmation Agreement, Stand-alone 2007 Americas Master Variance Swap Confirmation Agreement, and 2004 Americas Interdealer Master Equity Derivatives Confirmation Agreement and March 2004 Canadian Supplement to the Master Confirmation. The Commissions believe the broader example in this release provides the clarification the commenter requested.

[693] *See* Proposing Release at 29843–44.

[694] *Id.*

[695] *See infra* note 718 and accompanying text.

[696] *See* rule 1.3(bbbb) under the CEA and rule 3a68–5 under the Exchange Act.

[697] A security future is defined in both the CEA and the Exchange Act as a futures contract on a single security or a narrow-based security index, including any interest therein or based on the value thereof, except an exempted security under section 3(a)(12) of the Exchange Act, 15 U.S.C. 78c(a)(12), as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in section 3(a)(29) of the Exchange Act, 15 U.S.C. 78c(a)(29), as in effect on the date of enactment of the Futures Trading Act of 1982).

The term security future does not include any agreement, contract, or transaction excluded from the CEA under sections 2(c), 2(d), 2(f), or 2(g) of the CEA, 7 U.S.C. 2(c), 2(d), 2(f), or 2(g), as in effect on the date of enactment of the Commodity Futures Modernization Act of 2000 (''CFMA'') or Title IV of the CFMA. *See* section 1a(44) of the CEA, 7 U.S.C. 1a(44), and section 3(a)(55) of the Exchange Act, 15 U.S.C. 78c(a)(55).

[698] Depending on the underlying reference of the futures contract, though, such swaps could be SBSAs. For example, a swap on a future on the S&P 500 index would be an SBSA.

[699] *See* Proposing Release at 29843.

[700] Specifically, rule 3a12–8 under the Exchange Act requires as a condition to the exemption that the foreign government debt securities not be registered under the Securities Act (or be the subject of any American depositary receipt registered under the Securities Act) and that futures contracts on such foreign government debt securities ''require delivery outside the United States, [and] any of its possessions or territories, and are traded on or through a board of trade, as defined in [section 2 of the CEA, 7 U.S.C. 2].'' *See* rules 3a12–8(a)(2) and 3a12–8(b) under the Exchange Act, 17 CFR 240.3a12–8(a)(2) and 240.3a12–8(b). These conditions were ''designed to minimize the impact of the exemption on securities distribution and trading in the United States. * * *'' *See Exemption for Certain Foreign Government Securities for Purposes of Futures Trading,* 49 FR 8595 (Mar. 8, 1984) at 8596–97 (*citing* Futures Trading Act of 1982).

[701] *See* rule 3a12–8(a)(1) under the Exchange Act (designating the debt securities of the governments of the United Kingdom, Canada, Japan, Australia, France, New Zealand, Austria, Denmark, Finland, the Netherlands, Switzerland, Germany, Ireland, Italy, Spain, Mexico, Brazil, Argentina, Venezuela, Belgium, and Sweden).

[702] The Commissions note, by contrast, that a Title VII instrument that is based on the price or value of, or settlement into, a futures contract on the debt securities of one of the 21 enumerated foreign governments and that also has the potential to settle directly into such debt securities would be a security-based swap and, depending on other features of the Title VII instrument, possibly a mixed swap.

[703] Rule 3a12–8(b) under the Exchange Act defines ''qualifying foreign futures contracts'' as ''contracts for the purchase or sale of a designated foreign government security for future delivery, as 'future delivery' is defined in 7 U.S.C. 2, provided such contracts require delivery outside the United States, any of its possessions or territories, and are traded on or through a board of trade, as defined at 7 U.S.C. 2.'' 17 CFR 240.3a12–8(b).

[704] *See supra* note 700.

of the 21 enumerated governments. Further, the Commissions note that the Dodd-Frank Act did not exclude swaps on foreign government debt securities generally from the definition of the term ''security-based swap.'' Accordingly, a Title VII instrument that is based directly on foreign government debt securities, including those of the 21 enumerated governments, is a security-based swap or a swap under the same analysis as any other Title VII instruments based on securities.

The Commissions indicated in the Proposing Release that they would evaluate whether Title VII instruments based on futures contracts on the debt securities of the 21 enumerated foreign governments that satisfy the conditions of rule 3a12–8 should be characterized as swaps, security-based swaps, or mixed swaps.[705] In response to commenters,[706] the Commissions are adopting rule 1.3(bbbb) under the CEA and rule 3a68–5 under the Exchange Act, which address the treatment of these Title VII instruments.

The final rules provide that a Title VII instrument that is based on or references a qualifying foreign futures contract on the debt securities of one or more of the 21 enumerated foreign governments is a swap and not a security-based swap, provided that the Title VII instrument satisfies the following conditions:

- The futures contract on which the Title VII instrument is based or that is referenced is a qualifying foreign futures contract (as defined in rule 3a12–8) [707] on the debt securities of any one or more of the 21 enumerated foreign governments that satisfies the conditions of rule 3a12–8;
- The Title VII instrument is traded on or through a board of trade (as defined in section 1a(6) of the CEA);
- The debt securities on which the qualifying foreign futures contract is based or referenced and any security used to determine the cash settlement amount pursuant to the fourth condition below are not covered by an effective registration statement under the Securities Act or the subject of any American depositary receipt covered by an effective registration statement under the Securities Act;
- The Title VII instrument may only be cash settled; and
- The Title VII instrument is not entered into by the issuer of the securities upon which the qualifying foreign futures contract is based or referenced (including any security used to determine the cash payment due on settlement of such Title VII instrument), an affiliate (as defined in the Securities Act and the rules and regulations thereunder) [708] of the issuer, or an underwriter with respect to such securities.

Under the first condition, the final rules provide that the futures contract on which the Title VII instrument is based or referenced must be a qualifying foreign futures contract that satisfies the conditions of rule 3a12–8 and may only be based on the debt of any one or more of the enumerated 21 foreign governments. If the conditions of rule 3a12–8 are not satisfied, then there cannot be a qualifying foreign futures contract, the futures contract is a security future, and a swap on such a security future is a security-based swap.

The second condition of the final rules provides that the Title VII instrument on the qualifying foreign futures contract must itself be traded on or through a board of trade because a qualifying foreign futures contract on the debt securities of one or more of the 21 enumerated foreign governments itself is required to be traded on a board of trade. The Commissions believe that swaps on such futures contracts should be traded subject to rules applicable to such futures contracts themselves.

The third condition of the final rules provides that the debt securities on which the qualifying foreign futures contract is based or referenced and any security used to determine the cash settlement amount pursuant to the fourth condition cannot be registered under the Securities Act or be the subject of any American depositary receipt registered under the Securities Act. This condition is intended to prevent circumvention of registration and disclosure requirements of the Securities Act applicable to foreign government issuances of their securities. This condition is similar to a condition included in rule 3a12–8.[709]

The fourth condition of the final rules provides that the Title VII instrument must be cash settled. Although, as the Commissions recognize, rule 3a12–8 permits a qualifying foreign futures contract to be physically settled so long as delivery is outside the United States, any of its possessions or territories,[710] in the context of Title VII instruments, only cash settled Title VII instruments based on qualifying foreign futures contracts on the debt securities of the 21 enumerated foreign governments will be considered swaps. The Commissions believe that this condition is appropriate in order to provide consistent treatment of Title VII instruments based on qualifying foreign futures contracts on the debt securities of the 21 enumerated foreign governments with the Commissions' treatment of swaps and security-based swaps generally.[711]

The fifth condition of the final rules provides that for a Title VII instrument to be a swap under such rules, it cannot be entered into by the issuer of the securities upon which the qualifying foreign futures contract is based or referenced (including any security used to determine the cash payment due on settlement of such Title VII instrument), an affiliate of the issuer, or an underwriter of the issuer's securities. The Commissions have included this condition to address the concerns raised by the SEC in the Proposing Release that the characterization of a Title VII instrument that is based on a futures contract on the debt securities of one of the 21 enumerated foreign governments may affect Federal securities law provisions relating to the distribution of the securities upon which the Title VII instrument is based or referenced.[712]

The Dodd-Frank Act included provisions that would not permit issuers, affiliates of issuers, or underwriters to use security-based swaps to offer or sell the issuers' securities underlying a security-based swap without complying with the requirements of the Securities Act.[713] This provision applies regardless of whether the Title VII instrument allows the parties to physically settle any such security-based swap. In addition, the Dodd-Frank Act provided that any offer or sale of security-based swaps to non-ECPs would have to be registered under the Securities Act.[714] For example, if a Title VII instrument that is based on a futures contract on the debt securities of one of the 21 enumerated foreign governments is characterized as a swap, and not a security-based swap, then the provisions of the Dodd-Frank Act enacted to ensure that there could not be offers and sales of securities made without compliance with the Securities Act, either by issuers, their affiliates, or underwriters or to non-ECPs, would not apply to such swap transactions.

Only those Title VII instruments that are based on qualifying foreign futures contracts on the debt securities of the 21

[705] *See* Proposing Release at 29844.

[706] *See infra* note 718 and accompanying text.

[707] *See supra* note 703.

[708] *See, e.g.,* rule 405 under the Securities Act, 17 CFR 230.405.

[709] *See supra* note 700.

[710] *Id.*

[711] *See infra* part III.H.

[712] *See* Proposing Release at 29844.

[713] *See* section 2(a)(3) of the Securities Act, 15 U.S.C. 77b(a)(3), as amended by the Dodd-Frank Act.

[714] *See* section 5 of the Securities Act, 15 U.S.C. 77e, as amended by the Dodd-Frank Act.

enumerated foreign governments and that satisfy these five conditions will be swaps, not security-based swaps. The Commissions note that the final rules are intended to provide consistent treatment (other than with respect to method of settlement) of qualifying foreign futures contracts and Title VII instruments based on qualifying foreign futures contracts on the debt securities of the 21 enumerated foreign governments.[715] The Commissions understand that many of the qualifying foreign futures contracts on the debt securities of the 21 enumerated foreign governments trade with substantial volume through foreign trading venues under the conditions set forth in rule 3a12–8[716] and permitting swaps on such futures contracts subject to similar conditions would not raise concerns that such swaps could be used to circumvent the conditions of rule 3a12–8 and the Federal securities laws concerns that such conditions are intended to protect.[717] Further, providing consistent treatment for qualifying foreign futures contracts on the debt securities of the 21 enumerated foreign governments and Title VII instruments based on futures contracts on the debt securities of the 21 enumerated foreign governments will allow trading of these instruments through designated contract markets on which such futures are listed.

The Commissions recognize that the rules may result in a different characterization of a Title VII instrument that is based directly on a foreign government debt security and one that is based on a qualifying foreign futures contract on a debt security of one of the 21 enumerated foreign governments. However, the Commissions note that this is the case today (i.e., different treatments) with respect to other instruments subject to CFTC regulation and/or SEC regulation, such as futures on broad-based security indexes and futures on a single security or narrow-based security index.

Comments

Commenters did not address the interpretation as it applied to Title VII instruments based on futures contracts generally. Two commenters addressed Title VII instruments based on futures contracts on debt securities of the 21 enumerated foreign governments.[718] Both commenters requested that the Commissions treat these Title VII instruments as swaps.[719] The Commissions agree that these instruments should be treated as swaps under certain conditions and, therefore, are adopting rule 1.3(bbbb) under the CEA and rule 3a68–5 under the Exchange Act as discussed above to treat Title VII instruments based on qualifying foreign futures contracts on the debt securities of the 21 enumerated foreign governments as swaps, provided such Title VII instruments satisfy certain conditions.

F. Use of Certain Terms and Conditions in Title VII Instruments

The Commissions provided an interpretation in the Proposing Release regarding the use of certain fixed terms in Title VII instruments and are restating that interpretation without modification.[720] The Commissions are aware that market participants' setting of certain fixed terms or conditions of Title VII instruments may be informed by the value or level of a security, rate, or other commodity at the time of the execution of the instrument. The Commissions believe that, in evaluating whether a Title VII instrument with such a fixed term or condition is a swap or security-based swap, the nature of the security, rate, or other commodity that informed the setting of such fixed term or condition should not itself impact the determination of whether the Title VII instrument is a swap or a security-based swap, provided that the fixed term or condition is set at the time of execution and the value or level of that fixed term or condition may not vary over the life of the Title VII instrument.[721]

For example, a Title VII instrument, such as an interest rate swap, in which floating payments based on three-month LIBOR are exchanged for fixed rate payments of five percent would be a swap, and not a security-based swap, even if the five percent fixed rate was informed by, or quoted based on, the yield of a security, provided that the five percent fixed rate was set at the time of execution and may not vary over the life of the Title VII instrument.[722] Another example would be where a private sector or government borrower that issues a five-year, amortizing $100 million debt security with a semi-annual coupon of LIBOR plus 250 basis points also, at the same time, chooses to enter into a five-year interest rate swap on $100 million notional in which this same borrower, using the same amortization schedule as the debt security, receives semi-annual payments of LIBOR plus 250 basis points in exchange for five percent fixed rate payments. The fact that the specific terms of the interest rate swap (*e.g.,* five-year, LIBOR plus 250 basis points, $100 million notional, fixed amortization schedule) were set at the time of execution to match related terms of a debt security does not cause the interest rate swap to become a security-based swap. However, if the interest rate swap contained additional terms that were in fact contingent on a characteristic of the debt security that may change in the future, such as an adjustment to future interest rate swap payments based on the future price or yield of the debt security, then this Title VII instrument would be a security-based swap that would be a mixed swap.

[715] The Commissions note that the final rules provide consistent treatment of qualifying foreign futures contracts on the debt securities of the 21 enumerated foreign governments and Title VII instruments based on qualifying foreign futures contracts on the debt securities of the 21 enumerated foreign governments unless the Title VII instrument is entered into by the issuer of the securities upon which the qualifying foreign futures contract is based or referenced (including any security used to determine the cash payment due on settlement of such Title VII instrument), an affiliate of the issuer, or an underwriter with respect to such securities.

[716] For the quarter that ended December 31, 2011, the trading volume reported to the CFTC of qualifying foreign futures contracts on the debt securities of the 21 enumerated foreign governments made available for trading by direct access from the U.S. on foreign trading venues granted direct access no-action relief by the CFTC that exceeded 100,000 contracts per quarter from the U.S. were as follows: (i) 7,985,959 contracts for 3 Year Treasury Bond Futures on the Australian Securities Exchange's ASX Trade24 platform; (ii) 1,872,592 contracts for 10-Year Government of Canada Bond Futures on the Bourse de Montreal; (iii) 47,874,911 contracts for Euro Bund Futures on Eurex Deutschland (''Eurex''); (iv) 26,434,713 contracts for Euro Bobl Futures on Eurex; (v) 30,489,427 contracts for Euro Schatz Futures on Eurex; and (vi) 8,292,222 contracts for Long Gilt Futures on the NYSE LIFFE.

[717] *See supra* note 712 and accompanying text.

[718] *See* CME Letter and SIFMA Letter.

[719] *Id.* Both commenters stated their belief that the range of factors considered by the SEC in designating the debt securities of the 21 enumerated foreign governments as exempted securities indicated that there is sufficient disclosure about the 21 enumerated foreign governments and their securities such that the further disclosure should not be necessary. Both commenters also indicated that subjecting futures contracts on the debt securities of the 21 enumerated foreign governments to CFTC regulation, while subjecting Title VII instruments based on these futures contracts to SEC regulation, would be problematic. *Id.*

[720] *See* Proposing Release at 29845.

[721] This interpretation relates solely to the determination regarding whether a Title VII instrument is a swap or security-based swap. The Commissions are not expressing a view regarding whether such Title VII instrument would be a security-based swap agreement.

[722] However, to the extent the fixed term or condition is set at a future date or at a future value or level of a security, rate, or other commodity rather than the value or level of such security, rate, or other commodity at the time of execution of the Title VII instrument, the discussion above would not apply, and the nature of the security, rate, or other commodity used in determining the terms or conditions would be considered in evaluating whether the Title VII instrument is a swap or security-based swap.

Comments

One commenter agreed with the Commissions' interpretation generally, but believed that the Commissions should broaden the interpretation to allow a swap to reflect ''resets,'' or changes in the referenced characteristic of a security, where those ''resets'' or changes are ''intended to effect a purpose other than transmitting the risk of changes in the characteristic itself,'' without causing a Title VII instrument that is not a security-based swap to become a security-based swap.[723]

The Commissions are not expanding the interpretation to allow ''resets'' of a fixed rate derived from a security. The interpretation is consistent with the statutory swap and security-based swap definitions. The Commissions believe that a Title VII instrument based on a rate that follows a security, and that may ''reset'' or change in the future based on changes in that security, is a security-based swap. Further, any amendment or modification of a material term of a Title VII instrument would result in a new Title VII instrument and a corresponding reassessment of the instrument's status as either a swap or a security-based swap.[724]

G. The Term ''Narrow-Based Security Index'' in the Security-Based Swap Definition

1. Introduction

As noted above, a Title VII instrument in which the underlying reference of the instrument is a ''narrow-based security index'' is a security-based swap subject to regulation by the SEC, whereas a Title VII instrument in which the underlying reference of the instrument is a security index that is not a narrow-based security index (i.e., the index is broad-based) is a swap subject to regulation by the CFTC. The Commissions proposed an interpretation and rules regarding usage of the term ''narrow-based security index'' in the security-based swap definition, including:

- The existing criteria for determining whether a security index is a narrow-based security index and the applicability of past guidance of the Commissions regarding those criteria to Title VII instruments;
- New criteria for determining whether a CDS where the underlying reference is a group or index of entities or obligations of entities (typically referred to as an ''index CDS'') is based on an index that is a narrow-based security index;
- The meaning of the term ''index'';
- Rules governing the tolerance period for Title VII instruments on security indexes traded on DCMs, SEFs, foreign boards of trade (''FBOTs''), security-based SEFs, or NSEs, where the security index temporarily moves from broad-based to narrow-based or from narrow-based to broad-based; and
- Rules governing the grace period for Title VII instruments on security indexes traded on DCMs, SEFs, FBOTs, security-based SEFs, or NSEs, where the security index moves from broad-based to narrow-based or from narrow-based to broad-based and the move is not temporary.[725]

As discussed below, the Commissions are restating the interpretation set forth in the Proposing Release with certain further clarifications and adopting the rules as proposed with certain modifications.

2. Applicability of the Statutory Narrow-Based Security Index Definition and Past Guidance of the Commissions to Title VII Instruments

The Commissions provided an interpretation in the Proposing Release regarding the applicability of the statutory definition of the term ''narrow-based security index'' and past guidance of the Commissions relating to such term to Title VII instruments.[726] The Commissions are restating the interpretation set out in the Proposing Release without modification.

As defined in the CEA and Exchange Act,[727] an index is a narrow-based security index if, among other things, it meets any one of the following four criteria:

- It has nine or fewer component securities;
- A component security comprises more than 30 percent of the index's weighting;
- The five highest weighted component securities in the aggregate comprise more than 60 percent of the index's weighting; or
- The lowest weighted component securities comprising, in the aggregate, 25 percent of the index's weighting have an aggregate dollar value of average daily trading volume of less than $50,000,000 (or in the case of an index with more than 15 component securities, $30,000,000), except that if there are two or more securities with equal weighting that could be included in the calculation of the lowest weighted component securities comprising, in the aggregate, 25 percent of the index's weighting, such securities shall be ranked from lowest to highest dollar value of average daily trading volume and shall be included in the calculation based on their ranking starting with the lowest ranked security.[728]

The first three criteria apply to the number and concentration of the ''component securities'' in the index. The fourth criterion applies to the average daily trading volume of an index's ''component securities.'' [729]

This statutory narrow-based security index definition focuses on indexes composed of equity securities and certain aspects of the definition, in particular the evaluation of average daily trading volume, are designed to take into account the trading patterns of individual stocks.[730] However, the Commissions, pursuant to authority granted in the CEA and the Exchange Act,[731] previously have extended the definition to other categories of indexes but modified the definition to take into account the characteristics of those other categories. Specifically, the Commissions have previously provided guidance regarding the application of the narrow-based security index definition to futures contracts on volatility indexes [732] and debt security indexes.[733] Today, then, there exists guidance for determining what constitutes a narrow-based security index.

Volatility indexes are indexes composed of index options. The Commissions issued a joint order in

[723] *See* ISDA Letter.

[724] *See infra* part III.G.5(a).

[725] *See* Proposing Release at 29845–58.

[726] *See* Proposing Release at 29845–48.

[727] Sections 3(a)(55)(B) and (C) of the Exchange Act, 15 U.S.C. 78c(a)(55)(B) and (C), include a definition of ''narrow-based security index'' in the same paragraph as the definition of security future. *See also* sections 1a(35)(A) and (B) of the CEA, 7 U.S.C. 1a(35)(A) and (B). A security future is a contract for future delivery on a single security or narrow-based security index (including any interest therein or based on the value thereof). *See* section 3(a)(55) of the Exchange Act, 15 U.S.C. 78c(a)(55), and section 1a(44) of the CEA, 7 U.S.C. 1a(44).

[728] *See* section 3(a)(55)(B) of the Exchange Act, 15 U.S.C. 78c(a)(55)(B). *See also* sections 1a(35)(A) and (B) of the CEA, 7 U.S.C. 1a(35)(A) and (B).

[729] The narrow-based security index definition in the CEA and Exchange Act also excludes from its scope security indexes that satisfy certain specified criteria. *See* sections 3(a)(55)(C)(i)–(vi) of the Exchange Act, 15 U.S.C. 78c(a)(55)(C)(i)–(vi), and sections 1a(35)(B)(i)–(vi) of the CEA, 7 U.S.C. 1a(35)(B)(i)–(vi).

[730] *See Joint Order Excluding Indexes Comprised of Certain Index Options From the Definition of Narrow-Based Security Index,* 69 FR 16900 (Mar. 31, 2004) (''March 2004 Index Options Joint Order'').

[731] *See* section 1a(35)(B)(vi) of the CEA, 7 U.S.C. 1a(35)(B)(vi), and section 3(a)(55)(C)(vi) of the Exchange Act, 15 U.S.C. 78c(a)(55)(C)(vi).

[732] *See* March 2004 Index Options Joint Order.

[733] *See Joint Final Rules: Application of the Definition of Narrow-Based Security Index to Debt Securities Indexes and Security Futures on Debt Securities,* 71 FR 39434 (Jul. 13, 2006) (''July 2006 Debt Index Release'').

2004 to define when a volatility index is not a narrow-based security index. Under this joint order, a volatility index is not a narrow-based security index if the index meets all of the following criteria:

- The index measures the magnitude of changes (as calculated in accordance with the order) in the level of an underlying index that is not a narrow-based security index pursuant to the statutory criteria for equity indexes discussed above;
- The index has more than nine component securities, all of which are options on the underlying index;
- No component security of the index comprises more than 30 percent of the index's weighting;
- The five highest weighted component securities of the index in the aggregate do not comprise more than 60 percent of the index's weighting;
- The average daily trading volume of the lowest weighted component securities in the underlying index (those comprising, in the aggregate, 25 percent of the underlying index's weighting) have a dollar value of more than $50,000,000 (or $30,000,000 in the case of an underlying index with 15 or more component securities), except if there are 2 or more securities with equal weighting that could be included in the calculation of the lowest weighted component securities comprising, in the aggregate, 25 percent of the underlying index's weighting, such securities shall be ranked from lowest to highest dollar value of average daily trading volume and shall be included in the calculation based on their ranking starting with the lowest ranked security;
- Options on the underlying index are listed and traded on an NSE registered under section 6(a) of the Exchange Act; [734] and
- The aggregate average daily trading volume in options on the underlying index is at least 10,000 contracts calculated as of the preceding 6 full calendar months.[735]

With regard to debt security indexes, the Commissions issued joint rules in 2006 (''July 2006 Debt Index Rules'') to define when an index of debt securities [736] is not a narrow-based security index. The first three criteria of that definition are similar to the statutory definition for equities and the order regarding volatility indexes in that a debt security index would not be narrow-based if:

- It is comprised of more than nine debt securities that are issued by more than nine non-affiliated issuers;
- The securities of any issuer included in the index do not comprise more than 30 percent of the index's weighting; and
- The securities of any five non-affiliated issuers in the index do not comprise more than 60 percent of the index's weighting.

In the July 2006 Debt Index Rules, instead of the statutory average daily trading volume test, however, the Commissions adopted a public information availability requirement. Under this requirement, assuming the aforementioned number and concentration criteria were satisfied, a debt security index would not be a narrow-based security index if the debt securities or the issuers of debt securities in the index met any one of the following criteria:

- The issuer of the debt security is required to file reports pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934; [737]
- The issuer of the debt security has a worldwide market value of its outstanding common equity held by non-affiliates of $700 million or more;
- The issuer of the debt security has outstanding securities that are notes, bonds, debentures, or evidence of indebtedness having a total remaining principal amount of at least $1 billion;
- The security is an exempted security as defined in section 3(a)(12) of the Securities Exchange Act of 1934 [738] and the rules promulgated thereunder; or
- The issuer of the security is a government of a foreign country or a political subdivision of a foreign country.[739]

In the Dodd-Frank Act, Congress included the term ''narrow-based security index'' in the security-based swap definition, and thus the statutory definition of the term ''narrow-based security index'' [740] also applies in distinguishing swaps (on security indexes that are not narrow-based, also known as ''broad-based'') and security-based swaps (on narrow-based security indexes).[741] The Commissions have determined that their prior guidance with respect to what constitutes a narrow-based security index in the context of volatility indexes [742] and debt security indexes [743] applies in determining whether a Title VII instrument is a swap or a security-based swap, except as the rules the Commissions are adopting provide for other treatment with respect to index CDS as discussed below.[744]

To make clear that the Commissions are applying the prior guidance and rules to Title VII instruments, the Commissions are adopting rules to further define the term ''narrow-based security index'' in the security-based swap definition. Under paragraph (1) of rule 1.3(yyy) under the CEA and paragraph (a) of rule 3a68–3 under the Exchange Act, for purposes of the security-based swap definition, the term ''narrow-based security index'' has the same meaning as the statutory definition set forth in section 1a(35) of the CEA and section 3(a)(55) of the Exchange Act,[745] and the rules, regulations, and orders issued by the Commissions relating to such definition. As a result, except as the rules the Commissions are adopting provide for other treatment with respect to index CDS as discussed below,[746] market participants generally may use the Commissions' past guidance in determining whether certain Title VII instruments based on a security index are swaps or security-based swaps.

The Commissions also are providing an interpretation and adopting additional rules establishing criteria for indexes composed of securities, loans, or issuers of securities referenced by an

[734] 15 U.S.C. 78f(a).

[735] *See* March 2004 Index Options Joint Order. In 2009, the Commissions issued a joint order that provided that, instead of the index options having to be listed on an NSE, the index options must be listed on an exchange and pricing information for the index options, and the underlying index, must be computed and disseminated in real time through major market data vendors. *See Joint Order To Exclude Indexes Composed of Certain Index Options From the Definition of Narrow-Based Security Index,* 74 FR 61116 (Nov. 23, 2009) (expanding the criteria necessary for exclusion under the March 2004 Index Options Joint Order to apply to volatility indexes for which pricing information for the underlying broad-based security index, and the options that compose such index, is current, accurate, and publicly available).

[736] Under the rules, debt securities include notes, bonds, debentures or evidence of indebtedness. *See* rule 41.15(a)(1)(i) under the CEA, 17 CFR 41.15(a)(1)(i) and rule 3a55–4(a)(1)(i) under the Exchange Act, 17 CFR 240.3a55–4(a)(1)(i). *See also* July 2006 Debt Index Release.

[737] 15 U.S.C. 78m or 78o(d).

[738] 15 U.S.C. 78c(a)(12).

[739] *See* July 2006 Debt Index Rules. The July 2006 Debt Index Rules also provided that debt securities in the index must satisfy certain minimum outstanding principal balance criteria, established certain exceptions to these criteria and the public information availability requirement, and provided for the treatment of indexes that include exempted securities (other than municipal securities).

[740] *See* sections 3(a)(55)(B) and (C) of the Exchange Act, 15 U.S.C. 78c(a)(55)(B) and (C). *See also* sections 1a(35)(A) and (B) of the CEA, 7 U.S.C. 1a(35)(A) and (B).

[741] The statutory definition of the term ''narrow-based security index'' for equities, and the Commissions' subsequent guidance as to what constitutes a narrow-based security index with respect to volatility and debt indexes, is applicable in the context of distinguishing between futures contracts and security futures products.

[742] *See* March 2004 Index Options Joint Order.

[743] *See* July 2006 Debt Index Rules.

[744] *See infra* part III.G.3.

[745] 7 U.S.C. 1a(35) and 15 U.S.C. 78c(a)(55).

[746] *See infra* part III.G.3.

index CDS.[747] The interpretation and rules also address the definition of an ''index'' [748] and the treatment of broad-based security indexes that become narrow-based and narrow-based indexes that become broad-based, including rule provisions regarding tolerance and grace periods for swaps on security indexes that are traded on CFTC-regulated trading platforms and security-based swaps on security indexes that are traded on SEC-regulated trading platforms.[749] These rules and interpretation are discussed below.

3. Narrow-Based Security Index Criteria for Index Credit Default Swaps

(a) In General

The Commissions provided an interpretation in the Proposing Release regarding the narrow-based security index criteria for index CDS and are restating it without modification.[750] While the Commissions understand that the underlying reference for most cleared CDS is a single entity or an index of entities rather than a single security or an index of securities, the underlying reference for CDS also could be a single security or an index of securities.[751] A CDS where the underlying reference is a single entity (*i.e.,* a single-name CDS), a single obligation of a single entity (*e.g.,* a CDS on a specific bond, loan, or asset-backed security, or any tranche or series of any bond, loan, or asset-backed security), or an index CDS where the underlying reference is a narrow-based security index or the issuers of securities in a narrow-based security index is a security-based swap. An index CDS where the underlying reference is not a narrow-based security index or the issuers of securities in a narrow-based security index (*i.e.,* a broad-based index) is a swap.[752]

The statutory definition of the term ''narrow-based security index,'' as explained above, was designed with the U.S. equity markets in mind.[753] Thus, the statutory definition is not necessarily appropriate for determining whether an index underlying an index CDS is broad or narrow-based. Nor is the guidance that the Commissions have previously issued with respect to the narrow-based security index definition discussed above necessarily appropriate, because that guidance was designed to address and was uniquely tailored to the characteristics of volatility indexes and debt security indexes in the context of futures. Accordingly, the Commissions are clarifying that the guidance that the Commissions have previously issued with respect to the narrow-based security index definition discussed above does not apply to index CDS. Instead, the Commissions are adopting rules as discussed below that include separate criteria for determining whether an index underlying an index CDS is a narrow-based security index.

The Commissions are further defining the term ''security-based swap,'' and the use of the term ''narrow-based security index'' within that definition, to modify the criteria applied in the context of index CDS in assessing whether the index is a narrow-based security index. The third prong of the security-based swap definition includes a Title VII instrument based on the occurrence of an event relating to the ''issuers of securities in a narrow-based security index,'' provided that such event directly affects the ''financial statements, financial condition, or financial obligations of the issuer.'' [754] The first prong of the security-based swap definition includes a Title VII instrument that is based on a narrow-based security-index.[755] Because the third prong of the security-based swap definition relates to issuers of securities, while the first prong of such definition relates to securities, the Commissions are further defining both the term ''narrow-based security index'' and the term ''issuers of securities in a narrow-based security index'' in the context of the security-based swap definition as applied to index CDS. The Commissions believe it is important to further define both terms in order to assure consistent analysis of index CDS.[756] While the wording of the two definitions as adopted differs slightly, the Commissions expect that they will yield the same substantive results in distinguishing narrow-based and broad-based index CDS.[757]

(b) Rules Regarding the Definitions of ''Issuers of Securities in a Narrow-Based Security Index'' and ''Narrow-Based Security Index'' for Index Credit Default Swaps

The Commissions proposed rules to further define the terms ''issuers of securities in a narrow-based security index'' and ''narrow-based security index'' in order to provide appropriate criteria for determining whether an index composed of issuers of securities referenced by an index CDS and an index composed of securities referenced by an index CDS are narrow-based security indexes.[758] The Commissions are adopting rules 1.3(zzz) and 1.3(aaaa) under the CEA and rules 3a68–1a and 3a68–1b under the Exchange Act as proposed with certain modifications.[759]

In formulating the criteria in the final rules, and consistent with the guidance and rules the Commissions have

[747] *Id.*

[748] *See infra* part III.G.4.

[749] *See infra* part III.G.5.

[750] *See* Proposing Release at 29847–48.

[751] *See, e.g.,* Markit, ''Markit CDX'' (describing the Markit CDX indexes and the number of ''names'' included in each index), available at *http://www.markit.com/en/products/data/indices/credit-and-loan-indices/cdx/cdx.page*; Markit, ''Markit iTraxx Indices,'' (stating that the ''Markit iTraxx indices are comprised of the most liquid names in the European and Asian markets'') (emphasis added), available at *http://www.markit.com/en/products/data/indices/credit-and-loan-indices/itraxx/itraxx.page* . Examples of indexes based on securities include the Markit ABX.HE and CMBX indexes. *See* Markit, ''Markit ABX.HE,'' (describing the Markit ABX.HE index as ''a synthetic tradeable index referencing a basket of 20 subprime mortgage-backed securities''), available at *http://www.markit.com/en/products/data/indices/structured-finance-indices/abx/abx.page*; and Markit, ''Markit CMBX,'' (describing the Markit CMBX index as ''a synthetic tradeable index referencing a basket of 25 commercial mortgage-backed securities''), available at *http://www.markit.com/en/products/data/indices/structured-finance-indices/cmbx/cmbx.page.*

[752] Similarly, an option to enter into a single-name CDS or a CDS referencing a narrow-based security index as described above would be a security-based swap, while an option to enter into a CDS on a broad-based security index or the issuers of securities in a broad-based security index would be a swap. Index CDS where the underlying reference is a broad-based security index would be SBSAs. The SEC has enforcement authority with respect to swaps that are SBSAs, as discussed further in section V., *infra.*

[753] *See* July 2006 Debt Index Rules.

[754] Section 3(a)(68)(A)(ii)(III) of the Exchange Act, 15 U.S.C. 78c(a)(68)(A)(ii)(III).

[755] Section 3(a)(68)(A)(ii)(I) of the Exchange Act, 15 U.S.C. 78c(a)(68)(A)(ii)(I).

[756] Because they apply only with respect to index CDS, the definitions of ''issuers of securities in a narrow-based security index'' and ''narrow-based security index'' as adopted do not apply with respect to other types of event contracts, whether analyzed under the first or third prong.

[757] For example, if the reference entities included in one index are the same as the issuers of securities included in another index, application of the two definitions should result in both indexes being either broad-based or narrow-based.

[758] *See* Proposing Release at 29848.

[759] The discussion throughout this section refers to ''reference entities'' and ''issuers'' in discussing the final rules. The term ''reference entity'' is defined in paragraph (c)(3) of rule 1.3(zzz) under the CEA and rule 3a68–1a under the Exchange Act and the term ''issuer'' is defined in paragraph (c)(3) of rule 1.3(aaaa) under the CEA and rule 3a68–1b under the Exchange Act. The final rules provide that the term ''reference entity'' includes: (i) An issuer of securities; (ii) an issuer of securities that is an issuing entity of asset-backed securities is a reference entity or issuer, as applicable; and (iii) an issuer of securities that is a borrower with respect to any loan identified in an index of borrowers or loans is a reference entity. The final rules provide that the term ''issuer'' includes: (i) An issuer of securities; and (ii) an issuer of securities that is an issuing entity of asset-backed securities is a reference entity or issuer, as applicable. *See* paragraph (c)(3) of rules 1.3(zzz) and 1.3(aaaa) under the CEA and rule 3a68–1a and 3a68–1b under the Exchange Act.

previously issued and adopted regarding narrow-based security indexes in the context of security futures, the Commissions believe that there should be public information available about a predominant percentage of the reference entities included in the index, or, in the case of an index CDS on an index of securities, about the issuers of the securities or the securities underlying the index, in order to reduce the likelihood that non-narrow-based indexes referenced in index CDS or the component securities or issuers of securities in that index would be readily susceptible to manipulation, as well as to help prevent the misuse of material non-public information through the use of CDS based on such indexes.

To satisfy these objectives, the Commissions are adopting rules that are based on the criteria developed for debt indexes discussed above[760] but that tailor these criteria to address index CDS.[761] These criteria are included solely for the purpose of defining the terms ''narrow-based security index'' and ''issuers of securities in a narrow-based security index'' in the first and third prongs of the security-based swap definition with respect to index CDS and will not affect any other interpretation or use of the term ''narrow-based security index'' or any other provision of the Dodd-Frank Act, the CEA, or the Exchange Act.

Further, in response to commenters,[762] the Commissions are clarifying that if an index CDS is based on an index of loans that are not securities,[763] an event relating to a loan in the index, such as a default on a loan, is an event ''relating to'' the borrower.[764] To the extent that the borrower is an issuer of securities, the index CDS based on such index of loans will be analyzed under the third prong of the security-based swap definition in the same manner as any other index CDS.

Comments

The Commissions received two general comments requesting that the proposed rules further defining the terms ''issuers of securities in a narrow-based security index'' and ''narrow-based security index'' be simplified.[765] One commenter believed that the rules were exceedingly complicated.[766] Another commenter thought that the criteria should allow transactions to be readily and transparently classifiable as a swap or security-based swap.[767] The commenters did not provide analysis supporting their comments or recommend language changes.

The Commissions are adopting the rules regarding index CDS essentially as proposed with certain modifications to address commenters' concerns. While the final rules contain a number of elements that are similar or identical to elements contained in the statutory narrow-based security index definition, in order to enable the narrow-based security index definition to apply appropriately to index CDS, the final rules contain some alternative tests to those set forth in the statutory definition.

The Commissions also recognize the diversity of Title VII instruments. While the final rules for index CDS are based on the July 2006 Debt Index Rules, the substantive differences between the final rules in the index CDS and the equity or debt security contexts are intended to reflect the particular characteristics of the CDS marketplace, in which, for example, index components may be entities (issuers of securities) as well as specific equity and debt securities.

The Commissions also received three comments requesting clarification regarding the applicability of the index CDS rules to CDS based on indexes of loans.[768] One commenter noted that the Commissions did not address in the Proposing Release the question of whether an index composed exclusively of loans should be treated as a narrow-based security index.[769] This commenter noted that because the first and third prongs of the statutory security-based swap definition do not explicitly reference loans, the statutory definition does not expressly categorize Title VII instruments based on more than one loan, or contingent on events that occur with respect to more than one loan borrower, unless such borrowers are also ''issuers of securities.''[770] Based on this commenter's view of the statutory definition, this commenter requested that the Commissions clarify the treatment of indexes composed exclusively of loans.[771] Another commenter provided similar comments and also requested clarification regarding the treatment of CDS based on indexes of loans.[772] A third commenter stated its view that the third prong of the statutory security-based swap definition implies that Title VII instruments on a basket of loans are security-based swaps if the lenders would satisfy the criteria for issuers of a ''narrow-based security index'' and encouraged the Commissions to clarify this issue.[773] The Commissions agree with commenters that an index CDS based on an index of loans that are not securities is analyzed under the third prong of the statutory security-based swap definition and, therefore, are clarifying the treatment of these Title VII instruments above.[774]

(i) Number and Concentration Percentages of Reference Entities or Securities

The Commissions believe that the first three criteria of the debt security index test (which are based on the statutory narrow-based security index definition) discussed above (*i.e.,* the number and concentration weighting requirements) are appropriate to apply to index CDS,

[760] *See* discussion of July 2006 Debt Index Rules.

[761] The Commissions note that the language of the rules is intended, in general, to be consistent with the criteria developed for debt indexes discussed above. Certain changes from the criteria developed for debt indexes are necessary to address differences between futures on debt indexes and index CDS. Certain other changes are necessary because the rules for debt indexes define under what conditions an index is not a narrow-based security index, whereas the rules for index CDS define what is a narrow-based security index. For example, an index is not a narrow-based security index under the rule for debt indexes if it is not a narrow-based security index under either subparagraph (a)(1) or paragraph (a)(2) of the rule. *See* July 2006 Debt Index Rules. Under the rules for index CDS, however, an index is a narrow-based security index if it meets the requirements of both of the counterpart paragraphs in the rules regarding index CDS (paragraphs (1)(i) and (1)(ii) of rules 1.3(zzz) and 1.3(aaaa) under the CEA and paragraph (a)(1) and paragraph (a)(2) of rules 3a68–1a and 3a68–1b under the Exchange Act), even though the criteria in the debt index rules and the rules for index CDS include generally the same criteria and structure.

[762] *See infra* note 768 and accompanying text.

[763] If the loans underlying the index of loans are securities, the index CDS would be analyzed in the same manner as any other index CDS based on an index of securities.

[764] An index CDS referencing loans also may be based on events relating to the borrower, such as bankruptcy, and to defaults on any obligation of the borrower.

[765] *See* ISDA Letter and MarketAxess Letter.

[766] *See* MarketAxess Letter. This commenter stated that ''The Proposed Rules layout an exceedingly complex process for determining whether an index CDS is broad-based or narrow-based.'' *Id.*

[767] *See* ISDA Letter.

[768] *See* Allen & Overy Letter; July LSTA Letter; and SIFMA Letter.

[769] *See* Allen & Overy Letter.

[770] *Id.*

[771] *Id.*

[772] *See* July LSTA Letter. This commenter noted that prong (III) of the statutory security-based swap definition does not clearly reference borrowers of loans or indexes of borrowers. However, this commenter noted that because most borrowers that are named as reference entities in loan CDS transactions are corporate entities that issue equity interests to one or more shareholders (although they may not issue public securities or become subject to public reporting requirements), this commenter believes that prong (III) can be interpreted to include swaps that reference a single borrower or borrowers of loans in an index. *Id.*

[773] *See* SIFMA Letter.

[774] The Commissions also are providing guidance with respect to TRS based on two or more loans that are not securities. *See supra* part III.C.

whether CDS on indexes of securities or indexes of issuers of securities.[775] Accordingly, the Commissions are adopting the first three criteria of rule 1.3(zzz) under the CEA and rule 3a68–1a under the Exchange Act as proposed with certain modifications in response to commenters' concerns.[776] These rules contain the same number and concentration criteria as proposed, but modify the method of calculating affiliation among issuers and reference entities in response to commenters.[777] Further, in response to commenters,[778] the Commissions are providing an additional interpretation with respect to the application of these criteria to two particular types of CDS, commonly known as ''nth-to-default CDS'' and ''tranched CDS.''

The first three criteria provide that, for purposes of determining whether an index CDS is a security-based swap under section 3(a)(68)(A)(ii)(III) of the Exchange Act,[779] the term ''issuers of securities in a narrow-based security index'' includes issuers of securities identified in an index (including an index referencing loan borrowers) in which:

• *Number:* There are nine or fewer non-affiliated issuers of securities that are reference entities included in the index, provided that an issuer of securities shall not be deemed a reference entity included in the index unless (i) a credit event with respect to such reference entity would result in a payment by the credit protection seller to the credit protection buyer under the index CDS based on the related notional amount allocated to such reference entity; or (ii) the fact of such credit event or the calculation in accordance with clause (i) above of the amount owed with respect to such credit event is taken into account in determining whether to make any future payments under the index CDS with respect to any future credit events;

• *Single Component Concentration:* The effective notional amount allocated to any reference entity included in the index comprises more than 30 percent of the index's weighting; or

• *Largest Five Component Concentration:* The effective notional amount allocated to any five non-affiliated reference entities included in the index comprises more than 60 percent of the index's weighting.[780]

Similarly, the Commissions are adopting as proposed the first three criteria of rule 1.3(aaaa) under the CEA and rule 3a68–1b under the Exchange Act. These three criteria provide that, for purposes of determining whether an index CDS is a security-based swap under section 3(a)(68)(A)(ii)(I) of the Exchange Act,[781] the term ''narrow-based security index'' includes an index in which essentially the same criteria apply, substituting securities for issuers. Under these criteria, the term ''narrow-based security index'' would mean an index in which:

• *Number:* There are nine or fewer securities, or securities that are issued by nine or fewer non-affiliated issuers, included in the index, provided that a security shall not be deemed a component of the index unless (i) a credit event with respect to the issuer of such security or a credit event with respect to such security would result in a payment by the credit protection seller to the credit protection buyer under the index CDS based on the related notional amount allocated to such security, or (ii) the fact of such credit event or the calculation in accordance with clause (i) above of the amount owed with respect to such credit event is taken into account in determining whether to make any future payments under the index CDS with respect to any future credit events;

• *Single Component Concentration:* The effective notional amount allocated to the securities of any issuer included in the index comprises more than 30 percent of the index's weighting; or

• *Largest Five Component Concentration:* The effective notional amount allocated to the securities of any five non-affiliated issuers included in the index comprises more than 60 percent of the index's weighting.

Thus, the applicability of the final rules depends on conditions relating to the number of non-affiliated reference entities or issuers of securities, or securities issued by non-affiliated issuers, as applicable, included in an index and the weighting of notional amounts allocated to the reference entities or securities included in the index, as applicable. These first three criteria of the final rules evaluate the number and concentration of the reference entities or securities included in the index, as applicable, and ensure that an index with a small number of reference entities, issuers, or securities or concentrated in only a few reference entities, issuers, or securities is narrow-based, and thus where such index is the underlying reference of an index CDS, the index CDS is a security-based swap. Further, as more fully described below,[782] the final rules provide that a reference entity or issuer of securities included in an index and any of that reference entity's or issuer's affiliated entities (as defined in the final rules) that also are included in the index are aggregated for purposes of determining whether the number and concentration criteria are met.

Specifically, the final rules provide that an index meeting any one of certain identified conditions would be a narrow-based security index. The first condition in paragraph (1)(i)(A) of rule 1.3(zzz) under the CEA and paragraph (a)(1)(i) of rule 3a68–1a under the Exchange Act is that there are nine or fewer non-affiliated issuers of securities that are reference entities in the index. An issuer of securities counts toward this total only if a credit event with respect to such entity would result in a payment by the credit protection seller to the credit protection buyer under the index CDS based on the notional amount allocated to such entity, or if the fact of such a credit event or the calculation of the payment with respect to such credit event is taken into account when determining whether to make any future payments under the index CDS with respect to any future credit events.

Similarly, the first condition in paragraph (1)(i)(A) of rule 1.3(aaaa) under the CEA and paragraph (a)(1)(i) of rule 3a68–1b under the Exchange Act provides that a security counts toward the total number of securities in the index only if a credit event with respect to such security, or the issuer of such security, would result in a payment by the credit protection seller to the credit

[775] *See infra* notes 792 and 793 and accompanying text.

[776] *See* paragraphs (a)(1)(i)–(iii) of rules 1.3(zzz) and 1.3(aaaa) under the CEA and rules 3a68–1a and 3a68–1b under the Exchange Act.

[777] *See infra* note 804 and accompanying text.

[778] *See infra* notes 795 and 796 and accompanying text.

[779] 15 U.S.C. 78c(a)(68)(A)(ii)(III).

[780] These rules refer to the ''effective notional amount'' allocated to reference entities or securities in order to address potential situations in which the means of calculating payout across the reference entities or securities is not uniform. Thus, if one or more payouts is leveraged or enhanced by the structure of the transaction (*i.e.,* 2x recovery rate), that amount would be the ''effective notional amount'' for purposes of the 30 percent and 60 percent tests in paragraphs (1)(i)(B) and (1)(i)(C) of rules 1.3(zzz) and 1.3(aaaa) and paragraphs (a)(1)(ii) and (a)(1)(iii) of rules 3a68–1a and 3a68–1b. Similarly, if the aggregate notional amount under a CDS is not uniformly allocated to each reference entity or security, then the portion of the notional amount allocated to each reference entity or security (which may be by reference to the product of the aggregate notional amount and an applicable percentage) would be the ''effective notional amount.''

[781] 15 U.S.C. 78c(a)(68)(A)(ii)(I).

[782] *See infra* part III.G.3(b)(ii), for a discussion of the affiliation definition applicable to calculating the number and concentration criteria. As noted above, the Commissions are modifying the method of calculating affiliation for purposes of these criteria.

protection buyer under the index CDS based on the notional amount allocated to such security, or if the fact of such a credit event or the calculation of the payment with respect to such credit event is taken into account when determining whether to make any future payments under the index CDS with respect to any future credit events.

These provisions are intended to ensure that an index concentrated in a few reference entities or securities, or a few reference entities that are affiliated (as defined in the final rules) or a few securities issued by issuers that are affiliated, are within the narrow-based security index definition.[783] These provisions also are intended to ensure that an entity is not counted as a reference entity included in the index, and a security is not counted as a security included in the index, unless a credit event with respect to the entity, issuer, or security affects payout under a CDS on the index.[784]

Further, as this condition is in the alternative (i.e., either there must be a credit event resulting in a payment under the index CDS or a credit event is considered in determining future CDS payments), the tests encompass all index CDS. For example, and in response to a commenter,[785] the test would cover an nth-to-default CDS,[786] in which default with respect to a specified component of an index (such as the first default or fifth default) triggers the CDS payment, even if the CDS payment is not made with respect to such particular credit event. As another example, and in response to another commenter,[787] the test applies to a tranched CDS [788] if the payments are made on only a tranche, or portion, of the potential aggregate notional amount of the CDS (often expressed as a percentage range of the total notional amount of the CDS) because the CDS payment takes into account a credit event with respect to an index component, even if the credit event itself does not result in such a payment.

The second condition, in paragraphs (1)(i)(B) of rules 1.3(zzz) and 1.3(aaaa) under the CEA and paragraphs (a)(1)(ii) of rules 3a68–1a and 3a68–1b under the Exchange Act, is that the effective notional amount allocated to any reference entity or security of any issuer included in the index comprises more than 30 percent of the index's weighting.

The third condition, in paragraphs (1)(i)(C) of rules 1.3(zzz) and 1.3(aaaa) under the CEA and paragraphs (a)(1)(iii) of rules 3a68–1a and 3a68–1b under the Exchange Act, is that the effective notional amount allocated to any five non-affiliated reference entities, or to the securities of any five non-affiliated issuers, included in the index comprises more than 60 percent of the index's weighting.

Given that Congress determined that these concentration percentages are appropriate to characterize an index as a narrow-based security index, and the Commissions have determined they are appropriate for debt security indexes in the security futures context,[789] the Commissions believe that these concentration percentages are appropriate to apply to the notional amount allocated to reference entities and securities in order to apply similar standards to indexes that are the underlying references of index CDS. Moreover, with respect to both the number and concentration criteria, the markets have had experience with these criteria with respect to futures on equity indexes, volatility indexes, and debt security indexes.[790]

Comments

One commenter expressed its view that the Commissions should increase the percentage test in the largest five component concentration.[791] The Commissions are adopting the number and concentration criteria as proposed. The statutory definition of the term ''security-based swap'' references the definition of the term ''narrow-based security index'' contained in the Exchange Act and the CEA,[792] which includes the same number and concentration percentages as the Commissions are adopting in this release. The Commissions are not modifying the statutory definition to change the percentages. The statutory definition included the concentration percentages, which the Commissions understand are intended to assure that a security index could not be used as a surrogate for the underlying securities in order to avoid application of the Federal securities laws. The Commissions also previously determined to retain these statutory percentages in connection with rules relating to debt security indexes in the security futures context.[793] The Commissions believe that these percentages are similarly appropriate to apply to indexes on which index CDS are based. Moreover, with respect to the number and concentration criteria, as these are in the statutory definition of the term ''narrow-based security index'' applicable to security futures, market participants have experience in analyzing indexes, including equity, volatility and debt security indexes, to determine compliance with these criteria. As discussed below,[794] though, the Commissions are modifying the affiliation definition used in analyzing the number and concentration criteria for an index.

Two commenters requested clarification regarding nth-to-default CDS, stating their view that such CDS should be treated as security-based swaps to reflect their single-entity triggers.[795] Two commenters requested clarification regarding tranched index CDS, including whether the CDS would be classified based on the underlying index.[796] As discussed above, the Commissions are providing an interpretation on the applicability of the first three criteria of the rules to nth-to-default CDS and tranched CDS. As noted above, the Commissions believe the rules encompass all index CDS, regardless of the type or payment

[783] This requirement is generally consistent with the definition of ''narrow-based security index'' in section 1a(35)(A) of the CEA, 7 U.S.C. 1a(35)(A), and section 3(a)(55)(B) of the Exchange Act, 15 U.S.C. 78c(a)(55)(B), and the July 2006 Debt Index Rules.

[784] *Id.*

[785] *See infra* note 795 and accompanying text.

[786] An ''nth-to-default CDS'' is a CDS in which the payout is linked to one in a series of defaults (such as first-, second- or third-to-default), with the contract terminating at that point. *See* SIFMA Letter.

[787] *See infra* note 796 and accompanying text.

[788] A ''tranched CDS'' is a CDS in which the counterparties agree to buy and sell credit protection on only a portion of the potential losses that could occur on an underlying portfolio of reference entities. The portion is typically denoted as a specified percentage range of aggregate losses (*e.g.,* 2 percent to 5 percent, meaning the credit protection seller would not make payments until aggregate losses exceed 2 percent of the notional of the transaction, and would no longer be obligated to make payments after aggregate losses reach 5 percent). *See* SIFMA Letter.

[789] *See* July 2006 Debt Index Rules.

[790] As noted above, the Commissions are modifying the method of calculating affiliation for purposes of the number and concentration criteria. *See infra* part III.G.3(b)(ii).

[791] *See* ISDA Letter. According to this commenter, the ''operational complexity'' of the number and concentration criteria will increase costs and compliance risks. *Id.*

[792] *See* 15 U.S.C. 78c(a)(55)(B) and 7 U.S.C. 1a(35).

[793] *See* July 2006 Debt Index Rules.

[794] *See infra* part III.G.3(b)(ii).

[795] *See* ISDA Letter and SIFMA Letter. One of these commenters noted that such an approach also made sense for nth-to-default CDS because they are typically based on baskets of less than 10 securities. *See* ISDA Letter.

[796] *See* Markit Letter and SIFMA Letter. One of these commenters stated that classifying tranches underlying index CDS according to attachment or detachment points is not appropriate because it is impossible to know for certain at inception of the CDS the number of credit events that will ultimately affect actual payments, which typically depend on the severity of loss associated with each credit event. *See* SIFMA Letter.

structure, such as whether there is a single-entity payment based on credit events of other index components or whether the payment is based on a specific entity.

(ii) Affiliation of Reference Entities and Issuers of Securities With Respect to Number and Concentration Criteria

The Commissions are adopting the affiliation definition that applies when calculating the number and concentration criteria with certain modifications from the proposal to address commenters' concerns.[797] The final rules provide that the terms ''reference entity included in the index'' and ''issuer of the security included in the index'' include a single reference entity or issuer of securities included in an index, respectively, or a group of affiliated reference entities or issuers included in an index, respectively.[798] For purposes of the rules, affiliated reference entities or issuers of securities included in an index or securities included in an index issued by affiliated issuers will be counted together for determining whether the number and concentration criteria are met. However, with respect to asset-backed securities, the final rules provide that each reference entity or issuer of securities included in an index that is an issuing entity of an asset-backed security is considered a separate reference entity or issuer, as applicable, and will not be considered affiliated with other reference entities or issuers of securities included in the index.

The final rules provide that a reference entity or issuer of securities included in an index is affiliated with another reference entity or issuer of securities included in the index if it controls, is controlled by, or is under common control with, that other reference entity or issuer.[799] The final rules define control, solely for purposes of this affiliation definition, to mean ownership of more than 50 percent of a reference entity's or issuer's equity or the ability to direct the voting of more than 50 percent of a reference entity's or issuer's voting equity.[800] The affiliation definition in the final rules differs from the definition included in the proposal, which provided for a control threshold of 20 percent ownership.[801] This change is based on the Commissions' consideration of comments received.[802] By using a more than 50 percent (i.e., majority ownership) test rather than a 20 percent ownership test for the control threshold, there is a greater likelihood that there will be an alignment of economic interests of the affiliated entities that is sufficient to aggregate reference entities or issuers of securities included in an index for purposes of the number and concentration criteria.[803]

As the affiliation definition is applied to the number criterion, affiliated reference entities or issuers of securities included in an index will be viewed as a single reference entity or issuer of securities to determine whether there are nine or fewer non-affiliated reference entities included in the index or securities that are issued by nine or fewer non-affiliated issuers. Similarly, as the affiliation definition is applied to the concentration criteria, the notional amounts allocated to affiliated reference entities included in an index or the securities issued by a group of affiliated issuers of securities included in an index must be aggregated to determine the level of concentration of the components of the index for purposes of the 30-percent and 60-percent concentration criteria.

Comments

Three commenters requested that the Commissions revise the affiliation definition that applies when calculating the number and concentration criteria to increase the control threshold from 20 percent ownership to majority ownership.[804] These commenters noted that majority ownership is consistent with current market practice, including the definition of affiliate included in the 2003 ISDA Credit Derivatives Definitions.[805] One commenter also stated its belief that affiliated entities should only be aggregated where the reference entities' credit risks are substantially similar and credit decisions are made by the same group of individuals.[806] This commenter stated its view that 20 percent ownership is too low and that majority ownership is necessary for credit risk and credit decisions to be aligned enough as to warrant collapsing two issuers into one for purposes of the number and concentration criteria.[807]

As stated above, the Commissions are modifying the affiliation definition that applies when calculating the number and concentration criteria in response to commenters to use an affiliation test based on majority ownership. Based on commenters' letters, the Commissions understand that the current standard CDS documentation and the current approach used by certain index providers for index CDS with respect to the inclusion of affiliated entities in the same index use majority ownership rather than 20 percent ownership to determine affiliation. The Commissions are persuaded by commenters that, in the case of index CDS only it is more appropriate to use majority ownership because majority-owned entities are more likely to have their economic interests aligned and be viewed by the market as part of a group. The Commissions believe that revising the affiliation definition in this manner for purposes of calculating the number and concentration criteria responds to commenters' concerns that the percentage control threshold may inadvertently include entities that are not viewed as part of a group. Thus, as revised, the affiliation definition will include only those reference entities or issuers included in an index that satisfy the more than 50 percent (i.e., majority ownership) control threshold. The

[797] *See infra* note 804 and accompanying text.

[798] *See* paragraph (c)(4) of rules 1.3(zzz) and 1.3(aaaa) under the CEA and rule 3a68–1a and 3a68–1b under the Exchange Act.

[799] *See* paragraph (c)(1) of rules 1.3(zzz) and 1.3(aaaa) under the CEA and rules 3a68–1a and 3a68–1b under the Exchange Act.

[800] *See* paragraph (c)(2) of rules 1.3(zzz) and 1.3(aaaa) under the CEA and rules 3a68–1a and 3a68–1b under the Exchange Act.

[801] *See* Proposing Release at 29849.

[802] *See infra* note 804 and accompanying text. The Commissions note that another alternative would have been to include a requirement that the entities satisfy the 20 percent control threshold and also be consolidated with each other in financial statements. The Commissions did not include a requirement that the entities be consolidated with each other in financial statements because they do not believe that the scope of the affiliation definition should be exposed to the risk of future changes in accounting standards. Further, the use of a majority ownership control threshold (more than 50 percent) is generally consistent with consolidation under generally accepted accounting principles. *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).

[803] In such a case, as noted by commenters, the affiliated entities are viewed as part of group for which aggregation of these entities is appropriate. *See infra* note 806 and accompanying text.

[804] *See* ISDA Letter (requesting a threshold of at least 50 percent); Markit Letter (requesting a threshold of at least 50 percent); and SIFMA Letter (requesting a threshold of majority ownership, or 51 percent). One commenter also requested that the Commissions clarify the application of the affiliation definition. *See* Markit Letter. The Commissions have provided above and in *infra* part III.G.3(b)(ii), several examples illustrating the application of the affiliation definition in response to this commenter.

[805] *Id.*

[806] *See* SIFMA Letter. The ISDA Letter provides a similar rationale that ''the control threshold was too low and potentially disruptive when viewed against entities that the swap markets now trade as separate entities. In the CDS market, for example, entities that share ownership ties of substantially more than 20 percent trade quite independently. These entities may have completely disparate characteristics for the purpose of an index grouping of one sort or another.'' *See* ISDA Letter.

[807] *See* SIFMA Letter.

Commissions believe that determining affiliation in this manner for purposes of calculating the number and concentration criteria responds to the commenters' concerns.

The Commissions also believe that the modified affiliation definition addresses commenters' concerns noted above [808] that the rules further defining the terms ''issuers of securities in a narrow-based security index'' and ''narrow-based security index'' should be simplified. The modified affiliation definition enables market participants to make an affiliation determination for purposes of calculating the number and concentration criteria by measuring the more than 50 percent (i.e., majority ownership) control threshold.

(iii) Public Information Availability Regarding Reference Entities and Securities

In addition to the number and concentration criteria, the debt security index test also includes, as discussed above, a public information availability test. The public information availability test is intended as the substitute for the average daily trading volume (''ADTV'') provision in the statutory narrow-based security index definition. An ADTV test is designed to take into account the trading of individual stocks and, because Exchange Act registration of the security being traded is a listing standard for equity securities, the issuer of the security being traded must be subject to the reporting requirements under the Exchange Act. Based on the provisions of the statutory ADTV test, the Commissions have determined that the ADTV test is not useful for purposes of determining the status of the index on which the index CDS is based because index CDS most commonly reference entities, which do not ''trade,'' or debt instruments, which commonly are not listed, and, therefore, do not have a significant trading volume. However, the underlying rationale of such provision, that there is sufficient trading in the securities and therefore public information and market following of the issuer of the securities, applies to index CDS.

In general, if an index is not narrow-based under the number and concentration criteria, it will be narrow-based if one of the reference entities or securities included in the index fails to meet at least one of the criteria in the public information availability test. This test was designed to reduce the likelihood that broad-based debt security indexes or the component securities or issuers of securities in that index would be readily susceptible to manipulation. The fourth condition in the index CDS rules sets out a similar public information availability test that is intended solely for purposes of determining whether an index underlying a CDS is narrow-based.[809] The Commissions are adopting the public information availability test essentially as proposed with certain modifications to address commenters' concerns, including modifications to the definition of affiliation for purposes of satisfying certain criteria of the public information availability test.[810]

The Commissions are adopting final rules under which an index CDS will be considered narrow-based (except as discussed below) if a reference entity or security included in the index does not meet any of the following criteria: [811]

- The reference entity or the issuer of the security included in the index is required to file reports pursuant to the Exchange Act or the regulations thereunder;
- The reference entity or the issuer of the security included in the index is eligible to rely on the exemption provided in rule 12g3–2(b) under the Exchange Act; [812]
- The reference entity or the issuer of the security included in the index has a worldwide market value of its outstanding common equity held by non-affiliates of $700 million or more; [813]
- The reference entity or the issuer of the security included in the index (other than a reference entity or an issuer of the security included in the index that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Exchange Act [814]) has outstanding notes, bonds, debentures, loans, or evidences of indebtedness (other than revolving credit facilities) having a total remaining principal amount of at least $1 billion; [815]
- The reference entity included in the index is an issuer of an exempted security, or the security included in the index is an exempted security, each as defined in section 3(a)(12) of the Exchange Act [816] and the rules promulgated thereunder (except a municipal security);
- The reference entity or the issuer of the security included in the index is a government of a foreign country or a political subdivision of a foreign country; or
- If the reference entity or the issuer of the security included in the index is an issuing entity of asset-backed securities as defined in section 3(a)(77) of the Exchange Act,[817] such asset-backed security was issued in a transaction registered under the Securities Act and has publicly available distribution reports.

However, so long as the effective notional amounts allocated to reference entities or securities included in the index that satisfy the public information availability test comprise at least 80 percent of the index's weighting, failure by a reference entity or security included in the index to satisfy the public information availability test will be disregarded if the effective notional amounts allocated to that reference entity or security comprise less than five percent of the index's weighting.[818] In this situation, the public information availability test for purposes of the index would be satisfied.

The determination as to whether an index CDS is narrow-based is conditioned on the likelihood that information about a predominant percentage of the reference entities or securities included in the index is publicly available.[819] For example, a reference entity or an issuer of securities

[808] *See supra* note 765 and accompanying text.

[809] *See* Proposing Release at 29850.

[810] *See infra* notes 845, 847, 849 and 867 and accompanying text.

[811] *See* paragraphs (a)(1)(iv)(A)–(G) of rules 1.3(zzz) and 1.3(aaaa) under the CEA and rule 3a68–1a and 3a68–1b under the Exchange Act.

[812] 17 CFR 240.12g3–2(b).

[813] *See* July 2006 Debt Index Rules (noting that issuers having worldwide equity market capitalization of $700 million or more are likely to have public information available about them).

[814] 15 U.S.C. 78c(a)(77).

[815] *See* July 2006 Debt Index Rules (noting that issuers having at least $1 billion in outstanding debt are likely to have public information available about them).

[816] 15 U.S.C. 78c(a)12.

[817] 15 U.S.C. 78c(a)(77).

[818] *See* paragraph (b) of rules 1.3(zzz) and 1.3(aaaa) under the CEA and rule 3a68–1a and 3a68–1b under the Exchange Act.

[819] Most of the thresholds in the public information availability test are similar to those the Commissions adopted in their joint rules regarding the application of the definition of the term ''narrow-based security index'' to debt security indexes and security futures on debt securities. *See* July 2006 Debt Index Rules. The July 2006 Debt Index Rules also included an additional requirement regarding the minimum principal amount outstanding for each security in the index. The Commissions have not included this requirement in rule 1.3(zzz) under the CEA and rule 3a68–1a under the Exchange Act. That requirement was intended as a substitute criterion for trading volume because the trading volume of debt securities with a principal amount outstanding above that minimum amount was found to be generally larger than debt securities with a principal amount outstanding below that minimum amount. *See* July 2006 Debt Index Release. There is no similar criterion that would be applicable in the context of index CDS. The numerical thresholds also are similar to those the SEC adopted in other contexts, including in the existing definitions of ''well-known seasoned issuer'' and ''large accelerated filer.'' *See* rule 405 under the Securities Act, 17 CFR 230.405, and rule 12b–2 under the Exchange Act, 17 CFR 240.12b–2.

included in the index that is required to file reports pursuant to the Exchange Act or the regulations thereunder makes regular and public disclosure through those filings. Moreover, a reference entity or an issuer of securities included in the index that does not file reports with the SEC but that is eligible to rely on the exemption in rule 12g3–2(b) under the Exchange Act (*i.e.,* foreign private issuers) is required to make certain types of financial information publicly available in English on its Web site or through an electronic information delivery system generally available to the public in its primary trading markets.[820]

The Commissions believe that other reference entities or issuers of securities included in the index that do not file reports with the SEC, but that have worldwide equity market capitalization of $700 million or more, have at least $1 billion in outstanding debt obligations (other than in the case of issuing entities of asset-backed securities), issue exempted securities (other than municipal securities), or are foreign sovereign entities either are required to or are otherwise sufficiently likely, solely for purposes of the ''narrow-based security-index'' and ''issuers of securities in a narrow-based security index'' definitions, to have public information available about them.[821]

In response to commenters,[822] the Commissions are modifying the outstanding debt threshold criterion in the public information availability test to include any indebtedness, including loans, so long as such indebtedness is not a revolving credit facility. The Commissions believe that expanding the definition of indebtedness to include loans (other than revolving credit) for purposes of the debt threshold determination is consistent with the view that entities that have significant outstanding indebtedness likely will have public information available about them.[823]

As more fully described below,[824] for purposes of satisfying one of these issuer eligibility criteria, the final rules provide that a reference entity or an issuer of securities included in an index may rely upon the status of an affiliated entity as an Exchange Act reporting company or foreign private issuer or may aggregate the worldwide equity market capitalization or outstanding indebtedness of an affiliated entity, regardless of whether such affiliated entity itself or its securities are included in the index.

In the case of indexes including asset-backed securities, or reference entities that are issuing entities of asset-backed securities, information about the reference entity or issuing entity of the asset-backed security will not alone be sufficient and, consequently, the rules provide that the public information availability test will be satisfied only if certain information also is available about the asset-backed securities. An issuing entity (whether or not a reference entity) of asset-backed securities will meet the public information availability test if such asset-backed securities were issued in a transaction for which the asset-backed securities issued (which includes all tranches) [825] were registered under the Securities Act and distribution reports about such asset-backed securities are publicly available. In response to commenters,[826] the Commissions note that distribution reports, which sometimes are referred to as servicer reports, delivered to the trustee or security holders, as the case may be, are filed with the SEC on Form 10–D. In addition, because of the lack of public information regarding many asset-backed securities, despite the size of the outstanding amount of securities,[827] the rules do not permit such reference entities and issuers to satisfy the public information availability test by having at least $1 billion in outstanding indebtedness. Characterizing an index with reference entities or securities for which public information is not likely to be available as narrow-based, and thus index CDS where the underlying references or securities are such indexes as security-based swaps, should help to ensure that the index cannot be used to circumvent the Federal securities laws, including those relating to Securities Act compliance and the antifraud, antimanipulation and insider trading prohibitions with respect to the index components or the securities of the reference entities.

As noted above, if an index is not narrow-based under the number and concentration criteria, it will be narrow-based if one of the reference entities or securities included in the index fails to meet at least one of the criteria in the public information availability test. However, even if one or more of the reference entities or securities included in the index fail the public information availability test, the final rules provide that the index will not be considered ''issuers of securities in a narrow-based security index'' or a ''narrow-based security index,'' so long as the applicable reference entity or security that fails the test represents less than five percent of the index's weighting, and so long as reference entities or securities comprising at least 80 percent of the index's weighting satisfy the public information availability test.

An index that includes a very small proportion of reference entities or securities that do not satisfy the public information availability test will be treated as a broad-based security index if the other elements of the definition, including the five percent and 80 percent thresholds, are satisfied prior to execution, but no later than when the parties offer to enter into the index CDS.[828] The five-percent weighting threshold is designed to provide that reference entities or securities not satisfying the public information availability test comprise only a very small portion of the index, and the 80-percent weighting threshold is designed to provide that a predominant percentage of the reference entities or securities in the index satisfy the public information availability test. As a result, these thresholds provide market participants with flexibility in constructing an index. The Commissions believe that these thresholds are appropriate and that providing such flexibility is not likely to increase the likelihood that an index that satisfies these provisions or the component securities or issuers of securities in that index would be readily susceptible to manipulation or that there would be misuse of material non-public information about the component

[820] 17 CFR 240.12g3–2(b).

[821] It is important to note that the public information availability test is designed solely for purposes of distinguishing between index CDS that are swaps and index CDS that are security-based swaps. The proposed criteria are not intended to provide any assurance that there is any particular level of information actually available regarding a particular reference entity or issuer of securities. Meeting one or more of the criteria for the limited purpose here—defining the terms ''narrow-based security index'' and ''issuers of securities in a narrow-based security index'' in the first and third prongs of the security-based swap definition with respect to index CDS—would not substitute for or satisfy any other requirement for public disclosure of information or public availability of information for purposes of the Federal securities laws.

[822] *See infra* note 845 and accompanying text.

[823] *See* July 2006 Debt Index Release.

[824] *See infra* part III.G.3(b)(iv), for a discussion regarding the affiliation definition applicable to the public information availability test. As noted above, the Commissions are modifying the method of calculating affiliation for purposes of this test.

[825] Under this part of the public information availability test, all offerings of the asset-backed securities will have to be covered by a registration statement under the Securities Act, including all tranches, so that public information would exist for any tranche included in an index. However, as noted below, CDS that are offered to ECPs only may rely on alternatives to satisfy the public information test for asset-backed securities.

[826] *See infra* note 849 and accompanying text.

[827] *See generally Asset-Backed Securities,* 75 FR 23328 (May 3, 2010).

[828] *See supra* note 625 and accompanying text.

securities or issuers of securities in that index through the use of CDS based on such indexes.

The final rules also provide that, for index CDS entered into solely between ECPs, there are alternative means to satisfy the public information availability test. Under the final rules, solely for index CDS entered into between ECPs, an index will be considered narrow-based if a reference entity or security included in the index does not meet (i) any of the criteria enumerated above or (ii) any of the following criteria: [829]

- The reference entity or the issuer of the security included in the index (other than a reference entity or issuer included in the index that is an issuing entity of an asset-backed security) makes available to the public or otherwise makes available to such ECP information about such reference entity or issuer pursuant to rule 144A(d)(4) under the Securities Act; [830]
- Financial information about the reference entity or the issuer of the security included in the index (other than a reference entity or issuer included in the index that is an issuing entity of an asset-backed security) is otherwise publicly available; or
- In the case of an asset-backed security included in the index, or a reference entity included in the index that is an issuing entity of an asset-backed security, information of the type and level included in public distribution reports for similar asset-backed securities is publicly available about both the reference entity or issuing entity and the asset-backed security.

As more fully described below, for purposes of satisfying either the rule 144A information criterion or the financial information otherwise publicly available criterion, the final rules provide that a reference entity or an issuer of securities included in an index may look to an affiliated entity to determine whether it satisfies one of these criterion, regardless of whether such affiliated entity itself or its securities are included in the index.[831]

In response to commenters,[832] the Commissions are revising the rule 144A information criterion of the public information availability test applicable to index CDS entered into solely between ECPs to clarify that the rule 144A information must either be made publicly available or otherwise made available to the ECP. In addition, the Commissions are clarifying that financial information about the reference entity or the issuer of the security may otherwise be publicly available through an issuer's Web site, through public filings with other regulators or exchanges, or through other electronic means. This method of satisfying the public information availability test does not specify the precise method by which financial information must be available.

As with other index CDS, with respect to index CDS entered into solely with ECPs, if the percentage of the effective notional amounts allocated to reference entities or securities satisfying this expanded public information availability test comprise at least 80 percent of the index's weighting, then a reference entity or security included in the index that fails to satisfy the alternative public information test criteria will be disregarded so long as the effective notional amount allocated to that reference entity or security comprises less than five percent of the index's weighting.

Comments

The Commissions received a number of general and specific comments regarding the public information availability test.

A number of commenters believed that the public information availability test should not be included in the final rules for various reasons, including the potential disparate treatment between products based on indexes due to changes in index components,[833] the impact of the migration of indexes from narrow-based to broad-based and vice-versa,[834] and assertions that the test was not needed due to the types of participants engaged in swap and security-based swap transactions.[835] One commenter suggested replacing the public information availability test with a volume trading test.[836]

The Commissions are adopting the public information availability test as proposed with certain modifications described above. As discussed above, the public information availability test is intended as the substitute for the ADTV provision in the statutory narrow-based security index definition, which the Dodd-Frank Act included as the method for determining whether index CDS are swaps or security-based swaps. Based on the reasons discussed above, the Commissions have retained the public information availability test as the underlying rationale of such provision, that there is sufficient trading in the securities and therefore public information and market following of the issuer of the securities, applies to index CDS. Accordingly, the Commissions believe that there should be public information available about a predominant percentage of the reference entities or issuers of securities underlying the index in order to prevent circumvention of other provisions of the Federal securities laws through the use of CDS based on such indexes, to reduce the likelihood that the index, the component securities, or the named issuers of securities in the index could be readily susceptible to manipulation, and to prevent the misuse of material non-public information about such an index, the component securities, or the reference entities.

The Commissions understand that the characterization of an index underlying a CDS as broad-based or narrow-based may change because of changes to the index, such as addition or removal of components, or changes regarding the

[829] *See* paragraph (a)(1)(iv)(H) of rules 1.3(zzz) and 1.3(aaaa) under the CEA and rule 3a68–1a and 3a68–1b under the Exchange Act.

[830] 17 CFR 230.144A(d)(4).

[831] *See infra* part III.G.3(b)(iv), for a discussion regarding the affiliation definition applicable to the public information availability test applicable to index CDS entered into solely between ECPs. As noted above, the Commissions are modifying the method of calculating affiliation for purposes of this test.

[832] *See infra* note 847 and accompanying text.

[833] *See* SIFMA Letter. This commenter expressed its concern that transactions on the same or similar indexes may result in differing regulatory treatment due to changes in index components as a result of component adjustments or as the availability of information relating to a component issuer changes over time. *Id.*

[834] *See* Markit Letter. According to this commenter, determining whether an index of loans or borrowers meets the public information availability test would be more difficult and more costly than making the same determination for an index of securities, which ''are generally subject to national or exchange-based reporting and disclosure regimes'' and could create regulatory uncertainty. *Id.* This commenter also expressed its belief that the public information availability test would cause indexes to switch between a narrow-based and broad-based classification, which could result in unnecessary cost, confusion, and market disruption. *Id.*

[835] *See* ISDA Letter. This commenter expressed its belief that the public information availability test is not needed given the largely institutional nature of the existing over-the-counter market. *Id. See also* July LSTA Letter.

[836] *See* Markit Letter. This commenter expressed its belief that a volume-based classification process would be preferable to the public information availability test for several reasons. First, the statutory definition of ''narrow-based security index'' includes a volume-based factor. Second, a volume-based factor could be applied easily and transparently because the outstanding notional volume of CDS referencing each index constituent is captured by the Trade Information Warehouse. Third, an index classification based on outstanding notional amount as opposed to the public information availability test would result in less indices migrating from broad- to narrow-based classifications, and vice versa. This commenter also expressed its belief that a volume-based test would ensure that broad-based indices are not readily susceptible to manipulation because indexes based on constituents with high volumes are likely to have significant public information available. *Id.*

specific components of the index, such as a decrease in the amount of outstanding common equity for a component. However, these types of changes are contemplated by the statutory narrow-based security index definition, which the Dodd-Frank Act used to establish whether index CDS are swaps or security-based swaps.[837] Moreover, the Commissions have provided that the determination of whether a Title VII instrument is a swap, security-based swap or mixed swap is made prior to execution, but no later than when the parties offer to enter into the Title VII instrument,[838] and does not change if a security index underlying such instrument subsequently migrates from broad to narrow (or vice versa) during its life. Accordingly, even if the public information availability test would cause indexes underlying index CDS to migrate as suggested by a commenter, that will not affect the classification of outstanding index CDS entered into prior to such migration. However, if an amendment or change is made to such outstanding index CDS that would cause it to be a new purchase or sale of such index CDS, that could affect the classification of such outstanding index CDS. Further, as is true for other products using the narrow-based security index definition, the Commissions also believe that the effects of changes to an index underlying a CDS traded on an organized platform are addressed through the tolerance period and grace period rules the Commissions are adopting, which rules are based on tolerance period and grace period rules for security futures to which the statutory narrow-based security index definition applies.[839]

The Commissions are not adopting a volume-based test based on the trading of the CDS or the trading of the index, either as a replacement for the public information availability test or as an alternative means of satisfying it, as one commenter suggested.[840] The Commissions believe that using a volume-based test based on the trading of the CDS or the trading of the index would not work in the index CDS context because the character of the index CDS would have to be determined before any trading volume could exist and, therefore, the index CDS would fail a volume-based test. The Commissions also believe that a volume-based test based either on the CDS components of the index or the index itself would not be an appropriate substitute for or an alternative to a public information availability test with respect to the referenced entity, issuer of securities, or underlying security because such a volume-based test would not provide transparency on such underlying entities, issuers of securities or securities.[841]

The Commissions believe that the public information availability test in the index CDS rules allows more flexibility with respect to the types of components included in indexes underlying index CDS. For many indexes, such as bespoke indexes, trading volume for CDS on individual components may not be significant even though the index component would otherwise have no trouble satisfying one of the criteria of the public information availability test. The public information availability test in the index CDS rules also is very similar to the test in the rules for debt security indexes, which, as noted above, apply in the context of Title VII instruments, thus providing a consistent set of rules under which index compilers and market participants can analyze the characterization of CDS.

One commenter also had concerns regarding specific types of indexes and specific types of index components, including the applicability of the public information availability test to indexes of loans or borrowers.[842] As discussed above, however, the Commissions believe that index CDS based on indexes of loans or borrowers should be analyzed under the third prong of the statutory security-based swap definition in the same manner as any other index CDS. Although this commenter noted such indexes may include a higher proportion of ''private'' borrowers (those borrowers who are not public reporting companies or that do not register offerings of their securities) and thus may themselves not satisfy any of the criteria for the public information availability test,[843] the Commissions believe that the information tests of the rule as modified will address these concerns. The modified rule will add loans to the categories of instruments to be aggregated for purposes of the outstanding indebtedness criterion and, as discussed below, will aggregate outstanding indebtedness of affiliates.[844] As a result of these modifications, the Commissions believe that the indexes the commenter was concerned about may be more likely to satisfy the public information availability test.

One commenter agreed with including an outstanding debt threshold as a criterion in the public information availability test, but requested that the Commissions change this criterion to include loans that are not within the definition of security, as well as affiliate debt guaranteed by the issuer of securities or reference entity, and to reduce the required outstanding debt threshold from $1 billion to $100 million.[845] As discussed above, the Commissions are revising the rules to expand the types of debt that are counted toward the $1 billion debt threshold to include any indebtedness, including loans, so long as such indebtedness is not a revolving credit facility. The Commissions have made no other changes to the $1 billion debt threshold.

The Commissions believe that the fact that an entity has guaranteed the obligations of another entity will not affect the likelihood that public information is available about either the borrower on the guaranteed obligation or on the guarantor entity. However, the Commissions note that they are providing an additional interpretation on the affiliation definition of the index CDS rules, including modifying the method of calculating affiliation, that should address this commenter's concerns regarding guaranteed affiliate

[837] The index migration issue exists for all products in which the ''narrow-based security index'' definition is used. Thus, as is true for security futures, the migration issue exists for debt security indexes and the statutory definition of the term ''narrow-based security index,'' under which an index's characterization may be affected by a change to the index itself or to the components of the index.

[838] *See supra* note 625 and accompanying text.

[839] *See infra* part III.G.6.

[840] *See supra* note 836 and accompanying text.

[841] In the context of equity securities indexes to which the ADTV test applies, there likely is information regarding the underlying entities, issuers of securities or securities because, as noted above, Exchange Act registration of the security being traded is a listing standard for equity securities and, therefore, the issuer of the security being traded must be subject to the reporting requirements under the Exchange Act. However, in the context of index CDS, there are no comparable listing standards that would be applicable to provide transparency on the underlying entities, issuers of securities or securities.

[842] *See* July LSTA Letter.

[843] *Id.*

[844] As noted above, the Commissions are modifying the method of calculating affiliation for purposes of certain criteria of the public information availability test. *See infra* part III.G.3(b)(iv).

[845] *See* Markit Letter. This commenter suggested that the debt threshold should be reduced to $100 million because debt issuances in some debt markets, such as the high yield markets, tend to be relatively small. This commenter also suggested that the debt threshold should include debt guaranteed by the issuer of the securities or reference entity because in many cases the issuer of the securities or reference entity is merely guaranteeing debt of its affiliates and not issuing the debt. Finally, this commenter requested clarification as to whether the debt threshold included loans and leveraged loans.

debt.[846] The Commissions also believe that the $1 billion debt threshold, which is the same amount as the outstanding debt threshold in the rules for debt security indexes, is set at the appropriate level to achieve the objective that such entities are likely to have public information available about them.

One commenter suggested that the proposed rule 144A information criterion of the public information availability test applicable to index CDS entered into solely between ECPs should be satisfied if the issuer made the rule 144A information available upon request to the public or to the ECP in question, rather than being required to provide the information.[847] In response to this commenter, the Commissions are revising the rule 144A information criterion of the public information availability test applicable to index CDS entered into solely between ECPs to clarify that the rule 144A information must be made publicly available or otherwise made available to the ECP.

The Commissions received one comment regarding the criteria of the public information availability test that relate specifically to asset-backed securities.[848] The commenter was concerned that the test for asset-backed securities underlying an index may be difficult to apply because all asset-backed securities underlying an index are not always registered under the Securities Act.[849] This commenter also was concerned that the term ''distribution reports'' may not be the same as monthly service reports, which this commenter indicated are available through the deal trustee and/or the SEC Web site.[850] This commenter also believed that it was unclear whether these monthly service reports would qualify as ''distribution reports'' for purposes of the public information availability test and whether information regarding Agency MBS pools, which are available on Agency Web sites, would be sufficient to satisfy the public information availability test.[851] In addition, this commenter requested that the Commissions clarify that not all tranches of a transaction need to be registered under the Securities Act to satisfy the publicly available distribution report requirement.[852]

The Commissions are adopting as proposed the provisions of the public information availability test applicable to indexes based on asset-backed securities. The Commissions note that there are two possible ways to satisfy the public information availability test for index CDS based on asset-backed securities or asset-backed issuers. For index CDS available to non-ECPs, all asset-backed securities in the index or of the issuer in the index must have been sold in registered offerings under the Securities Act and have publicly available distribution reports. The Commissions are clarifying that monthly service reports filed with the SEC will satisfy the requirement for publicly available distribution reports.[853] However, for index CDS being sold only to ECPs, the public information availability test with respect to the index components is satisfied, regardless of whether the asset-backed securities have been sold in registered offerings under the Securities Act, if information of the type and level included in public distribution reports for similar asset-backed securities is publicly available about both the issuing entity and such asset-backed securities. The Commissions believe that requiring such information about the asset-backed securities and the assets in the pools underlying such asset-backed securities is consistent with existing disclosure requirements for asset-backed securities and existing practices of ABS issuers.

(iv) Affiliation of Reference Entities and Issuers of Securities With Respect to Certain Criteria of the Public Information Availability Test

The Commissions are adopting the affiliation definition that applies to certain criteria of the public information availability test with certain modifications from the proposals to address commenters' concerns.[854] The Commissions are making modifications to this affiliation definition that are the same as the modifications the Commissions are making to the affiliation definition that applies when calculating the number and concentration criteria.[855]

This affiliation definition applies for purposes of determining whether a reference entity or issuer of securities included in an index satisfies one of the following four criteria of the public information availability test: (i) The reference entity or issuer of the security included in the index is required to file reports pursuant to the Exchange Act or the regulations thereunder;[856] (ii) the reference entity or issuer of the security included in the index is eligible to rely on the exemption provided in rule 12g3–2(b) under the Exchange Act for foreign private issuers;[857] (iii) the reference entity or issuer of the security included in the index has a worldwide market value of its outstanding common equity held by non-affiliates of $700 million or more;[858] and (iv) the reference entity or issuer of the security included in the index has outstanding notes, bonds, debentures, loans, or evidences of indebtedness (other than revolving credit facilities) having a total remaining principal amount of at least $1 billion.[859] This affiliation definition also applies for purposes of determining whether a reference entity or issuer of securities included in an index satisfies one of the following two criteria of the alternative public information availability test applicable to index CDS entered into solely between ECPs: (i) The reference entity or issuer of the security included in the index makes available rule 144A information;[860] and (ii) financial information about the reference entity or issuer of the security included in the index is otherwise publicly available.[861]

The final rules provide that the terms ''reference entity included in the index'' and ''issuer of the security included in the index'' include a single reference entity or issuer of securities included in an index, respectively, or a group of affiliated entities.[862] For purposes of the rules, a reference entity or issuer of securities included in an index may rely upon an affiliated entity to satisfy certain criteria of the public information availability test. However, with respect to asset-backed securities, the final rules provide that each reference entity or issuer of securities included in an index

[846] *See infra* part III.G.3(b)(iv).

[847] *See* SIFMA Letter.

[848] *See* Markit Letter.

[849] *Id.*

[850] *Id.*

[851] *Id.*

[852] *Id.*

[853] Distribution reports, which sometimes are referred to as servicer reports, delivered to the trustee or security holders, as the case may be, are filed with the SEC on Form 10–D.

[854] *See infra* note 867 and accompanying text.

[855] *See supra* part III.G.3(b)(ii).

[856] *See* paragraph (a)(1)(iv)(A) of rules 1.3(zzz) and 1.3(aaaa) under the CEA and rule 3a68–1a and 3a68–1b under the Exchange Act.

[857] *See* paragraph (a)(1)(iv)(B) of rules 1.3(zzz) and 1.3(aaaa) under the CEA and rule 3a68–1a and 3a68–1b under the Exchange Act.

[858] *See* paragraph (a)(1)(iv)(C) of rules 1.3(zzz) and 1.3(aaaa) under the CEA and rule 3a68–1a and 3a68–1b under the Exchange Act.

[859] *See* paragraph (a)(1)(iv)(D) of rules 1.3(zzz) and 1.3(aaaa) under the CEA and rule 3a68–1a and 3a68–1b under the Exchange Act.

[860] *See* paragraph (a)(1)(iv)(H)(1) of rules 1.3(zzz) and 1.3(aaaa) under the CEA and rule 3a68–1a and 3a68–1b under the Exchange Act.

[861] *See* paragraph (a)(1)(iv)(H)(2) of rules 1.3(zzz) and 1.3(aaaa) under the CEA and rule 3a68–1a and 3a68–1b under the Exchange Act.

[862] *See* paragraph (c)(4) of rules 1.3(zzz) and 1.3(aaaa) under the CEA and rule 3a68–1a and 3a68–1b under the Exchange Act.

that is an issuing entity of an asset-backed security is considered a separate reference entity or issuer, as applicable, and will not be considered affiliated with any other entities.

The final rules provide that a reference entity or issuer of securities included in an index is affiliated with another entity if it controls, is controlled by, or is under common control with, that other entity.[863] The final rules define control, solely for purposes of this affiliation definition, to mean ownership of more than 50 percent of a reference entity's or issuer's equity or the ability to direct the voting of more than 50 percent of a reference entity's or issuer's voting equity.[864] This revision is the same as the modification the Commissions are making to the affiliation definition that applies when calculating the number and concentration criteria, which is discussed above.[865]

As the Commissions noted above, this change is based on the Commissions' consideration of comments received. By using a more than 50 percent (i.e., majority ownership) test rather than a 20 percent ownership test for the control threshold, there is a greater likelihood that there will be information available about the reference entity or issuer of securities included in the index because the market likely will view the affiliated entity and the reference entity or issuer of securities included in the index as a single company or economic entity.[866] Accordingly, to the extent information regarding the affiliated entity is publicly available, there may be information regarding the reference entity or issuer of securities included in the index that also is publicly available. This modified control threshold will permit such reference entity or issuer of securities to rely upon an affiliated entity to satisfy one of the criteria of the public information availability test. Further, unlike the affiliation definition that applies when calculating the number and concentration criteria, the affiliation definition that applies to certain criteria of the public information availability test does not require that the affiliated entity or its securities be included in the index.

As the affiliation definition applies to the Exchange Act reporting company and foreign private issuer criteria of the public information availability test, a reference entity or an issuer of securities included in an index that itself is not required to file reports pursuant to the Exchange Act or the regulations thereunder or is not eligible to rely on the exemption provided in rule 12g3–2(b) under the Exchange Act for foreign private issuers may rely upon the status of an affiliated entity as an Exchange Act reporting company or foreign private issuer, regardless of whether that affiliated entity itself or its securities are included in the index, to satisfy one of these criteria. For example, a majority-owned subsidiary included in an index may rely upon the status of its parent, which may or may not be included in the index, to satisfy the issuer eligibility criteria if the parent is required to file reports under the Exchange Act or is a foreign private issuer.

Similarly, as the affiliation definition applies to the worldwide equity market capitalization and outstanding indebtedness criteria of the public information availability test, a reference entity or an issuer of securities included in an index that itself does not have a worldwide market value of its outstanding common equity held by non-affiliates of $700 million or more or outstanding notes, bonds, debentures, loans, or evidences of indebtedness (other than revolving credit facilities) having a total remaining principal amount of at least $1 billion, may aggregate the worldwide equity market capitalization or outstanding indebtedness of an affiliated entity, regardless of whether that affiliated entity itself or its securities are included in the index, to satisfy one of these criteria. For example, a majority-owned subsidiary included in an index may aggregate the worldwide equity market capitalization or outstanding indebtedness of its parent and/or other affiliated entities, such as other majority-owned subsidiaries of the parent, to satisfy one of these criteria.

Finally, as the affiliation definition applies to the rule 144A information and financial information otherwise publicly available criteria of the alternative public information availability test applicable to index CDS entered into solely between ECPs, a reference entity or an issuer of securities included in an index that itself does not make available rule 144A information or does not have financial information otherwise publicly available may rely upon an affiliated entity, regardless of whether that affiliated entity itself or its securities are included in the index, to satisfy one of these criteria.

Comments

One commenter requested that the Commissions revise the affiliation definition that applies for purposes of the public information availability test to increase the threshold from 20 percent ownership to majority ownership.[867] This commenter noted that majority ownership is consistent with current market practice, including the definition of affiliate included in the 2003 ISDA Credit Derivatives Definitions.[868] This commenter also noted that the current approach with respect to the inclusion of affiliated entities in the same index uses majority ownership rather than 20 percent ownership to determine affiliation.[869] This commenter also requested that the Commissions clarify the application of the affiliation definition to the public information availability test.[870] Further, this commenter requested that the worldwide equity market capitalization criterion should include all affiliated entities because the reference entity included in the index may not be the member of a corporate group that issues public equity.[871] Finally, this commenter was concerned that the outstanding indebtedness criterion would not include affiliate debt guaranteed by the reference entity or issuer of securities included in the index.[872] Further, as noted above,[873] another commenter was concerned that index CDS may include a higher proportion of ''private'' borrowers (those borrowers that are not public reporting companies or that do not register offerings of their securities) and thus may themselves not satisfy each of the

[863] *See* paragraph (c)(1) of rules 1.3(zzz) and 1.3(aaaa) under the CEA and rule 3a68–1a and 3a68–1b under the Exchange Act.

[864] *See* paragraph (c)(2) of rules 1.3(zzz) and 1.3(aaaa) under the CEA and rule 3a68–1a and 3a68–1b under the Exchange Act.

[865] *See supra* part III.G.3(b)(ii).

[866] The more than 50 percent (i.e., majority ownership) test is generally consistent with consolidation under U.S. generally accepted accounting principles. *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). Accordingly, using a more than 50 percent (i.e., majority ownership) test will make it more likely that the reference entity or issuer of securities included in the index and the affiliated entity will be consolidated with each other in financial statements. Consolidated financial statements present the financial position and results of operations for a parent (controlling entity) and one or more subsidiaries (controlled entities) as if the individual entities actually were a single company or economic entity.

[867] *See* Markit Letter (requesting a threshold of at least 50 percent).

[868] *Id.*

[869] *Id.*

[870] *Id.*

[871] *Id.* This commenter provided Kinder Morgan Kansas Inc. (CDS) and Kinder Morgan Inc. (equity) as an example of where the reference entity and issuer of equity among a corporate group are not the same. *Id.*

[872] *Id.*

[873] *See supra* note 842 and accompanying text.

criteria for the public information availability test.[874]

The Commissions note the commenters' concerns. The Commissions are modifying the method of determining affiliation that applies for purposes of satisfying certain criteria of the public information availability test. The final rules provide that a reference entity or issuer of securities included in an index may rely upon an affiliated entity (meeting the more than 50 percent control threshold) to satisfy one of the criterion of the public information availability test. This modification is similar to the one the Commissions are making to the affiliation definition that applies for purposes of calculating the number and concentration criteria. As noted above, based on commenters' letters, the Commissions understand that the current standard CDS documentation and the current approach with respect to the inclusion of affiliated entities in the same index use majority ownership rather than 20 percent ownership to determine affiliation. The Commissions agree with commenters that in the case of index CDS only it is more appropriate to use a more than 50 percent (i.e., majority ownership) test rather than a 20 percent ownership test. The Commissions believe that because reference entities or issuers of securities included in an index may rely on an affiliated entity to help satisfy the public information availability test a threshold of majority ownership rather than 20 percent ownership will increase the likelihood that there is information available about the reference entity or issuer of securities included in the index. The Commissions believe that determining affiliation in this manner for purposes of the public availability of information test responds to the commenter's concerns.

Further, the Commissions are providing several illustrative examples of the way in which the affiliation definition works in the context of the public availability of information criteria to address the commenter's concerns regarding the application of the affiliation definition in that context. The Commissions also note that the final rules respond to the commenter's concerns regarding the applicability of the affiliation definition to the worldwide equity market capitalization criterion by providing that the worldwide market capitalization of an affiliate can be counted in determining whether the reference entity or issuer of securities included in the index meets the worldwide equity market capitalization criterion. Moreover, the Commissions note that the final rules respond to the commenter's concerns regarding affiliate debt by providing that indebtedness of an affiliate can be counted in determining whether the reference entity or issuer of securities included in the index meets the outstanding indebtedness criterion. Finally, the Commissions note that the affiliation definition as modified responds to the commenter's concerns regarding ''private'' borrowers because the modified affiliation definition will allow a reference entity or issuer of securities included in an index to consider the indebtedness, the outstanding equity, and the reporting status of an affiliate in determining whether the public information availability test is satisfied.

As noted above, the Commissions also believe that the modified affiliation definition responds to commenters' concerns noted above that the rules further defining the terms ''issuers of securities in a narrow-based security index'' and ''narrow-based security index'' should be simplified. The modified affiliation definition enables market participants to make an affiliation determination for purposes of the public information availability test criteria by measuring the more than 50 percent (i.e., majority ownership) control threshold.

(v) Application of the Public Information Availability Requirements to Indexes Compiled by a Third-Party Index Provider

The Commissions requested comment in the Proposing Release as to whether the public information availability test should apply to an index compiled by an index provider that is not a party to an index CDS (''third-party index provider'') that makes publicly available general information about the construction of the index, index rules, identity of components, and predetermined adjustments, and which index is referenced by an index CDS that is offered on or subject to the rules of a DCM or SEF, or by direct access in the U.S. from an FBOT that is registered with the CFTC.[875] Two commenters stated that the presence of a third-party index provider would assure that sufficient information is available regarding the index CDS itself.[876] Neither commenter provided any analysis to explain how or whether a third-party index provider would be able to provide information about the underlying securities or issuers of securities in the index. The Commissions are not revising the rules to exclude from the public information availability test any index compiled by a third-party index provider.

(vi) Treatment of Indexes Including Reference Entities That Are Issuers of Exempted Securities or Including Exempted Securities

The Commissions are adopting the rules regarding the treatment of indexes that include exempted securities or reference entities that are issuers of exempted securities as proposed without modification.[877] The Commissions believe such treatment is consistent with the objective and intent of the statutory definition of the term ''security-based swap,'' as well as the approach taken in the context of security futures.[878] Accordingly, paragraph (1)(ii) of rules 1.3(zzz) and 1.3(aaaa) under the CEA and paragraph (a)(2) of rules 3a68–1a and 3a68–1b under the Exchange Act provide that, in the case of an index that includes exempted securities, or reference entities that are issuers of exempted securities, in each case as defined as of the date of enactment of the Futures Trading Act of 1982 (other than municipal securities), such securities or reference entities are excluded from the index when determining whether the securities or reference entities in the index constitute a ''narrow-based security index'' or ''issuers of securities in a narrow-based security index'' under the rules.

Under paragraph (1)(ii) of rules 1.3(zzz) and 1.3(aaaa) under the CEA and paragraph (a)(2) of rules 3a68–1a and 3a68–1b) under the Exchange Act, an index composed solely of securities that are, or reference entities that are issuers of, exempted securities (other than municipal securities) will not be a

[874] *See* July LSTA Letter.

[875] *See* Proposing Release at 29851–52.

[876] *See* ISDA Letter and SIFMA Letter.

[877] *See* rules 1.3(zzz)(1)(i) and 1.3(aaaa)(1)(i) under the CEA and rules 3a68–1a(a)(2) and 3a68–1b(a)(2) under the Exchange Act; and July 2006 Debt Index Rules. The Commissions did not receive any comments on the proposed rules regarding the treatment of indexes that include exempted securities or reference entities that are issuers of exempted securities.

[878] *See* section 3(a)(68)(C) of the Exchange Act, 15 U.S.C. 78c(a)(68)(C) (providing that ''[t]he term 'security-based swap' does not include any agreement, contract, or transaction that meets the definition of a security-based swap only because such agreement, contract, or transaction references, is based upon, or settles through the transfer, delivery, or receipt of an exempted security under paragraph (12) [of the Exchange Act], as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in paragraph (29) [of the Exchange Act] as in effect on the date of enactment of the Futures Trading Act of 1982), unless such agreement, contract, or transaction is of the character of, or is commonly known in the trade as, a put, call, or other option'').

''narrow-based security index'' or an index composed of ''issuers of securities in a narrow-based security index.'' In the case of an index where some, but not all, of the securities or reference entities are exempted securities (other than municipal securities) or issuers of exempted securities (other than municipal securities), the index will be a ''narrow-based security index'' or an index composed of ''issuers of securities in a narrow-based security index'' only if the index is narrow-based when the securities that are, or reference entities that are issuers of, exempted securities (other than municipal securities) are disregarded. The Commissions believe this approach should result in consistent treatment for indexes regardless of whether they include securities that are, or issuers of securities that are, exempted securities (other than municipal securities) while helping to ensure that exempted securities (other than municipal securities) and issuers of exempted securities (other than municipal securities) are not included in an index merely to make the index either broad-based or narrow-based under the rules.

4. Security Indexes

The Dodd-Frank Act defines the term ''index'' as ''an index or group of securities, including any interest therein or based on the value thereof.'' [879] The Commissions provided an interpretation in the Proposing Release regarding how to determine when a portfolio of securities is a narrow-based or broad-based security index, and the circumstances in which changes to the composition of a security index (including a portfolio of securities) [880] underlying a Title VII instrument would affect the characterization of such Title VII instrument.[881] The Commissions are restating the interpretation set forth in the Proposing Release with one clarification in response to a commenter.[882] Specifically, the Commissions are clarifying what is meant by ''predetermined'' for purposes of whether criteria or a self-executing formula for adjusting the security index underlying a Title VII instrument qualify under the interpretation. The Commissions find that this interpretation is an appropriate way to address how to determine when a portfolio of securities is a narrow-based or broad-based security index, and the circumstances in which changes to the composition of a security index (including a portfolio of securities) underlying a Title VII instrument would affect the characterization of such Title VII instrument, and is designed to reduce costs associated with making such a determination.[883]

A security index in most cases is designed to reflect the performance of a market or sector by reference to representative securities or interests in securities. There are several well-known security indexes established and maintained by recognized index providers currently in the market.[884] However, instead of using these established indexes, market participants may enter into a Title VII instrument where the underlying reference of the Title VII instrument is a portfolio of securities selected by the counterparties or created by a third-party index provider at the behest of one or both counterparties. In some cases, the Title VII instrument may give one or both of the counterparties, either directly or indirectly (*e.g.,* through an investment adviser or through the third-party index provider), discretionary authority to change the composition of the security portfolio, including, for example, by adding or removing securities in the security portfolio on an ''at-will'' basis during the term of the Title VII instrument.[885] Where the counterparties, either directly or indirectly (*e.g.,* through an investment adviser or through the third-party index provider), have this discretionary authority to change the composition or weighting of securities in a security portfolio, that security portfolio will be treated as a narrow-based security index, and therefore a Title VII instrument on that security portfolio is a security-based swap.[886]

However, not all changes that occur to the composition or weighting of a security index underlying a Title VII instrument will always result in that security index being treated as a narrow-based security index. Many security indexes are constructed and maintained by an index provider pursuant to a published methodology.[887] For instance, the various Standard & Poor's security indexes are reconstituted and rebalanced as needed and on a periodic basis pursuant to published index criteria.[888] Such indexes underlying a Title VII instrument would be broad-based or narrow-based depending on the composition and weighting of the underlying security index.

In addition, counterparties to a Title VII instrument frequently agree to use as the underlying reference of a Title VII instrument a security index based on predetermined criteria where the security index composition or weighting may change as a result of the occurrence of certain events specified in the Title VII instrument at execution, such as ''succession events.'' Counterparties to a Title VII instrument also may use a predetermined self-executing formula to make other changes to the composition or weighting of a security index underlying a Title VII instrument. In either of these situations, the composition of a security index may

[879] *See* section 3(a)(68)(E) of the Exchange Act, 15 U.S.C. 78c(a)(68)(E).

[880] The Commissions noted in the Proposing Release that a ''portfolio'' of securities could be a group of securities and therefore an ''index'' for purposes of the Dodd-Frank Act. *See* Proposing Release at 29854. To the extent that changes are made to the securities underlying the Title VII instrument and each such change is individually confirmed, then those substituted securities are not part of a security index as defined in the Dodd-Frank Act, and therefore a Title VII instrument on each of those substituted securities is a security-based swap.

[881] Solely for purposes of the discussion in this section, the terms ''security index'' and ''security portfolio'' are intended to include either securities or the issuers of securities.

[882] *See infra* note 891 and accompanying text.

[883] *See supra* part I, under ''Overall Economic Considerations''.

[884] One example is the S&P 500® Index, an index that gauges the large cap U.S. equities market.

[885] Alternatively, counterparties may enter into Title VII instruments where a third-party investment manager selects an initial portfolio of securities and has discretionary authority to change the composition of the security portfolio in accordance with guidelines agreed upon with the counterparties. Under the final guidance the Commissions are issuing today, such security portfolios are treated as narrow-based security indexes, and Title VII instruments on those security portfolios are security-based swaps.

[886] The Commissions understand that a security portfolio could be labeled as such or could just be an aggregate of individual Title VII instruments documented, for example, under a master agreement or by amending an annex of securities attached to a master trade confirmation. If the security portfolio were created by aggregating individual Title VII instruments, each Title VII instrument must be evaluated in accordance with the guidance to determine whether it is a swap or a security-based swap. For the avoidance of doubt, if the counterparties to a Title VII instrument exchanged payments under that Title VII instrument based on a security index that was itself created by aggregating individual security-based swaps, such Title VII instrument would be a security-based swap. *See supra* part III.D.

[887] *See, e.g.,* NASDAQ, ''NASDAQ–100 Index'' (''The NASDAQ–100 Index is calculated under a modified capitalization-weighted methodology. The methodology generally is expected to retain the economic attributes of capitalization-weighting while providing enhanced diversification. To accomplish this, NASDAQ will review the composition of the NASDAQ–100 Index on a quarterly basis and adjust the weightings of Index components using a proprietary algorithm, if certain pre-established weight distribution requirements are not met.''), available at *http://dynamic.nasdaq.com/dynamic/nasdaq100_activity.stm.*

[888] Information regarding security indexes and their related methodologies may be widely available to the general public or restricted to licensees in the case of proprietary or ''private label'' security indexes. Both public and private label security indexes frequently are subject to intellectual property protection.

change pursuant to predetermined criteria or predetermined self-executing formulas without the Title VII instrument counterparties, their agents, or third-party index providers having any direct or indirect discretionary authority to change the security index.

In general, and by contrast to Title VII instruments in which the counterparties, either directly or indirectly (*e.g.,* through an investment adviser or through the third-party index provider), have the discretion to change the composition or weighting of the referenced security index, where there is an underlying security index for which there are predetermined criteria or a predetermined self-executing formula for adjusting the security index that are not subject to change or modification through the life of the Title VII instrument and that are set forth in the Title VII instrument at execution (regardless of who establishes the criteria or formula), a Title VII instrument on such underlying security index is based on a broad-based or narrow-based security index, depending on the composition and weighting of the underlying security index. Subject to the interpretation discussed below regarding security indexes that may shift from being a narrow-based security index or broad-based security index during the life of an existing Title VII instrument, the characterization of a Title VII instrument based on a security index as either a swap or a security-based swap will depend on the characterization of the security index using the above interpretation.[889]

The Commissions are clarifying in response to a commenter that, for purposes of this interpretation, criteria or a self-executing formula regarding composition of a security index underlying a Title VII instrument shall be considered ''predetermined'' if it is bilaterally agreed upon pre-trade by the parties to a transaction.[890] In order to qualify under this interpretation, however, the Commissions reiterate that the ''predetermined'' criteria or self-executing formula, as described above, must not be subject to change or modification through the life of the Title VII instrument and must be set forth in the Title VII instrument at execution (regardless of who establishes the criteria or formula).

Comments

The Commissions requested comment on a number of issues regarding the interpretation contained in this section as it was proposed, including whether the terms ''predetermined criteria'' and ''predetermined self-executing formula'' are clear, and whether additional interpretations should be provided with respect to these terms. The Commissions received one comment on the interpretation provided in the Proposing Release, in which the commenter requested clarification that criteria affecting the composition of an index, when such criteria are agreed bilaterally, pre-trade, by the counterparties to a bespoke index trade, are ''predetermined'' for purposes of determining whether the index is treated as narrow-based or broad-based.[891]

The Commissions are restating the interpretation set forth in the Proposing Release with one clarification in response to the commenter's concerns. As discussed above, the Commissions are providing that not all changes that occur to the composition or weighting of a security index underlying a Title VII instrument will result in that security index being treated as a narrow-based security index. Foremost among these examples is a security index that is constructed and maintained by an index provider pursuant to a published methodology.[892] Changes to such an index pursuant to such a methodology are not the type of discretionary changes that will render an otherwise broad-based security index a narrow-based security index. The Commissions believe this clarification addresses the commenter's concerns.

5. Evaluation of Title VII Instruments on Security Indexes That Move from Broad-Based to Narrow-Based or Narrow-Based to Broad-Based

(a) In General

The determination of whether a Title VII instrument is a swap, a security-based swap, or both (*i.e.,* a mixed swap), is made prior to execution, but no later than when the parties offer to enter into the Title VII instrument.[893] If the security index underlying a Title VII instrument migrates from being broad-based to being narrow-based, or vice versa, during the life of a Title VII instrument, the characterization of that Title VII instrument will not change from its initial characterization regardless of whether the Title VII instrument was entered into bilaterally or was executed through a trade on or subject to the rules of a DCM, SEF, FBOT, security-based SEF, or NSE. For example, if two counterparties enter into a swap based on a broad-based security index, and three months into the life of the swap the security index underlying that Title VII instrument migrates from being broad-based to being narrow-based, the Title VII instrument will remain a swap for the duration of its life and will not be recharacterized as a security-based swap.

If the material terms of a Title VII instrument are amended or modified during its life based on an exercise of discretion and not through predetermined criteria or a predetermined self-executing formula, the Commissions view the amended or modified Title VII instrument as a new Title VII instrument.[894] As a result, the characteristics of the underlying security index must be reassessed at the time of such an amendment or modification to determine whether the security index has migrated from broad-based to narrow-based, or vice versa. If the security index has migrated, then the characterization of the amended or

[889] *See supra* note 886, regarding the aggregation of separate trades.

[890] *See infra* note 891 and accompanying text.

[891] *See* ISDA Letter. While this commenter agrees with the guidance that the predetermined changes described in this section should not alter the character of an index (or the classification of a Title VII instrument based thereon), this commenter disagrees that the ability to make discretionary changes should cause an otherwise broad-based security index to be a narrow-based security index. This commenter requested that the Commissions classify transactions ''at inception and upon actual change in respect of any classification-related characteristic, be that change the product of a renegotiation or a unilateral exercise of discretion.'' *Id.* The Commissions note that if material terms of a Title VII instrument are amended or modified during its life based on an exercise of discretion and not through predetermined criteria or a predetermined self-executing formula, the Commissions view the amended or modified Title VII instrument as a new Title VII instrument. *See infra* part III.G.5.

[892] Indeed, the Commissions specifically mentioned in this regard, and have included in the final guidance above, the various Standard & Poor's security indexes—some of which may be described as ''common equity indices'' as alluded to in ISDA's comment—that are reconstituted and rebalanced as needed and on a periodic basis pursuant to published index criteria.

[893] *See supra* note 625 and accompanying text.

[894] For example, if, on its effective date, a Title VII instrument tracks the performance of an index of 12 securities but is amended during its term to track the performance of only 8 of those 12 securities, the Commissions would view the amended or modified Title VII instrument as a new Title VII instrument. Because it is a new Title VII instrument, any regulatory requirements regarding new Title VII instruments apply. Conversely, if, on its effective date, a Title VII instrument tracks the performance of an index of 12 securities but is amended during its term to reflect the replacement of a departing ''key person'' of a hedge fund that is a counterparty to the Title VII instrument with a new ''key person,'' the Commissions would not view the amended or modified Title VII instrument as a new Title VII instrument because the amendment or modification is not to a material term of the Title VII instrument.

modified Title VII instrument will be determined by evaluating the underlying security index at the time the Title VII instrument is amended or modified. Similarly, if a security index has migrated from broad-based to narrow-based, or vice versa, any new Title VII instrument based on that security index will be characterized pursuant to an evaluation of the underlying security index at the execution of that new Title VII instrument.

The Commissions provided an interpretation in the Proposing Release regarding circumstances in which the character of a security index on which a Title VII instrument is based changes according to predetermined criteria or a predetermined self-executing formula set forth in the Title VII instrument (or in a related or other agreement entered into by the counterparties or a third-party index provider to the Title VII instrument) at execution. The Commissions are restating this interpretation with one clarification in response to a commenter.[895]

Where at the time of execution such criteria or such formula would cause the underlying broad-based security index to become or assume the characteristics of a narrow-based security index or vice versa during the duration of the instrument,[896] then the Title VII instrument based on such security index is a mixed swap during the entire life of the Title VII instrument.[897] Although at certain points during the life of the Title VII instrument, the underlying security index would be broad-based and at other points the underlying security index would be narrow-based, regulating such a Title VII instrument as a mixed swap from the execution of the Title VII instrument and throughout its life reflects the appropriate characterization of a Title VII instrument based on a security index that migrates pursuant to predetermined criteria or a predetermined self-executing formula.

The Commissions are clarifying what is meant by whether the pre-determined criteria or pre-determined self-executing formula ''would cause'' the underlying broad-based security index to become or assume the characteristics of a narrow-based security index, or vice versa, as noted above in the interpretation. The Commissions believe that, unless the criteria or formula were intentionally designed to change the index from narrow to broad, or vice versa, Title VII instruments based on indexes that may, but will not necessarily, change from broad to narrow (or vice versa) under such criteria or formula should be considered swaps or security-based swaps, as appropriate, at execution and for the term thereof, and not mixed swaps. In such circumstances, it is not the case that the criteria or formula ''would cause'' the change within the meaning of the Commission's interpretation.

The Commissions believe that this interpretation regarding the use of predetermined criteria or a predetermined self-executing formula will prevent potential gaming of the Commissions' interpretation regarding security indexes, and prevent potential regulatory arbitrage based on the migration of a security index from broad-based to narrow-based, or vice versa. In particular, predetermined criteria and predetermined self-executing formulas can be constructed in ways that take into account the characteristics of a narrow-based security index and prevent a narrow-based security index from becoming broad-based, and vice versa.

Comments

The Commissions received two comments on the proposed interpretation in this section regarding the classification of Title VII Instruments based on security indexes that change from narrow-based to broad-based, or vice versa, under predetermined criteria or a predetermined self-executing formula, as mixed swaps. One commenter requested that the Commissions clarify that a Title VII instrument based on a security index that may, but will not necessarily, change from narrow-based to broad-based, or vice versa, under predetermined criteria or a predetermined self-executing formula should be characterized at execution as a swap or security-based swap, as applicable, and not as a mixed swap.[898] This commenter believed that the Commissions' interpretation should capture as mixed swaps only those Title VII instruments on indexes that will change with certainty, and not those that might change given specific market circumstances.[899] Moreover, this commenter believed that the Commissions' statement that a Title VII instrument on a security index governed by a pre-determined self-executing formula that ''would cause'' a change from broad to narrow, or narrow to broad, means that the change in character must be a certainty for the instrument to be classified as a mixed swap.[900] The Commissions have clarified their interpretation in response to this commenter's concerns as discussed above.

Another commenter disagreed with the Commissions' proposed interpretation that transactions on indexes under predetermined criteria or a predetermined self-executing formula that would change from broad to narrow, or narrow to broad, should be classified as mixed swaps at inception.[901] This commenter does not believe that regulatory arbitrage is such a significant concern in this context that would justify the challenges to market participants if these transactions were treated as mixed swaps subject to the dual regulatory authority of the Commissions.[902]

The Commissions believe that regulatory arbitrage is a sufficient concern to justify mixed swap status and dual regulatory oversight for Title VII instruments where the index would change from broad to narrow, or narrow to broad, under the pre-determined criteria or predetermined self-executing formula. Counterparties that are concerned about regulatory burdens associated with mixed swap status can redesign their formula to avoid the result, or enter into another swap or security-based swap that is structured to achieve the same economic result without mixed swap status.

(b) Title VII Instruments on Security Indexes Traded on Designated Contract Markets, Swap Execution Facilities, Foreign Boards of Trade, Security-Based Swap Execution Facilities, and National Securities Exchanges

As was recognized in the Proposing Release, security indexes underlying Title VII instruments that are traded on DCMs, SEFs, FBOTs, security-based SEFs, or NSEs raise particular issues if an underlying security index migrates

[895] *See infra* note 898 and accompanying text.

[896] Thus, for example, if a predetermined self-executing formula agreed to by the counterparties of a Title VII instrument at or prior to the execution of the Title VII instrument provided that the security index underlying the Title VII instrument would decrease from 20 to 5 securities after six months, such that the security index would become narrow-based as a result of the reduced number of securities, then the Title VII instrument is a mixed swap at its execution. The characterization of the Title VII instrument as a mixed swap will not change during the life of the Title VII instrument.

[897] As discussed in section III.G.4., *supra,* to the extent a Title VII instrument permits ''at-will'' substitution of an underlying security index, however, as opposed to the use of predetermined criteria or a predetermined self-executing formula, the Title VII instrument is a security-based swap at its execution and throughout its life regardless of whether the underlying security index was narrow-based at the execution of the Title VII instrument.

[898] *See* SIFMA Letter.

[899] *Id.*

[900] *Id.*

[901] *See* ISDA Letter.

[902] *Id.*

from broad-based to narrow-based, or vice versa.[903] The Commissions are adopting as proposed their interpretation clarifying that the characterization of an exchange-traded Title VII instrument based on a security index at its execution will not change through the life of the Title VII instrument, regardless of whether the underlying security index migrates from broad-based to narrow-based, or vice versa. Accordingly, a market participant who enters into a swap on a broad-based security index traded on or subject to the rules of a DCM, SEF or FBOT that migrates from broad-based to narrow-based may hold that position until the swap's expiration without any change in regulatory responsibilities, requirements, or obligations; similarly, a market participant who enters into a security-based swap on a narrow-based security index traded on a security-based SEF or NSE that migrates from narrow-based to broad-based may hold that position until the security-based swap's expiration without any change in regulatory responsibilities, requirements, or obligations.

In addition, the Commissions are adopting, as proposed, final rules providing for tolerance and grace periods for Title VII instruments on security indexes that are traded on DCMs, SEFs, FBOTs, security-based SEFs and NSEs.[904] As was noted in the Proposing Release,[905] in the absence of any action by the Commissions, if a market participant wants to offset a swap or enter into a new swap on a DCM, SEF or FBOT where the underlying security index has migrated from broad-based to narrow-based, or to offset a security-based swap or enter into a new security-based swap on a security-based SEF or NSE where the underlying security index has migrated from narrow-based to broad-based, the participant would be prohibited from doing so. That is because swaps may trade only on DCMs, SEFs, and FBOTs, and security-based swaps may trade only on registered NSEs and security-based SEFs.[906] The rules being adopted by the Commissions address how to treat Title VII instruments traded on trading platforms where the underlying security index migrates from broad-based to narrow-based or narrow-based to broad-based, so that market participants will know where such Title VII instruments may be traded and can avoid potential disruption of their ability to offset or enter into new Title VII instruments on trading platforms when such migration occurs.[907]

As was noted in the Proposing Release,[908] Congress and the Commissions addressed a similar issue in the context of security futures, where the security index on which a future is based may migrate from broad-based to narrow-based or vice versa. Congress provided in the definition of the term ''narrow-based security index'' in both the CEA and the Exchange Act[909] for a tolerance period ensuring that, under certain conditions, a futures contract on a broad-based security index traded on a DCM may continue to trade, even when the index temporarily assumes characteristics that would render it a narrow-based security index under the statutory definition.[910] In general, an index is subject to this tolerance period, and therefore is not a narrow-based security index, if: (i) A futures contract on the index traded on a DCM for at least 30 days as a futures contract on a broad-based security index before the index assumed the characteristics of a narrow-based security index; and (ii) the index does not retain the characteristics of a narrow-based security index for more than 45 business days over 3 consecutive calendar months. Pursuant to these statutory provisions, if the index becomes narrow-based for more than 45 business days over 3 consecutive calendar months, the index is excluded from the definition of the term ''narrow-based security index'' for the following 3 calendar months as a grace period.

The Commissions believe that a similar tolerance period should apply to swaps traded on DCMs, SEFs, and FBOTs and security-based swaps traded on security-based SEFs and NSEs. Accordingly, the Commissions are adopting the rules, as proposed, providing for tolerance periods for swaps that are traded on DCMs, SEFs, or FBOTs[911] and for security-based swaps traded on security-based SEFs and NSEs.[912]

The final rules provide that to be subject to the tolerance period, a security index underlying a swap executed on or subject to the rules of a DCM, SEF, or FBOT must not have been a narrow-based security index[913] during the first 30 days of trading.[914] If the index becomes narrow-based during the first 30 days of trading, the index must not have been a narrow-based security index during every trading day of the 6 full calendar months preceding a date no earlier than 30 days prior to the commencement of trading of a swap on such index.[915] If either of these alternatives is met, the index will not be a narrow-based security index if it has been a narrow-based security index for no more than 45 business days over 3 consecutive calendar months.[916] These provisions apply solely for purposes of swaps traded on or subject to the rules of a DCM, SEF, or FBOT.

Similarly, the rules provide a tolerance period for security-based swaps traded on security-based SEFs or NSEs. To be subject to the tolerance period, a security index underlying a security-based swap executed on a security-based SEF or NSE must have

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[903] *See* Proposing Release at 29856.

[904] *See* paragraphs (2), (3) and (4) of rule 1.3(yyy) under the CEA and paragraphs (b), (c) and (d) of rule 3a68–3 under the Exchange Act.

[905] *See* Proposing Release at 29857.

[906] If a swap were based on a security index that migrated from broad-based to narrow-based, a DCM, SEF, or FBOT could no longer offer the Title VII instrument because it is now a security-based swap. Similarly, if a security-based swap were based on a security index that migrated from narrow-based to broad-based, a security-based SEF or NSE could no longer offer the Title VII instrument because it is now a swap.

[907] The rules apply only to the particular Title VII instrument that is traded on or subject to the rules of a DCM, SEF, FBOT, security-based SEF, or NSE. As the Commissions noted in the Proposing Release, to the extent that a particular Title VII instrument is not traded on such a trading platform (even if another Title VII instrument of the same class or type is traded on such a trading platform), the rules do not apply to that particular Title VII instrument. *See* Proposing Release at 29857 n. 259.

[908] *See* Proposing Release at 29857.

[909] CEA section 1a(35)(B)(iii), 7 U.S.C. 1a(35)(B)(iii); section 3(a)(55)(C)(iii) of the Exchange Act, 15 U.S.C. 78c(a)(55)(C)(iii).

[910] By joint rules, the Commissions have provided that ''[w]hen a contract of sale for future delivery on a security index is traded on or subject to the rules of a foreign board of trade, such index shall not be a narrow-based security index if it would not be a narrow-based security index if a futures contract on such index were traded on a designated contract market * * *.'' *See* rule 41.13 under the CEA, 17 CFR 41.13, and rule 3a55–3 under the Exchange Act, 17 CFR 240.3a55–3. Accordingly, the statutory tolerance period applicable to futures on security indexes traded on DCMs applies to futures traded on FBOTs as well.

[911] *See* paragraph (2) of rule 1.3(yyy) under the CEA and paragraph (b) of rule 3a68–3 under the Exchange Act.

[912] *See* paragraph (3) of rule 1.3(yyy) under the CEA and paragraph (c) of rule 3a68–3 under the Exchange Act.

[913] For purposes of these rules, the term ''narrow-based security index'' shall also mean ''issuers of securities in a narrow-based security index.'' *See supra* part III.G.3(b), (discussing the rules defining ''issuers of securities in a narrow-based security index'').

[914] This provision is consistent with the provisions of the CEA and the Exchange Act applicable to futures contracts on security indexes. CEA section 1a(35)(B)(iii)(I), 7 U.S.C. 1a(35)(B)(iii)(I); section 3(a)(55)(C)(iii)(I) of the Exchange Act, 15 U.S.C. 78c(a)(55)(C)(iii)(I).

[915] This alternative test is the same as the alternative test applicable to futures contracts in CEA rule 41.12, 17 CFR 41.12, and rule 3a55–2 under the Exchange Act, 17 CFR 240.3a55–2.

[916] These provisions are consistent with the parallel provisions in the CEA and Exchange Act applicable to futures contracts on security indexes traded on DCMs. *See* CEA section 1a(35)(B)(iii)(II), 7 U.S.C. 1a(35)(B)(iii)(II), and section 3(a)(55)(C)(iii)(II) of the Exchange Act, 15 U.S.C. 78c(a)(55)(C)(iii)(II).

been a narrow-based security index during the first 30 days of trading. If the index becomes broad-based during the first 30 days of trading, paragraph (3)(i)(B) of rule 1.3(yyy) under the CEA and paragraph (c)(1)(ii) of rule 3a68–3 under the Exchange Act provide that the index must have been a non-narrow-based (*i.e.,* a broad-based) security index during every trading day of the 6 full calendar months preceding a date no earlier than 30 days prior to the commencement of trading of a security-based swap on such index. If either of these alternatives is met, the index will be a narrow-based security index if it has been a security index that is not narrow-based for no more than 45 business days over 3 consecutive calendar months.[917] These provisions apply solely for purposes of security-based swaps traded on security-based SEFs or NSEs.

In addition, the Commissions are adopting rules as proposed that, once the tolerance period under the rules has ended, there will be a grace period during which a Title VII instrument based on a security index that has migrated from broad-based to narrow-based, or vice versa, will be able to trade on the platform on which Title VII instruments based on such security index were trading before the security index migrated and can also, during such period, be cleared.[918] The final rules provide for an additional three-month grace period applicable to a security index that becomes narrow-based for more than 45 business days over three consecutive calendar months, solely with respect to swaps that are traded on or subject to the rules of DCMs, SEFs, or FBOTs. During the grace period, such an index will not be considered a narrow-based security index. The rules apply the same grace period to a security-based swap on a security index that becomes broad-based for more than 45 business days over 3 consecutive calendar months, solely with respect to security-based swaps that are traded on a security-based SEF or NSE. During the grace period, such an index will not be considered a broad-based security index.[919] As a result, this rule provides sufficient time for a Title VII instrument based on a migrated security index to satisfy listing and clearing requirements applicable to swaps or security-based swaps, as appropriate.

As was noted in the Proposing Release,[920] there will be no overlap between the tolerance and the grace periods under the rules and no ''re-triggering'' of the tolerance period. For example, if a security index becomes narrow-based for more than 45 business days over 3 consecutive calendar months, solely with respect to swaps that are traded on or subject to the rules of DCMs, SEFs, or FBOTs, but as a result of the rules is not considered a narrow-based security index during the grace period, the tolerance period provisions will not apply, even if the security-index migrated temporarily during the grace period. After the grace period has ended, a security index will need to satisfy anew the requirements under the rules regarding the tolerance period in order to trigger a new tolerance period.

The rules will not result in the re-characterization of any outstanding Title VII instruments. In addition, the tolerance and grace periods as adopted will apply only to Title VII instruments that are traded on or subject to the rules of DCMs, SEFs, FBOTs, security-based SEFs, and NSEs.

Comments

The Commissions received one comment on the proposed rules described in this section.[921] This commenter stated its view that extending the ''grace period'' from three months to six months would ease any disruption or dislocation associated with the delisting process with respect to an index that has migrated from broad to narrow, or narrow to broad, and that has failed the tolerance period.[922] This commenter also stated its view that where an index CDS migrates, for entities operating both a SEF and a security-based SEF, such entities should be permitted to move the index from one platform to the other simply by providing a notice to the SEC and CFTC.[923]

As discussed above, the Commissions are adopting the proposed rules without modification. The Commissions note that the three-month grace period applicable to security futures was mandated by Congress in that context,[924] and the commenter has provided no data or evidence for its request that the Commissions diverge from that grace period and provide for a longer grace period with respect to swaps and security-based swaps. The Commissions believe that the three-month grace period is similarly appropriate to apply in the context of a Title VII instrument based on an index that has migrated to provide sufficient time to execute off-setting positions. With respect to the commenter's other suggestion that entities operating both a SEF and a security-based SEF should be able to move the index from one platform to another where an index CDS migrates simply by filing a notice with the SEC and CFTC, the Commissions do not believe that this proposal is within the scope of this rulemaking.

H. Method of Settlement of Index CDS

The method that the parties have chosen or use to settle an index CDS following the occurrence of a credit event under such index CDS also can affect whether such index CDS would be a swap, a security-based swap, or both (*i.e.,* a mixed swap). The Commissions provided an interpretation in the Proposing Release regarding the method of settlement of index CDS and are restating the interpretation without modification. The Commissions find that this interpretation is an appropriate way to address index CDS with different settlement methods and is designed to reduce the cost associated with determining whether such an index CDS is a swap or a security-based swap.[925]

If an index CDS that is not based on a narrow-based security index under the Commissions' rules includes a mandatory physical settlement provision that would require the delivery of, and therefore the purchase and sale of, a non-exempted security[926]

[917] These provisions are consistent with the parallel provisions in the CEA and the Exchange Act applicable to futures contracts on security indexes traded on DCMs. *See* CEA section 1a(35)(B)(iii), 7 U.S.C. 1a(35)(B)(iii); section 3(a)(55)(C)(iii) of the Exchange Act, 15 U.S.C. 78c(a)(55)(C)(iii).

[918] *See* paragraph (4) of rule 1.3(yyy) under the CEA and paragraph (d) of rule 3a68–3 under the Exchange Act.

[919] These provisions are consistent with the parallel provisions in the CEA and the Exchange Act applicable to futures contracts on security indexes traded on DCMs. *See* CEA section 1a(35)(D), 7 U.S.C. 1a(35)(D); section 3(a)(55)(E) of the Exchange Act, 15 U.S.C. 78c(a)(55)(E).

[920] *See* Proposing Release at 29858.

[921] *See* MarketAxess Letter.

[922] *Id.*

[923] *Id.*

[924] *See* July 2006 Debt Index Rules. The Commissions are not aware of any disruptions caused by the three-month grace period in the context of security futures.

[925] *See supra* part I, under ''Overall Economic Considerations''.

[926] The Commissions note that section 3(a)(68)(C) of the Exchange Act, 15 U.S.C. 78c(a)(68)(C), provides that ''[t]he term ''security-based swap'' does not include any agreement, contract, or transaction that meets the definition of a security-based swap only because such agreement, contract, or transaction references, is based upon, or settles through the transfer, delivery, or receipt of an exempted security under paragraph (12) [of the Exchange Act], as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in paragraph (29) [of the Exchange Act] as in effect on the date of enactment of the Futures Trading Act of 1982), unless such agreement, contract, or transaction is of the character of, or is commonly known in the trade as, a put, call, or other option.''

or a loan in the event of a credit event, such an index CDS is a mixed swap.[927] Conversely, if an index CDS that is not based on a narrow-based security index under the Commissions' rules includes a mandatory cash settlement[928] provision, such index CDS is a swap, and not a security-based swap or a mixed swap, even if the cash settlement were based on the value of a non-exempted security or a loan.

An index CDS that is not based on a narrow-based security index under the Commissions' rules and that provides for cash settlement in accordance with the 2009 ISDA Credit Derivatives Determinations Committees and Auction Settlement Supplement to the 2003 Definitions (the ''Auction Supplement'') or with the 2009 ISDA Credit Derivatives Determinations Committees and Auction Settlement CDS Protocol (''Big Bang Protocol'')[929] is a swap, and will not be considered a security-based swap or a mixed swap solely because the determination of the cash price to be paid is established through a securities or loan auction.[930] In 2009, auction settlement, rather than physical settlement, became the default method of settlement for, among other types of CDS, index CDS on corporate issuers of securities.[931] The amount of the cash settlement is determined through an auction triggered by the occurrence of a credit event.[932] The Auction Supplement ''hard wired'' the mechanics of credit event auctions into the 2003 Definitions.[933] The Commissions understand that the credit event auction process that is part of the ISDA terms works as follows.

Following the occurrence of a credit event under a CDS, a determinations committee (''DC'') established by ISDA, following a request by any party to a credit derivatives transaction that is subject to the Big Bang Protocol or Auction Supplement, will determine, among other matters: (i) Whether and when a credit event occurred; (ii) whether or not to hold an auction to enable market participants to settle those of their credit derivatives transactions covered by the auction; (iii) the list of deliverable obligations of the relevant reference entity; and (iv) the necessary auction specific terms. The credit event auction takes place in two parts. In the first part of the auction, dealers submit physical settlement requests, which are requests to buy or sell any of the deliverable obligations (based on the dealer's needs and those of its counterparties), and an initial market midpoint price is created based on dealers' initial bids and offers. Following the establishment of the initial market midpoint, the physical settlement requests are then calculated to determine the amount of open interest.

The aggregate amount of open interest is the basis for the second part of the auction. In the second part of the auction, dealers and investors can determine whether to submit limit orders and the levels of such limit orders. The limit orders, which are irrevocable, have a firm price in addition to size and whether it is a buy or sell order. The auction is conducted as a ''dutch'' auction, in which the open buy interests and open sell interests are matched.[934] The final price of the auction is the last limit order used to match against the open interest. The final price in the auction is the cash price used for purposes of calculating the settlement payments in respect of the orders to buy and sell the deliverable obligations and it is also used to determine the cash settlement payment under the CDS.

Comments

One commenter believed that a mandatory physical settlement provision in an index CDS based on a broad-based security index should not transform a swap into a mixed swap because (i) the SEC would retain jurisdiction over a transfer of securities as part of such settlement and (ii) application of the interpretation would be difficult since many instruments contemplate physical settlement but have a cash settlement option, or vice versa.[935]

As discussed above, the Commissions are restating the interpretation regarding mandatory physical settlement as provided in the Proposing Release. The Commissions' interpretation assures that the Federal securities laws apply to the offer and sale of the underlying securities at the time the index CDS is sold.[936] The Commissions note the commenter's concerns but believe that as a result of the Commissions' understanding of the auction settlement process for index CDS, which is the primary method by which index CDS are settled and which addresses circumstances in which securities may be tendered in the auction process separate from the CDS settlement payment, it is not clear that there is in fact any significant number of circumstances in which such index CDS may be optionally physically settled. The Commissions note that this commenter did not elaborate on the

[927] The SEC also notes that there must either be an effective registration statement covering the transaction or an exemption under the Securities Act would need to be available for such physical delivery of securities and compliance issues under the Exchange Act would also need to be considered.

[928] The Commissions are aware that the 2003 Definitions include ''Cash Settlement'' as a defined term and that such ''Settlement Method'' (also a defined term in the 2003 Definitions) works differently than auction settlement pursuant to the ''Big Bang Protocol'' or ''Auction Supplement'' (each as defined below). The Commissions' use of the term ''cash settlement'' in this section includes ''Cash Settlement,'' as defined in the 2003 Definitions, and auction settlement, as described in the ''Big Bang Protocol'' or ''Auction Supplement.'' *See infra* note 929 and accompanying text.

[929] *See* ISDA, ''2009 ISDA Credit Derivatives Determinations Committees and Auction Settlement CDS Protocol,'' available at *http://www.isda.org/bigbangprot/docs/Big-Bang-Protocol.pdf.*

[930] The possibility that such index CDS may, in fact, be physically settled if an auction is not held or if the auction fails would not affect the characterization of the index CDS.

[931] The Commissions understand that the Big Bang Protocol is followed for index CDS involving corporate debt obligations but is not followed for index CDS based on asset-backed securities, loan-only CDS, and certain other types of CDS contracts. To the extent that such other index CDS contain auction procedures similar to the auction procedures for corporate debt to establish the cash price to be paid, the Commissions also would not consider such other index CDS that are not based on narrow-based security indexes under the Commissions' rules to be mixed swaps.

[932] The Commissions understand that other conditions may need to be satisfied as well for an auction to be held.

[933] *See supra* note 48.

[934] The second part of the credit event auction process involves offers and sales of securities that must be made in compliance with the provisions of the Securities Act and the Exchange Act. First, the submission of a physical settlement request constitutes an offer by the counterparty to either buy or sell any one of the deliverable obligations in the auction. Second, the submission of the irrevocable limit orders by dealers or investors are sales or purchases by such persons at the time of submission of the irrevocable limit order. Through the auction mechanism, where the open interest (which represents physical settlement requests) is matched with limit orders, buyers and sellers are matched. Finally, following the auction and determination of the final price, the counterparty who has submitted the physical delivery request decides which of the deliverable obligations will be delivered to satisfy the limit order in exchange for the final price. The sale of the securities in the auction occurs at the time the limit order is submitted, even though the identification of the specific deliverable obligation does not occur until the auction is completed.

[935] *See* ISDA Letter.

[936] With respect to the applicability of the Federal securities laws, the Commissions are concerned about the use of index CDS to effect distributions of securities without compliance with the requirements of the Securities Act. The Commissions recognize that with respect to transactions in security-based swaps by an issuer of an underlying security, an affiliate of the issuer, or an underwriter the offer and sale of the underlying security (in this case the security to be delivered) occur at the time that the security-based swap is offered and sold, not at the time of settlement. Further, the Commissions note the restrictions on offers and sales of security-based swaps to non-ECPs without compliance with the registration requirements of the Securities Act. *See* section 5(e) of the Securities Act, 15 U.S.C. 77e(d).

circumstances in which the auction process would not apply.

I. Security-Based Swaps as Securities Under the Exchange Act and Securities Act

Pursuant to the Dodd-Frank Act, a security-based swap is defined as a ''security'' under the Exchange Act[937] and Securities Act.[938] As a result, security-based swaps are subject to the Exchange Act and the Securities Act and the rules and regulations promulgated thereunder.[939]

The SEC did not provide interpretations in the Proposing Release on the application of the Exchange Act and the Securities Act, and the rules and regulations thereunder, to security-based swaps. However, the SEC solicited comment on whether additional interpretations may be necessary regarding the application of certain provisions of the Exchange Act and the Securities Act, and the rules and regulations promulgated thereunder, to security-based swaps. The SEC did not receive any comments with respect to this issue in the context of this rulemaking and is not providing any interpretations in this release.

IV. Mixed Swaps

A. Scope of the Category of Mixed Swap

The category of mixed swap is described, in both the definition of the term ''security-based swap'' in the Exchange Act and the definition of the term ''swap'' in the CEA, as a security-based swap that is also based on the value of 1 or more interest or other rates, currencies, commodities, instruments of indebtedness, indices, quantitative measures, other financial or economic interest or property of any kind (other than a single security or a narrow-based security index), or the occurrence, non-occurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence (other than an event described in subparagraph (A)(ii)(III) [of section 3(a)(68) of the Exchange Act]).[940]

A mixed swap, therefore, is both a security-based swap and a swap.[941] As stated in the Proposing Release, the Commissions believe that the scope of mixed swaps is, and is intended to be, narrow.[942] Title VII establishes robust and largely parallel regulatory regimes for both swaps and security-based swaps and directs the Commissions to jointly prescribe such regulations regarding mixed swaps as may be necessary to carry out the purposes of the Dodd-Frank Act.[943] More generally, the Commissions believe the category of mixed swap was designed so that there would be no gaps in the regulation of swaps and security-based swaps. Therefore, in light of the statutory scheme created by the Dodd-Frank Act for swaps and security-based swaps, the Commissions believe the category of mixed swap covers only a small subset of Title VII instruments.

For example, a Title VII instrument in which the underlying references are the value of an oil corporation stock and the price of oil would be a mixed swap. Similarly, a Title VII instrument in which the underlying reference is a portfolio of both securities (assuming the portfolio is not an index or, if it is an index, that the index is narrow-based) and commodities would be a mixed swap. Mixed swaps also would include certain Title VII instruments called ''best of'' or ''out performance'' swaps that require a payment based on the higher of the performance of a security and a commodity (other than a security). As discussed elsewhere in this release, the Commissions also believe that certain Title VII instruments may be mixed swaps if they meet specified conditions.

The Commissions also believe that the use of certain market standard agreements in the documentation of Title VII instruments should not in and of itself transform a Title VII instrument into a mixed swap. For example, many instruments are documented by incorporating by reference market standard agreements. Such agreements typically set out the basis of establishing a trading relationship with another party but are not, taken separately, a swap or security-based swap. These agreements also include termination and default events relating to one or both of the counterparties; such counterparties may or may not be entities that issue securities.[944] The Commissions believe that the term ''any agreement * * * based on * * * the occurrence of an event relating to a single issuer of a security,'' as provided in the definition of the term ''security-based swap,'' was not intended to include such termination and default events relating to counterparties included in standard agreements that are incorporated by reference into a Title VII instrument.[945] Therefore, an instrument would not be simultaneously a swap and a security-based swap (and thus not a mixed swap) simply by virtue of having incorporated by reference a standard agreement, including default and termination events relating to counterparties to the Title VII instrument.

Comments

While the Commissions did not receive any comments on the interpretation regarding the scope of the category of mixed swaps, one commenter recommended that the Commissions require that market participants disaggregate mixed swaps and enter into separate simultaneous transactions so that they cannot employ mixed swaps to obscure the underlying substance of transactions.[946] The Commissions are not adopting any rules or interpretations to require disaggregation of mixed swaps into their separate components, as the Dodd-Frank Act specifically contemplated that there would be mixed swaps comprised of both swaps and security-based swaps.

B. Regulation of Mixed Swaps

1. Introduction

The Commissions are adopting as proposed paragraph (a) of rule 1.9 under the CEA and rule 3a68–4 under the Exchange Act to define a ''mixed swap'' in the same manner as the term is defined in both the CEA and the Exchange Act. The Commissions also are adopting as proposed two rules to address the regulation of mixed swaps. First, paragraph (b) of rule 1.9 under the CEA and rule 3a68–4 under the Exchange Act will provide a regulatory framework with which parties to bilateral uncleared mixed swaps (*i.e.,*

[937] *See* section 761(a)(2) of the Dodd-Frank Act (inserting the term ''security-based swap'' into the definition of ''security'' in section 3a(10) of the Exchange Act, 15 U.S.C. 78c(a)(10)).

[938] *See* section 768(a)(1) of the Dodd-Frank Act (inserting the term ''security-based swap'' into the definition of ''security'' in section 2(a)(1) of the Securities Act, 15 U.S.C. 77b(a)(1)).

[939] Sections 761(a)(3) and (4) of the Dodd-Frank Act amend sections 3(a)(13) and (14) of the Exchange Act, 15 U.S.C. 78c(a)(13) and (14), and section 768(a)(3) of the Dodd-Frank Act adds section 2(a)(18) to the Securities Act, 15 U.S.C. 77b(a)(18), to provide that the terms ''purchase'' and ''sale'' of a security-based swap shall mean the ''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, as the context may require.''

[940] Section 3(a)(68)(D) of the Exchange Act, 15 U.S.C. 78c(a)(68)(D); section 1a(47)(D) of the CEA, 7 U.S.C. 1a(47)(D).

[941] *Id.* The exclusion from the definition of the term ''swap'' for security-based swaps does not include security-based swaps that are mixed swaps. *See* section 1a(47)(B)(x) of the CEA, 7 U.S.C. 1a(47)(B)(x).

[942] *See* Proposing Release at 29860.

[943] *See* section 712(a)(8) of the Dodd-Frank Act.

[944] Those standard events include inter alia bankruptcy, breach of agreement, cross default to other indebtedness, and misrepresentations.

[945] *See* section 3(a)(68)(A)(ii)(III) of the Exchange Act, 15 U.S.C. 78c(a)(68)(A)(ii)(III).

[946] *See* Better Markets Letter.

mixed swaps that are neither executed on or subject to the rules of a DCM, NSE, SEF, security-based SEF, or FBOT nor cleared through a DCO or clearing agency), as to which at least one of the parties is dually registered with both Commissions, will need to comply. Second, paragraph (c) of rule 1.9 under the CEA and rule 3a68–4 under the Exchange Act establishes a process for persons to request that the Commissions issue a joint order permitting such persons (and any other person or persons that subsequently lists, trades, or clears that class of mixed swap)[947] to comply, as to parallel provisions[948] only, with specified parallel provisions of either the CEA or the Exchange Act, and related rules and regulations (collectively ''specified parallel provisions''), instead of being required to comply with parallel provisions of both the CEA and the Exchange Act.

2. Bilateral Uncleared Mixed Swaps Entered Into by Dually-Registered Dealers or Major Participants

Swap dealers and major swap participants will be comprehensively regulated by the CFTC, and security-based swap dealers and major security-based swap participants will be comprehensively regulated by the SEC.[949] The Commissions recognize that there may be differences in the requirements applicable to swap dealers and security-based swap dealers, or major swap participants and major security-based swap participants, such that dually-registered market participants may be subject to potentially conflicting or duplicative regulatory requirements when they engage in mixed swap transactions. In order to assist market participants in addressing such potentially conflicting or duplicative requirements, the Commissions are adopting, as proposed with one modification explained below, rules that will permit dually-registered swap dealers and security-based swap dealers and dually-registered major swap participants and major security-based swap participants to comply with an alternative regulatory regime when they enter into certain mixed swaps under specified circumstances. The Commissions received no comments on the proposed rules.

Accordingly, as adopted, paragraph (b) of rule 1.9 under the CEA and rule 3a68–4 under the Exchange Act provide that a bilateral uncleared mixed swap,[950] where at least one party is dually-registered with the CFTC as a swap dealer or major swap participant and with the SEC as a security-based swap dealer or major security-based swap participant, will be subject to all applicable provisions of the Federal securities laws (and SEC rules and regulations promulgated thereunder). The rules as adopted also provide that such mixed swaps will be subject to only the following provisions of the CEA (and CFTC rules and regulations promulgated thereunder):

- Examinations and information sharing: CEA sections 4s(f) and 8; [951]
- Enforcement: CEA sections 2(a)(1)(B), 4(b), 4b, 4c, 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6c, 6d, 9, 13(a), 13(b) and 23; [952]
- Reporting to an SDR: CEA section 4r; [953]
- Real-time reporting: CEA section 2(a)(13); [954]
- Capital: CEA section 4s(e); [955] and
- Position Limits: CEA section 4a.[956]

The Commissions are modifying proposed rule 1.9(b)(3)(i) under the CEA and Rule 3a68–4(b)(3)(i) to include additional ''enforcement'' authority. Specifically, as adopted, the rules provide that such swaps will be subject to the anti-fraud, anti-manipulation, and other provisions of the business conduct standards in CEA sections 4s(h)(1)(A) and 4s(h)(4)(A) and the rules promulgated thereunder for mixed swaps.[957] Rule 23.410 under the CEA,[958] adopted under CEA section 4s(h)(1)(A), applies to swap dealers and major swap participants and prohibits fraud, manipulation, and other abusive practices and also imposes requirements regarding the confidential treatment of counterparty information, which will apply to mixed swaps.[959]

As discussed in the Proposing Release, the Commissions believe that paragraph (b) of rule 1.9 under the CEA and rule 3a68–4 under the Exchange Act will address potentially conflicting or duplicative regulatory requirements for dually-registered dealers and major participants that are subject to regulation by both the CFTC and the SEC, while requiring dual registrants to comply with the regulatory requirements the Commissions believe are necessary to provide sufficient regulatory oversight for mixed swap transactions entered into by such dual registrants. The CFTC also believe that paragraph (b) of rule 1.9 under the CEA and rule 3a68–4 under the Exchange Act will provide clarity to dually-registered dealers and major participants, who are subject to regulation by both the CFTC and the SEC, as to the requirements of each Commission that will apply to their bilateral uncleared mixed swaps.

3. Regulatory Treatment for Other Mixed Swaps

Because mixed swaps are both security-based swaps and swaps,[960] absent a joint rule or order by the Commissions permitting an alternative regulatory approach, persons who desire or intend to list, trade, or clear a mixed swap (or class thereof) will be required to comply with all the statutory provisions in the CEA and the Exchange Act (including all the rules and regulations thereunder) that were added or amended by Title VII with respect to swaps or security-based swaps.[961] Such

[947] All references to Title VII instruments in parts IV and VI shall include a class of such Title VII instruments as well. For example, a ''class'' of Title VII instrument would include instruments that are of similar character and provide substantially similar rights and privileges.

[948] As stated in paragraph (c) of proposed rule 1.9 under the CEA and rule 3a68–4 under the Exchange Act, ''parallel provisions'' means comparable provisions of the CEA and the Exchange Act that were added or amended by Title VII with respect to security-based swaps and swaps, and the rules and regulations thereunder.

[949] Section 712(a)(7)(A) of the Dodd-Frank Act requires the Commissions to treat functionally or economically similar entities in a similar manner.

[950] Under paragraph (b) of rule 1.9 under the CEA and rule 3a68–4 under the Exchange Act, a ''bilateral uncleared mixed swap'' will be a mixed swap that: (i) Is neither executed on nor subject to the rules of a DCM, NSE, SEF, security-based SEF, or FBOT; and (ii) will not be submitted to a DCO or registered or exempt clearing agency to be cleared. To the extent that a mixed swap is subject to the mandatory clearing requirement (*see* section 2(h)(1)(A) of the CEA, 7 U.S.C. 2(h)(1)(A), and section 3C(a)(1) of the Exchange Act) (and where a counterparty is not eligible to rely on the end-user exclusion from the mandatory clearing requirement (*see* section 2(h)(7) of the CEA, 7 U.S.C. 2(h)(7), and section 3C(g) of the Exchange Act)), this alternative regulatory treatment will not be available.

[951] 7 U.S.C. 6s(f) and 12, respectively.

[952] 7 U.S.C. 2(a)(1)(B), 6(b), 6b, 6c, 6s(h)(1)(A), 6s(h)(4)(A), 9 and 15, 13b, 13a–1, 13a–2, 13, 13c(a), 13c(b), and 26, respectively.

[953] 7 U.S.C. 6r.

[954] 7 U.S.C. 2(a)(13).

[955] 7 U.S.C. 6s(e).

[956] 7 U.S.C. 6a.

[957] 7 U.S.C. 6s(h)(1)(A) and 6s(h)(4)(A).

[958] 17 CFR 23.410.

[959] *Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties,* 77 FR 9734, 9751–9755 (Feb. 17, 2012). The Commissions note that, while the introductory text of rule 1.9(b)(3)(i)(A) through (F) under the CEA and rule 3a68–4(b)(3)(i)(A) through (F) under the Exchange Act characterizes the cited CEA sections (*e.g.,* ''enforcement,'' ''capital,'' etc.), such characterization is meant as guidance only. For example, final rule 1.9(b)(3)(i)(B) uses the word ''enforcement'' to characterize certain of the cited CEA sections and the rules and regulations promulgated thereunder that prohibit fraud, manipulation, or abusive practices. Other cited provisions, such as the Whistleblower protections under CEA section 23, or the related rules and regulations, such as requirements to keep counterparty information confidential under rule 23.410(c) under the CEA, 17 CFR 23.410(c), are similarly enforcement provisions in that they protect market participants from fraudulent or other abusive practices.

[960] *See supra* note 10.

[961] Because security-based swaps are also securities, compliance with the Federal securities

dual regulation may not be appropriate in every instance and may result in potentially conflicting or duplicative regulatory requirements. However, before the Commissions can determine the appropriate regulatory treatment for mixed swaps (other than the treatment discussed above), the Commissions will need to understand better the nature of the mixed swaps that parties want to trade. As a result, the Commissions proposed paragraph (c) of rule 1.9 under the CEA and rule 3a68–4 under the Exchange Act to establish a process pursuant to which any person who desires or intends to list, trade, or clear a mixed swap (or class thereof) that is not subject to the provisions of paragraph (b) of the rules (*i.e.,* bilateral uncleared mixed swaps entered into by at least one dual registrant) may request the Commissions to publicly issue a joint order permitting such person (and any other person or persons that subsequently lists, trades, or clears that class of mixed swap) to comply, as to parallel provisions only, with the specified parallel provisions, instead of being required to comply with parallel provisions of both the CEA and the Exchange Act.[962] The Commissions received no comments on the proposed rules and are adopting the rules as proposed.

As adopted, paragraph (c) of rule 1.9 under the CEA and rule 3a68–4 under the Exchange Act further provide that a person submitting such a request to the Commissions must provide the Commissions with:

(i) All material information regarding the terms of the specified, or specified class of, mixed swap;

(ii) the economic characteristics and purpose of the specified, or specified class of, mixed swap;

(iii) the specified parallel provisions, and the reasons the person believes such specified parallel provisions would be appropriate for the mixed swap (or class thereof);

(iv) an analysis of (1) the nature and purposes of the parallel provisions that are the subject of the request; (2) the comparability of such parallel provisions; and (3) the extent of any conflicts or differences between such parallel provisions; and

(v) such other information as may be requested by either of the Commissions.

This provision is intended to provide the Commissions with sufficient information regarding the mixed swap (or class thereof) and the proposed regulatory approach to make an informed determination regarding the appropriate regulatory treatment of the mixed swap (or class thereof).

As adopted, paragraph (c) of rule 1.9 under the CEA and rule 3a68–4 under the Exchange Act also will allow a person to withdraw a request regarding the regulation of a mixed swap at any time prior to the issuance of a joint order by the Commissions. This provision is intended to permit persons to withdraw requests that they no longer need. This, in turn, will save the Commissions time and staff resources.

As adopted, paragraph (c) of rule 1.9 under the CEA and rule 3a68–4 under the Exchange Act further provide that in response to a request pursuant to the rules, the Commissions may jointly issue an order, after public notice and opportunity for comment, permitting the requesting person (and any other person or persons that subsequently lists, trades, or clears that class of mixed swap) to comply, as to parallel provisions only, with the specified parallel provisions (or another subset of the parallel provisions that are the subject of the request, as the Commissions determine is appropriate), instead of being required to comply with parallel provisions of both the CEA and the Exchange Act. In determining the contents of such a joint order, the Commissions can consider, among other things:

(i) The nature and purposes of the parallel provisions that are the subject of the request;

(ii) the comparability of such parallel provisions; and

(iii) the extent of any conflicts or differences between such parallel provisions.

Finally, as adopted, paragraph (c) of rule 1.9 under the CEA and rule 3a68–4 under the Exchange Act require the Commissions, if they determine to issue a joint order pursuant to these rules, to do so within 120 days of receipt of a complete request (with such 120-day period being tolled during the pendency of a request for public comment on the proposed interpretation). If the Commissions do not issue a joint order within the prescribed time period, the rules require that each Commission publicly provide the reasons for not having done so. Paragraph (c) of rule 1.9 under the CEA and rule 3a68–4 under the Exchange Act makes clear that nothing in the rules requires either Commission to issue a requested joint order regarding the regulation of a particular mixed swap (or class thereof).

These provisions are intended to provide market participants with a prompt review of requests for a joint order regarding the regulation of a particular mixed swap (or class thereof). The rules also will provide transparency and accountability by requiring that at the end of the review period, the Commissions issue the requested order or publicly state the reasons for not doing so.

V. Security-Based Swap Agreements

A. Introduction

SBSAs are swaps over which the CFTC has regulatory and enforcement authority but for which the SEC also has antifraud and certain other authority.[963] The term ''security-based swap agreement'' is defined as a ''swap agreement'' (as defined in section 206A of the GLBA [964]) of which ''a material term is based on the price, yield, value, or volatility of any security or any group or index of securities, including any interest therein'' but does not include a security-based swap.[965]

laws and rules and regulations thereunder (in addition to the provisions of the Dodd-Frank Act and the rules and regulations thereunder) will also be required. To the extent one of the Commissions has exemptive authority with respect to other provisions of the CEA or the Federal securities laws and the rules and regulations thereunder, persons may submit separate exemptive requests or rulemaking petitions regarding those provisions to the relevant Commission.

[962] Other than with respect to the specified parallel provisions with which such persons may be permitted to comply instead of complying with parallel provisions of both the CEA and the Exchange Act, any other provision of either the CEA or the Federal securities laws that applies to swaps or security-based swaps will continue to apply.

[963] *See* section 3(a)(78) of the Exchange Act, 15 U.S.C. 78c(a)(78); CEA section 1a(47)(A)(v), 7 U.S.C. 1a(47)(A)(v). The Dodd-Frank Act provides that certain CFTC registrants, such as DCOs and SEFs, will keep records regarding SBSAs open to inspection and examination by the SEC upon request. *See, e.g.,* sections 725(e) and 733 of the Dodd-Frank Act. The Commissions are committed to working cooperatively together regarding their dual enforcement authority over SBSAs.

[964] 15 U.S.C. 78c note. The Dodd-Frank Act amended the definition of ''swap agreement'' in section 206A of the GLBA to eliminate the requirements that a swap agreement be between ECPs, as defined in section 1a(18)(C) of the CEA, 7 U.S.C. 1a(18)(C), and subject to individual negotiation. *See* section 762(b) of the Dodd-Frank Act. Sections 762(c) and (d) of the Dodd-Frank Act also made conforming amendments to the Exchange Act and the Securities Act to reflect the changes to the regulation of ''swap agreements'' that are either ''security-based swaps'' or ''security-based swap agreements'' under the Dodd-Frank Act.

[965] *See* section 3(a)(78) of the Exchange Act, 15 U.S.C. 78c(a)(78). The CFMA amended the Exchange Act and the Securities Act to exclude swap agreements from the definitions of security in those statutes but subjected ''security-based swap agreements,'' as defined in section 206B of the GLBA, 15 U.S.C. 78c note, to the antifraud, anti-manipulation, and anti-insider trading provisions of the Exchange Act and Securities Act. *See* CFMA, *supra* note 697, title III.

The CEA does not contain a stand-alone definition of ''security-based swap agreement,'' but includes the definition instead in subparagraph (A)(v) of the swap definition in CEA section 1a(47), 7 U.S.C. 1a(47). The only difference between these definitions is that the definition of SBSA in the Exchange Act specifically excludes security-based

Continued

B. Swaps That are Security-Based Swap Agreements

Although the Commissions believe it is not possible to provide a bright line test to define an SBSA, the Commissions believe that it is possible to clarify that certain types of swaps clearly fall within the definition of SBSA. For example, as the Commissions noted in the Proposing Release, a swap based on an index of securities that is not a narrow-based security index (*i.e.,* a broad-based security index) would fall within the definition of an SBSA under the Dodd-Frank Act.[966] Similarly, an index CDS that is not based on a narrow-based security index or on the ''issuers of securities in a narrow-based security index,'' as defined in rule 1.3(zzz) under the CEA and rule 3a68–1a under the Exchange Act, would be an SBSA. In addition, a swap based on a U.S. Treasury security or on certain other exempted securities other than municipal securities would fall within the definition of an SBSA under the Dodd-Frank Act.[967]

The Commissions received no comments on the examples provided in the Proposing Release regarding SBSAs. Accordingly, the Commissions are not further defining SBSA beyond restating the examples above.[968]

C. Books and Records Requirements for Security-Based Swap Agreements

The Commissions are adopting rule 1.7 under the CEA and rule 3a68–3 under the Exchange Act, as proposed, to clarify that there will not be additional books and records requirements regarding SBSAs other than those that are required for swaps. The Dodd-Frank Act provides that the Commissions shall adopt rules regarding the books and records required to be kept for SBSAs.[969] As discussed above, SBSAs are swaps over which the CFTC has regulatory authority, but for which the SEC has antifraud, anti-manipulation, and certain other authority. In the Proposing Release, the Commissions noted that the CFTC had proposed rules governing books and records for swaps, which would apply to swaps that also are SBSAs.[970] The Commissions further stated their belief that those proposed rules would provide sufficient books and records regarding SBSAs, and that additional books and records requirements were not necessary for SBSAs.[971] The Commissions received no comments on the proposed rules.

Accordingly, rule 1.7 under the CEA and rule 3a68–3 under the Exchange Act provide that persons registered as SDRs under the CEA and the rules and regulations thereunder are not required to (i) keep and maintain additional books and records regarding SBSAs other than the books and records regarding swaps that SDRs would be required to keep and maintain pursuant to the CEA and rules and regulations thereunder; and (ii) collect and maintain additional data regarding SBSAs other than the data regarding swaps that SDRs are required to collect and maintain pursuant to the CEA and rules and regulations thereunder. In addition, rule 1.7 under the CEA and rule 3a68–3 under the Exchange Act provide that persons registered as swap dealers or major swap participants under the CEA and the rules and regulations thereunder, or registered as security-based swap dealers or major security-based swap participants under the Exchange Act and the rules and regulations thereunder, are not required to keep and maintain additional books and records, including daily trading records, regarding SBSAs other than the books and records regarding swaps that those persons are required to keep and maintain pursuant to the CEA and the rules and regulations thereunder.[972]

VI. Process for Requesting Interpretations of the Characterization of a Title VII Instrument

The Commissions recognize that there may be Title VII instruments (or classes of Title VII instruments) that may be difficult to categorize definitively as swaps or security-based swaps. Further, because mixed swaps are both swaps and security-based swaps, identifying a mixed swap may not always be straightforward.

Section 712(d)(4) of the Dodd-Frank Act provides that any interpretation of, or guidance by, either the CFTC or SEC regarding a provision of Title VII shall be effective only if issued jointly by the Commissions (after consultation with the Board) on issues where Title VII requires the CFTC and SEC to issue joint regulations to implement the provision. The Commissions believe that any interpretation or guidance regarding whether a Title VII instrument is a

swaps (*see* section 3(a)(78)(B) of the Exchange Act, 15 U.S.C. 78c(a)(78)(B)), while the definition of SBSA in the CEA does not contain a similar exclusion. Instead, the exclusion for security-based swaps is placed in the general exclusions from the swap definition in the CEA (*see* CEA section 1a(47)(B)(x), 7 U.S.C. 1a(47)(B)(x)).

[966] *See* Proposing Release at 29863. Swaps based on indexes that are not narrow-based security indexes are not included within the definition of the term security-based swap under the Dodd-Frank Act. *See* section 3(a)(68)(A)(ii)(I) of the Exchange Act, 15 U.S.C. 78c(a)(68)(A)(ii)(I), and discussion *supra* part III.G. However, such swaps have a material term that is ''based on the price, yield, value, or volatility of any security or any group or index of securities, or any interest therein,'' and therefore such swaps fall within the SBSA definition.

[967] Swaps on U.S. Treasury securities that do not have any other underlying references involving securities are expressly excluded from the definition of the term ''security-based swap'' under the Dodd-Frank Act. *See* section 3(a)(68)(C) of the Exchange Act, 15 U.S.C. 78c(a)(68)(C) (providing that an agreement, contract, or transaction that would be a security-based swap solely because it references, is based on, or settles through the delivery of one or more U.S. Treasury securities (or certain other exempted securities) is excluded from the security-based swap definition). However, swaps on U.S. Treasury securities or on other exempted securities covered by subparagraph (C) of the security-based swap definition have a material term that is ''based on the price, yield, value, or volatility of any security or any group or index of securities, or any interest therein,'' and therefore fall within the SBSA definition.

[968] The Commissions noted that certain transactions that were not ''security-based swap agreements'' under the CFMA are nevertheless included in the definition of security-based swap under the Dodd-Frank Act—including, for example, a CDS on a single loan. Accordingly, although such transactions were not subject to insider trading restrictions under the CFMA, under the Dodd-Frank Act they are subject to the Federal securities laws, including insider trading restrictions.

[969] Specifically, section 712(d)(2)(B) of the Dodd-Frank Act requires the Commissions, in consultation with the Board, to jointly adopt rules governing books and records requirements for SBSAs by persons registered as SDRs under the CEA, including uniform rules that specify the data elements that shall be collected and maintained by each SDR. Similarly, section 712(d)(2)(C) of the Dodd-Frank Act requires the Commissions, in consultation with the Board, to jointly adopt rules governing books and records for SBSAs, including daily trading records, for swap dealers, major swap participants, security-based swap dealers, and major security-based swap participants.

[970] *See Swap Data Recordkeeping and Reporting Requirements,* 75 FR 76573 (Dec. 8, 2010) (proposed rules regarding swap data recordkeeping and reporting requirements for SDRs, DCOs, DCMs, SEFs, swap dealers, major swap participants, and swap counterparties who are neither swap dealers nor major swap participants); *See Reporting, Recordkeeping, and Daily Trading Records Requirements for Swap Dealers and Major Swap Participants,* 75 FR 76666 (Dec. 9, 2010) (proposed rules regarding reporting and recordkeeping requirements and daily trading records requirements for swap dealers and major swap participants). These rules have been adopted by the CFTC. *See Swap Data Recordkeeping and Reporting Requirements,* 77 FR 2136 (Jan. 13, 2012) (final rules regarding swap data recordkeeping and reporting requirements for SDRs, DCOs, DCMs, SEFs, swap dealers, major swap participants, and swap counterparties who are neither swap dealers or major swap participants); *See 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,* 77 FR 20128 (Apr. 3, 2012) (final rules regarding reporting and recordkeeping requirements and daily trading records requirements for swap dealers and major swap participants).

[971] *See* Proposing Release at 29863.

[972] Rule 1.7 under the CEA and Rule 3a69–3 under the Exchange Act provide that the term ''security-based swap agreement'' has the meaning set forth in CEA section 1a(47)(A)(v), 7 U.S.C. 1a(47)(A)(v), and section 3(a)(78) of the Exchange Act, 15 U.S.C. 78c(a)(78), respectively.

swap, a security-based swap, or both (i.e., a mixed swap), must be issued jointly pursuant to this requirement.

The Commissions proposed rules in the Proposing Release to establish a process for interested persons to request a joint interpretation by the Commissions regarding whether a particular Title VII instrument (or class of Title VII instruments) is a swap, a security-based swap, or both (i.e., a mixed swap).[973] The Commissions are adopting the rules as proposed.

Section 718 of the Dodd-Frank Act establishes a process for determining the status of ''novel derivative products'' that may have elements of both securities and futures contracts. Section 718 of the Dodd-Frank Act provides a useful model for a joint Commission review process to appropriately categorize Title VII instruments. As a result, the final rules include various attributes of the process established in section 718 of the Dodd-Frank Act. In particular, to permit an appropriate review period that provides sufficient time to ensure Federal regulatory interests are satisfied that also does not unduly delay the introduction of new financial products, the adopted process, like the process established in section 718, includes a deadline for responding to a request for a joint interpretation.[974]

The Commissions are adopting rule 1.8 under the CEA and rule 3a68–2 under the Exchange Act that establish a process for parties to request a joint interpretation regarding the characterization of a particular Title VII instrument (or class thereof). Specifically, the final rules provide that any person may submit a request to the Commissions to provide a public joint interpretation of whether a particular Title VII instrument is a swap, a security-based swap, or both (i.e., a mixed swap).[975]

The final rules afford market participants with the opportunity to obtain greater certainty from the Commissions regarding the regulatory status of particular Title VII instruments under the Dodd-Frank Act. This provision should decrease the possibility that market participants inadvertently might fail to meet the regulatory requirements applicable to a particular Title VII instrument.

The final rules provide that a person requesting an interpretation as to the characterization of a Title VII instrument as a swap, a security-based swap, or both (i.e., a mixed swap), must provide the Commissions with the person's determination of the characterization of the instrument and supporting analysis, along with certain other documentation.[976] Specifically, the person must provide the Commissions with the following information:

- All material information regarding the terms of the Title VII instrument;
- A statement of the economic characteristics and purpose of the Title VII instrument;
- The requesting person's determination as to whether the Title VII instrument should be characterized as a swap, a security-based swap, or both (i.e., a mixed swap), including the basis for such determination; and
- Such other information as may be requested by either Commission.

This provision should provide the Commissions with sufficient information regarding the Title VII instrument at issue so that the Commissions can appropriately evaluate whether it is a swap, a security-based swap, or both (i.e., a mixed swap).[977] By requiring that requesting persons furnish a determination regarding whether they believe the Title VII instrument is a swap, a security-based swap, or both (i.e., a mixed swap), including the basis for such determination, this provision also will assist the Commissions in more quickly identifying and addressing the relevant issues involved in arriving at a joint interpretation of the characterization of the instrument.

The final rules provide that a person may withdraw a request at any time prior to the issuance of a joint interpretation or joint notice of proposed rulemaking by the Commissions.[978] Notwithstanding any such withdrawal, the Commissions may provide an interpretation regarding the characterization of the Title VII instrument that was the subject of a withdrawn request.

This provision will permit parties to withdraw requests for which the party no longer needs an interpretation. This, in turn, should save the Commissions time and staff resources. If the Commissions believe such an interpretation is necessary regardless of a particular request for interpretation, however, the Commissions may provide such a joint interpretation of their own accord.

The final rules provide that if either Commission receives a proposal to list, trade, or clear an agreement, contract, or transaction (or class thereof) that raises questions as to the appropriate characterization of such agreement, contract, or transaction (or class thereof) as a swap, security-based swap, or both (i.e., a mixed swap), the receiving Commission promptly shall notify the other.[979] This provision of the final rules further provides that either Commission, or their Chairmen jointly, may submit a request for a joint interpretation to the Commissions as to the characterization of the Title VII instrument where no external request has been received.

This provision is intended to ensure that Title VII instruments do not fall into regulatory gaps and will help the Commissions to fulfill their responsibility to oversee the regulatory regime established by Title VII of the Dodd-Frank Act by making sure that Title VII instruments are appropriately characterized, and thus appropriately regulated. An agency, or their Chairmen jointly, submitting a request for an interpretation as to the characterization of a Title VII instrument under this paragraph will be required to submit the same information as, and could withdraw a request in the same manner as, a person submitting a request to the Commissions. The bases for these provisions are set forth above with respect to paragraphs (b) and (c) of the final rules.

The final rules require that the Commissions, if they determine to issue a joint interpretation as to the characterization of a Title VII instrument, do so within 120 days of receipt of the complete external or agency submission (unless such 120-day period is tolled during the pendency of a request for public comment on the proposed interpretation).[980] If the Commissions do not issue a joint interpretation within the prescribed time period, the final rules require that each Commission publicly provide the reasons for not having done so within

[973] *See* Proposing Release at 29864–65.

[974] The Commissions note that section 718 of the Dodd-Frank Act is a separate process from the process the Commissions are adopting, and that any future interpretation involving the process under section 718 would not affect the process being adopted here, nor will any future interpretation involving the process adopted here affect the process under section 718.

[975] *See* paragraph (a) of rule 1.8 under the CEA and rule 3a68–2 under the Exchange Act.

[976] *See* paragraph (b) of rule 1.8 under the CEA and rule 3a68–2 under the Exchange Act.

[977] The Commissions also may use this information to issue (within the timeframe for issuing a joint interpretation) a joint notice of proposed rulemaking to further define one or more of the terms ''swap,'' ''security-based swap,'' or ''mixed swap.'' *See* paragraph (f) of rule 1.8 under the CEA and rule 3a68–2 under the Exchange Act, which are discussed below.

[978] *See* paragraph (c) of rule 1.8 under the CEA and rule 3a68–2 under the Exchange Act.

[979] *See* paragraph (d) of rule 1.8 under the CEA and rule 3a68–2 under the Exchange Act.

[980] *See* paragraph (e) of rule 1.8 under the CEA and rule 3a68–2 under the Exchange Act. This 120-day period is based on the timeframe set forth in section 718(a)(3) of the Dodd-Frank Act.

such prescribed time period. This provision of the final rules also incorporates the mandate of the Dodd-Frank Act that any joint interpretation by the Commissions be issued only after consultation with the Board of Governors of the Federal Reserve System.[981] Finally, the rules make clear that nothing requires either Commission to issue a requested joint interpretation regarding the characterization of a particular instrument.

These provisions are intended to assure market participants a prompt review of submissions requesting a joint interpretation of whether a Title VII instrument is a swap, a security-based swap, or both (i.e., a mixed swap). The final rules also provide transparency and accountability by requiring that at the end of the review period, the Commissions issue the requested interpretation or publicly state the reasons for not doing so.

The final rules permit the Commissions, in lieu of issuing a requested interpretation, to issue (within the timeframe for issuing a joint interpretation) a joint notice of proposed rulemaking to further define one or more of the terms ''swap,'' ''security-based swap,'' or ''mixed swap.'' [982] Under the final rules, the 120-day period to provide a response will be tolled during the pendency of a request for public comment on any such proposed interpretation. Such a rulemaking, as required by Title VII, would be required to be done in consultation with the Board of Governors of the Federal Reserve System. This provision is intended to provide the Commissions with needed flexibility to address issues that may be of broader applicability than the particular Title VII instrument that is the subject of a request for a joint interpretation.

Comments

Three commenters discussed the proposed process for requesting interpretations of the characterization of a Title VII instrument,[983] and while supporting such joint interpretive process, suggested certain changes, including extending it to SBSAs,[984] mandating that the Commissions issue a response to a request,[985] and suggesting that the Commissions should seek expedited judicial review in the event the Commissions do not agree on the interpretation.[986]

The Commissions are adopting the final rules as proposed and are not including SBSAs in the process. The joint interpretive process is intended to decrease the possibility that market participants inadvertently might fail to meet regulatory requirements that are applicable to swaps, security-based swaps, or mixed swaps and, as such, provides a mechanism for market participants to request whether an instrument will be regulated by the CFTC, the SEC, or both. However, the Commissions do not believe it is appropriate to predetermine whether particular swaps also are SBSAs as SBSAs are already swaps over which the CFTC has regulatory and enforcement authority and as to which the SEC has antifraud and certain other related authorities.[987] Predetermining whether particular swaps may be SBSAs under this process is not needed to provide certainty as to the applicable regulatory treatment of these instruments.

The Commissions also are retaining in the final rules the framework for providing or not providing joint interpretations. As noted above, section 718 of the Dodd-Frank Act contains a framework for evaluating novel derivative products that may have elements of both securities and futures contracts (other than swaps, security-based swaps or mixed swaps). The Commissions believe that establishing a joint interpretive process for swaps, security-based swaps and mixed swaps that is modeled in part on this statutory framework should facilitate providing interpretations to market participants in a timely manner, if the Commissions determine to do so. Establishing a process by rule will provide market participants with an understandable method by which they can request an interpretation from the Commissions. As the Commissions have the authority, but not the obligation, under the Dodd-Frank Act to further define the terms ''swap,'' ''security-based swap,'' and ''mixed swap,'' the Commissions are retaining the flexibility in the interpretive process rules to decide whether or not to issue joint interpretations. The Commissions believe, however, that it is appropriate to advise market participants of the reasons why such interpretation is not being issued and the final rules retain the requirement that the Commissions publicly explain the reasons for not issuing a joint interpretation.

Further, the Commissions are not revising the final rules to provide for expedited judicial review. The Dodd-Frank Act does not contain any provision that provides for expedited judicial review if the Commissions do not issue a joint interpretation with respect to a Title VII instrument. Although the Commissions note that section 718 of the Dodd-Frank Act contains a statutorily mandated expedited judicial review of one of the Commission's actions (if sought by the other Commission) regarding novel derivative products that may have elements of both securities and futures contracts, such statutory provision does not apply to Title VII instruments.[988] Further, Title VII provides flexibility to the Commissions to determine the methods by which joint interpretations are provided. Title VII does not contain any required expedited judicial review of Commission actions, and the Commissions do not have the authority to require expedited judicial review under Title VII, with respect to a Title VII instrument. Accordingly, the Commissions do not believe that including such a provision is appropriate in the context of providing interpretations to market participants regarding the definitions of swap, security-based swap, or mixed swap.

Two commenters were concerned about the length of the review period and believed that the Commissions should shorten such time period.[989] The

[981] *See* section 712(d)(4) of the Dodd-Frank Act.

[982] *See* paragraph (f) of rule 1.8 under the CEA and rule 3a68–2 under the Exchange Act.

[983] *See* Better Markets Letter; CME Letter; and SIFMA Letter.

[984] *See* Better Markets Letter.

[985] *See* CME Letter and SIFMA Letter. These commenters suggested that the Commissions should be required to issue a joint interpretation for all joint interpretive requests that are not withdrawn. *Id.*

[986] *See* CME Letter. This commenter suggested that the Commissions should seek expedited judicial review to determine the characterization of a Title VII instrument if the Commissions cannot agree on a joint interpretation. *Id.*

[987] *See* section 3(a)(78) of the Exchange Act, 15 U.S.C. 78c(a)(78), and section 1a(47)(A)(v) of the CEA, 7 U.S.C. 1a(47)(A)(v). The Dodd-Frank Act provides that certain CFTC registrants, such as DCOs and SEFs, will keep records regarding security-based swap agreements open to inspection and examination by the SEC upon request. *See, e.g.,* sections 725(e) and 733 of the Dodd-Frank Act.

[988] The Commissions note that judicial review provisions in section 718 relating to the status of novel derivative products only provide that either Commission (either the SEC or the CFTC) has the right to petition for review of a final order of the other Commission with respect to novel derivative products that may have elements of both securities and futures that affects jurisdictional issues. Nothing in section 718 requires that the Commissions issue exemptions or interpretations pursuant to such section or provides any person other than the Commissions the right to petition for Court review of a Commission order issued pursuant to section 718.

[989] *See* CME Letter and Markit Letter. One of these commenters suggested that the Commissions should reduce the 120-day review period to 30 days because the value of receiving a joint interpretation would be negated if a market participant had to wait 120 days. This commenter also suggested that foreign competitors will gain a competitive advantage to U.S. market participants because they will not need to wait for a joint interpretation before

Commissions are not modifying the final rules from those proposed with respect to the length of the review period. The 120-day review period is based on a timeframe established by Congress with respect to determining the status of novel derivative products.[990] The Commissions believe that this length of the review period also is appropriate for other derivative products such as swaps, security-based swaps, and mixed swaps. Further, the Commissions believe the 120-day review period is necessary to enable the Commissions to obtain the necessary information regarding a Title VII instrument, thoroughly analyze the instrument, and formulate any joint interpretation regarding the instrument. In a related comment, one commenter suggested that the Commissions allow a requesting party, while awaiting a joint interpretation, to make a good faith characterization of a particular Title VII instrument and engage in transactions based on such characterization.[991] The Commissions believe that it is essential that the characterization of an instrument be established prior to any party engaging in the transactions so that the appropriate regulatory schemes apply. The Commissions do not believe that allowing market participants to make such a determination as to the status of a product is either appropriate or consistent with the statutory provisions providing for the Commissions to further define the terms ''swap,'' ''security-based swap'' and ''mixed swap.'' Further, allowing market participants to determine the status of a product could give rise to regulatory arbitrage and inconsistent treatment of similar products.

Finally, some commenters expressed concern about the public availability of information regarding the joint interpretive process and asked that the parties be able to seek confidential treatment of their submissions.[992] The Commissions note that under existing rules of both Commissions, requesting parties may seek confidential treatment for joint interpretive requests from the SEC and the CFTC in accordance with the applicable existing rules relating to confidential treatment of information.[993] The Commissions also note that even if confidential treatment has been requested, all joint interpretive requests, as well all joint interpretations and any decisions not to issue a joint interpretation (along with the explanation of the grounds for such decision), will be made publicly available at the conclusion of the review period.[994]

VII. Anti-Evasion

A. CFTC Anti-Evasion Rules

1. CFTC's Anti-Evasion Authority

(a) Statutory Basis for the Anti-Evasion Rules

Pursuant to the authority in sections 721(c) and 725(g)(2) of the Dodd-Frank Act and CEA sections 1a(47)(E) and 2(i),[995] the CFTC is promulgating the anti-evasion rules as they were proposed and restating the accompanying interpretation with modifications in response to commenters. The CFTC also is providing an additional interpretation regarding rules 1.3(xxx)(6) and 1.6 under the CEA.

Section 721(c) of the Dodd-Frank Act requires the CFTC 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 made by subtitle A of the CEA). Moreover, as the CFTC noted in the Proposing Release,[996] several other provisions of Title VII reference the promulgation of anti-evasion rules, including:

- Subparagraph (E) of the definition of ''swap'' provides that foreign exchange swaps and foreign exchange forwards shall be considered swaps unless the Secretary of the Treasury makes a written determination that either foreign exchange swaps or foreign exchange forwards, or both, among other things, ''are not structured to evade the [Dodd-Frank Act] in violation of any rule promulgated by the [CFTC] pursuant to section 721(c) of that Act;'' [997]
- Section 722(d) of the Dodd-Frank Act provides that the provisions of the CEA relating to swaps shall not apply to activities outside the United States unless those activities, among other things, ''contravene such rules or regulations as the [CFTC] may prescribe or promulgate as are necessary or appropriate to prevent the evasion of any provision of [the CEA] that was enacted by the [Title VII];'' [998] and
- Section 725(g) of the Dodd-Frank Act amends the Legal Certainty for Bank Products Act of 2000 to provide that,

trading similar or identical products. *See* CME Letter. The Commissions note that to the extent foreign competitors are engaging in swap and security-based swap transactions subject to either Commission's jurisdiction, they will be subject to the same process for requesting interpretations of the characterization of Title VII instruments as U.S. market participants. The other commenter requested that the Commissions issue a joint interpretation for each ''widely-utilized index,'' at the time of the index series' launch, within a two-week period rather than the proposed 120-day period for novel derivative products under section 718 of the Dodd-Frank Act. This commenter did not recognize that the joint interpretive process would be available in this case, and that it may be initiated by an index provider. See paragraph (a) of rule 1.8 under the CEA and rule 3a68–2 under the Exchange Act (providing that ''[a]ny person'' may submit a request for a joint interpretation). *See* Markit Letter.

[990] *See* section 718(a)(3) of the Dodd-Frank Act.

[991] *See* SIFMA Letter. This commenter also suggested that while the requesting party, and all other market participants, would be bound by the joint interpretation when issued, they should not face retroactive re-characterization of a transaction executed during the review period and prior to the issuance of the joint interpretation. *Id.*

[992] One commenter suggested that the Commissions should permit the parties seeking a joint interpretation to request confidential treatment from the Commissions during the course of the review period in order to protect proprietary information and deal structures. *See* SIFMA Letter. Another commenter suggested that the Commissions should make public all requests for joint interpretations, any guidance actually provided in response to such requests, and any decisions not to provide guidance in response to such requests (along with an explanation of the grounds for any such decision). *See* Better Markets Letter.

[993] *See* 17 CFR 200.81 and 17 CFR 140.98. The Commissions note that the joint interpretive process is intended to provide, among other things, notification to all market participants as to the regulatory classification of a particular Title VII instrument. In this regard, the Commissions do not believe it is appropriate to provide a joint interpretation only to the market participants requesting the interpretation, while delaying publication of the same joint interpretation to market participants generally. Therefore, CFTC staff will not exercise its discretion under 17 CFR 140.98(b) to delay publication of a joint interpretation. SEC staff does not have discretion under 17 CFR 200.81(b) to delay publication of a joint interpretation.

[994] The CFTC's publication of any joint interpretive request and the joint interpretation itself will be subject to the restrictions of section 8 of the CEA. *See* 7 U.S.C. 12. Subject to limited exceptions, CEA section 8 generally restricts the CFTC from publishing ''data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers . . .'' *Id.* The CFTC and its staff have a long history of providing interpretive guidance with respect to the regulatory status of specific proposed transactions in compliance with CEA section 8. However, market participants making a joint interpretive request should be aware that the SEC is not subject to CEA section 8 and, therefore, is not subject to the restrictions of CEA section 8. The CFTC anticipates that most joint interpretive requests will not contain CEA Section 8 information. However, given that the SEC is not subject to the restrictions of CEA section 8, the CFTC intends to work with requesting parties to assure that joint interpretive requests do not include CEA section 8 information. Nevertheless, given the foregoing, market participants should not submit CEA section 8 information in their joint interpretive requests.

[995] 7 U.S.C. 1a(47)(E) and 2(i).

[996] Proposing Release at 29866.

[997] CEA section 1a(47)(E), 7 U.S.C. 1a(47)(E).

[998] CEA section 2(i), 7 U.S.C. 2(i). New CEA section 2(i), as added by section 722(d) of the Dodd-Frank Act, also provides that the provisions of Title VII relating to swaps shall not apply to activities outside the United States unless those activities ''have a direct and significant connection with activities in, or effect on, commerce of the United States.''

although identified banking products generally are excluded from the CEA, that exclusion shall not apply to an identified banking product that is a product of a bank that is not under the regulatory jurisdiction of an appropriate Federal banking agency,[999] meets the definition of the terms ''swap'' or ''security-based swap,'' and ''has been structured as an identified banking product for the purpose of evading the provisions of the [CEA], the [Securities Act], or the [Exchange Act].'' [1000]

Comments

One commenter asserted the CFTC has no statutory basis to promulgate the anti-evasion rules, as proposed.[1001] Specifically, this commenter stated that neither CEA sections 2(h)(4)(A) nor 6(e) grant the CFTC authority to prescribe an anti-evasion rule and interpretation as described in the Proposing Release.[1002] Moreover, this commenter argued that CEA section 2(i) limits the CFTC to prescribing anti-evasion rules related only to activities occurring outside of the United States.[1003] The CFTC finds these comments misplaced because CEA sections 2(h)(4)(A) and 6(e) provide the CFTC with additional authority to prescribe anti-evasion rules for specific purposes above and beyond the authority provided by sections 721(c) and 725(g) of the Dodd-Frank Act and CEA sections 1a(47)(E) and 2(i), upon which the CFTC is relying in this rulemaking.[1004] In addition, section 2(i) of the CEA provides that activities conducted outside the United States, including entering into agreements, contracts and transactions or structuring entities, which willfully evade or attempt to evade any provision of the CEA, shall be subject to the provisions of Subtitle A of Title VII of the Dodd-Frank Act; it does not limit the CFTC's other authorities cited above. Accordingly, nothing in CEA sections 2(h)(4)(A), 2(i) or 6(e) prevent the CFTC from prescribing rules 1.3(xxx)(6) and 1.6.

Two commenters supported the proposal's ''principles-based'' approach to anti-evasion,[1005] while several others suggested modifications.[1006] Two commenters believed that the Proposing Release is overly broad and that, if the CFTC does finalize anti-evasion rules, such rules should be narrower in scope.[1007] Similarly, one other commenter asserted that the CFTC erred in the Proposing Release by placing too great an emphasis on the flexibility of the rules as opposed to providing clarity for market participants.[1008] The CFTC continues to believe a ''principles-based'' approach to its anti-evasion rules is appropriate. The CFTC is not adopting an alternative approach, whereby it provides a bright-line test of non-evasive conduct, because such an approach may provide potential wrongdoers with a roadmap for structuring evasive transactions. Notwithstanding this concern, as described below, the CFTC is providing an additional interpretation and examples of evasion in order to provide clarity to market participants.[1009]

One commenter suggested an alternative standard for a finding of evasion should be ''whether the transaction is lawful or not'' under the CEA, CFTC rules and regulations, orders, or other applicable federal, state or other laws.[1010] The CFTC is not adopting this suggested alternative standard for evasion because to adopt this standard would blur the distinction between whether a transaction (or entity) is lawful and whether it is structured in a way to evade the Dodd-Frank Act and the CEA. The anti-evasion rules provided herein are concerned with the latter conduct, not the former.[1011] Thus, the CFTC does not believe it is appropriate to limit the enforcement of its anti-evasion authority to only unlawful transactions.

2. Final Rules

(a) Rule 1.3(xxx)(6)

The CFTC is adopting the Rule 1.3(xxx)(6) as proposed. As adopted, Rule 1.3(xxx)(6)(i) under the CEA generally defines as swaps those transactions that are willfully structured to evade the provisions of Title VII governing the regulation of swaps. Furthermore, rules 1.3(xxx)(6)(ii) and (iii) effectuate CEA section 1a(47)(E)(i) and section 725(g) of the Dodd-Frank Act, respectively, and will be applied in a similar fashion as rule 1.3(xxx)(6)(i). Rule 1.3(xxx)(6)(ii) applies to currency and interest rate swaps that are willfully structured as foreign exchange forwards or foreign exchange swaps to evade the new regulatory regime for swaps enacted in Title VII. Rule 1.3(xxx)(6)(iii) applies to transactions of a bank that are not under the regulatory jurisdiction of an appropriate Federal banking agency and where the transaction is willfully structured as an identified banking product to evade the new regulatory regime for swaps enacted in Title VII.

Rule 1.3(xxx)(6)(iv) provides that in determining whether a transaction has been willfully structured to evade rules 1.3(xxx)(6)(i) through (iii), the CFTC will not consider the form, label, or written documentation dispositive.[1012] This approach is intended to prevent evasion through clever draftsmanship of a form, label, or other written documentation.

Rule 1.3(xxx)(6)(v) further provides that transactions, other than transactions structured as securities, willfully structured to evade (as provided in rules 1.3(xxx)(6)(i) through (iii)) will be considered in determining whether a person is a swap dealer or major swap participant.

Lastly, rule 1.3(xxx)(6)(vi) provides that rule 1.3(xxx)(6) will not apply to any agreement, contract or transaction structured as a security (including a security-based swap) under the

[999] The term ''identified banking product'' is defined in section 402 of the Legal Certainty for Bank Products Act of 2000, 7 U.S.C. 27. The term ''appropriate Federal banking agency'' is defined in CEA section 1a(2), 7 U.S.C. 1a(2), and section 3(a)(72) of the Exchange Act, 15 U.S.C. 78c(a)(72), which were added by sections 721(a) and 761(a) of the Dodd-Frank Act, respectively.

[1000] Section 741(b) of the Dodd-Frank Act amends section 6(e) of the CEA, 7 U.S.C. 9a, to provide that any DCO, swap dealer, or major swap participant ''that knowingly or recklessly evades or participates in or facilitates an evasion of the requirements of section 2(h) [of the CEA] shall be liable for a civil monetary penalty in twice the amount otherwise available for a violation of section 2(h) [of the CEA].'' This anti-evasion provision is not dependent upon the promulgation of a rule under section 721(c) of the Dodd Frank Act, and hence the proposed rule and interpretive guidance is not meant to apply to CEA section 6(e).

[1001] *See* IECA Letter.

[1002] *Id.;* 7 U.S.C. 2(h)(4)(A) and 9a.

[1003] *See* IECA Letter; 7 U.S.C. 2(i).

[1004] CEA section 2(h)(4)(A), 7 U.S.C. 2(h)(4)(A), provides: The Commission shall prescribe rules under this subsection (and issue interpretations of rules prescribed under this subsection) as determined by the Commission to be necessary to prevent evasions of the mandatory clearing requirements under this Act.

CEA section 6(e), 7 U.S.C. 9a, in relevant part, provides: (4) Any designated clearing organization that knowingly or recklessly evades or participates in or facilitates an evasion of the requirements of section 2(h) shall be liable for a civil money penalty in twice the amount otherwise available for a violation of section 2(h). (5) Any swap dealer or major swap participant that knowingly or recklessly evades or participates in or facilitates an evasion of the requirements of section 2(h) shall be liable for a civil money penalty in twice the amount otherwise available for a violation of section 2(h).

[1005] *See* Barnard Letter and Better Markets Letter.

[1006] *See* CME Letter; ISDA Letter; and SIFMA Letter.

[1007] *See* ISDA Letter and SIFMA Letter.

[1008] *See* CME Letter.

[1009] Examples described in the guidance are illustrative and not exhaustive of the transactions, instruments or entities that could be considered evasive. In considering whether a transaction, instrument or entity is evasive, the CFTC will consider the facts and circumstances of each situation.

[1010] *See* WGCEF Letter.

[1011] If a transaction is unlawful, the CFTC (or another authority) may be able to bring an action alleging a violation of the applicable rule, regulation, order or law.

[1012] *See supra* part II.D.1.

securities laws as defined in section 3(a)(47) of the Exchange Act.[1013]

(b) Rule 1.6

The CFTC is adopting rule 1.6 as proposed. Section 2(i) of the CEA states that the provisions of the CEA relating to swaps that were enacted by Title VII (including any rule prescribed or regulation promulgated thereunder) shall not apply to activities outside the United States unless, among other things, those activities ''contravene such rules or regulations as the [CFTC] 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].''

Pursuant to this authority, rule 1.6(a), as adopted, makes it unlawful to conduct activities outside the United States, including entering into transactions and structuring entities, to willfully evade or attempt to evade any provision of the CEA as enacted under Title VII or the rules and regulations promulgated thereunder.

In addition, rule 1.6(b) provides that in determining whether a transaction or entity has been entered into or structured willfully to evade, as provided in rule 1.6(a), the CFTC will not consider the form, label, or written documentation as dispositive.

Rule 1.6(c) provides that an activity conducted outside the United States to evade, as described in proposed rule 1.6(a), shall be subject to the provisions of Subtitle A of Title VII of the Dodd-Frank Act. As the CFTC explained in the Proposing Release,[1014] such provisions are necessary to fully prevent those who seek to willfully evade the regulatory requirements established by Congress in Title VII relating to swaps from enjoying any benefits from their efforts to evade.

Lastly, rule 1.6(d) provides that no agreement, contract or transaction structured as a security (including a security-based swap) under the securities laws shall be deemed a swap pursuant to rule 1.6.

(c) Interpretation of the Final Rules

The CFTC is providing an interpretation of the final rules in response to commenters, addressing (i) the applicability of the anti-evasion rules to transactions that qualify for the forward exclusion, (ii) the applicability of the anti-evasion rules to transactions executed on a SEF, (iii) the treatment of evasive transactions after they are discovered, and (iv) documentation considerations.[1015]

With regard to the forward exclusion, the CFTC is clarifying, in response to a commenter,[1016] that entering into transactions that qualify for the forward exclusion from the swap definition shall not be considered evasive. However, in circumstances where a transaction does not, in fact, qualify for the forward exclusion, the transaction may or may not be evasive depending on an analysis of all relevant facts and circumstances.[1017]

Concerning the applicability of the anti-evasion rules to transactions executed on a SEF, the CFTC is clarifying, in response to comments,[1018] that a transaction that has been self-certified by a SEF (or a DCM), or that has received prior approval from the CFTC, will not be considered evasive.[1019]

With respect to the treatment of evasive transactions after they are discovered, the CFTC is clarifying, in response to comments,[1020] that in instances where one party willfully structures a transaction to evade but the counterparty does not, the transaction, which meets the swap definition under rule 1.3(xxx)(6), or is subject to the provisions of Subtitle A of Title VII pursuant to rule 1.6, will be subject to all CEA provisions and the regulations thereunder (as applied to the party who willfully structures a transaction to evade). In rare situations where there is a true ''innocent party,''[1021] it will likely be due to fraud or misrepresentation by the evading party and the business consequences and remedies will be the same as for any such victim.[1022] The CFTC will impose appropriate sanctions only on the willful evader for violations of the relevant provisions of the CEA and CFTC regulations since the individual agreement, contract or transaction was (and always should have been) subject to them.[1023] Further, on a prospective basis for future transactions or instruments similar to those of the particular evasive swap, the CFTC will consider these transactions or instruments to be swaps within the meaning of the Dodd-Frank Act (as applied to both the party who willfully structures a transaction to evade and the ''innocent party'').

Moreover, evasive transactions will count toward determining whether each evading party with the requisite intent is a swap dealer or major swap participant.[1024] In response to a commenter's suggestion that, as proposed, rule 1.3(xxx)(6)(v) should require a pattern of transactions,[1025] the CFTC is not requiring a pattern of evasive transactions as a prerequisite to prove evasion, although such a pattern may be one factor in analyzing whether evasion has occurred under rules 1.3(xxx)(6) or 1.6. Further, in

[1013] 15 U.S.C. 78c(a)(47).

[1014] Proposing Release at 29866.

[1015] The CFTC also is adopting the interpretive guidance from the Proposing Release, as proposed, but with certain clarifications. *See infra* part VII.A.3.

[1016] *See* COPE Letter (requesting clarification that transacting in the physical markets (*e.g.,* entering into nonfinancial commodity forward contracts), as opposed to executing a swap, would not be considered evasion).

[1017] The CFTC is aware that there are circumstances where a forward contract can perform the same or a substantially similar economic function as a swap through alternative delivery procedures. Further, there are circumstances where a person who deals in both forwards and swaps may make decisions regarding financial risk assessment that will involve the consideration of regulatory obligations. The CFTC will carefully scrutinize the facts and circumstances associated with forward contracts.

[1018] *See* MarketAxess Letter (commenting that the anti-evasion rules should not apply to transactions executed on, or subject to the rules of, a SEF, because before a SEF may list a swap, it must self-certify or voluntarily obtain CFTC approval to list the product).

[1019] Pursuant to part 40 of the CFTC's regulations, 17 CFR Part 40, registered SEFs and DCMs must self-certify with the CFTC that any products that they list ''[comply] with the [CEA] and regulations thereunder'' and are liable for any false self-certifications. Therefore, market participants that have entered into such transactions will not be considered to be engaging in evasion, while a SEF or DCM could be found to have falsely self-certified.

[1020] *See* WGCEF Letter (generally expressing concern that the penalty for anti-evasion is ''draconian'') and IECA Letter (commenting that the non-evading party should not become a party to an evasive ''swap'' transaction, and thus subject to the regulatory requirements of the Dodd-Frank Act.) .

[1021] The analysis of whether a party is ''innocent'' is based on the facts and circumstances of a particular transaction as well as a course of dealing by each of the parties.

[1022] This is not dissimilar to an enforcement action for trading illegal off-exchange futures contracts in violation of CEA section 4(a), 7 U.S.C. 6(a). The CFTC regularly seeks restitution for victims in enforcement actions where applicable. Additionally, victims retain their private rights of action for breach of contract and any related equitable remedies.

[1023] In considering which provisions of the CEA and CFTC regulations are relevant, the CFTC will evaluate which CEA provisions and CFTC regulations the evasive swap would have had to comply with had it not evaded the definition of swap (*e.g.,* reporting, recordkeeping, clearing, etc.). However, where both parties have willfully structured to evade or attempted to evade the requirements of the Dodd-Frank Act, the CFTC may subject the agreement, contract, instrument, or transaction itself to the full regulatory regime and the willful evaders to applicable sanctions.

[1024] In other words, the evasive transaction would count toward the relevant thresholds (*e.g.,* de minimis (with respect to determining swap dealer status, if the evasive transaction constituted dealing activity) and substantial position (with respect to determining major swap participant status)).

[1025] *See* IECA Letter. This same commenter suggested that rule 1.3(xxx)(6)(v) should be applied only to the authorities regarding evasion provided by Congress and refer to the entity structuring the evading transaction have been addressed above.

determining whether such a transaction is a swap, the CFTC will consider whether the transaction meets the definition of the term ''swap'' as defined by statute and as it is further defined in this rulemaking.[1026]

As an illustration of some of the foregoing concepts, if the market for foreign exchange forwards on a particular currency settles on a T+ 4 basis, but two counterparties agree to expedite the settlement of an foreign exchange forward on such currency to characterize the transaction falsely as a spot transaction in order to avoid reporting the transaction, rule 1.3(xxx)(6)(i) would define the transaction as a swap. In this example, both parties may be subject to sanctions if they both have the requisite intent (i.e., willfully evaded). However, had the counterparty with the reporting obligation in this example convinced the other counterparty, by using a false rationale unrelated to avoiding reporting, to expedite the foreign exchange forward settlement in order to avoid reporting, then the only party that would be at risk for sanctions (*i.e.,* the only party with the requisite intent) would be the counterparty with the reporting obligation who deceived the other counterparty.

With regard to documentation considerations, as discussed above, the CFTC is adopting rules 1.3(xxx)(6)(iv) and 1.6(b), as proposed,[1027] but is providing the following interpretation. As stated in the Proposing Release,[1028] the structuring of instruments, transactions, or entities to evade the requirements of the Dodd-Frank Act may be ''limited only by the ingenuity of man.''[1029] Therefore, the CFTC will look beyond manner in which an instrument, transaction, or entity is documented to examine its actual substance and purpose to prevent any evasion through clever draftsmanship—an approach consistent with the CFTC's case law in the context of determining whether a contract is a futures contract and the CFTC's interpretations in this release regarding swaps.[1030] The documentation of an instrument, transaction, or entity (like its form or label) is a relevant, but not dispositive, factor in determining whether evasion has occurred.

Comments

The CFTC received a number of comments on various aspects of proposed rules 1.3(xxx)(6) and 1.6.

Several commenters requested clarity as to what types of transactions might be considered evasive under proposed rule 1.3(xxx)(6) and 1.6.[1031] One commenter requested that the CFTC clarify that transacting in the physical markets (*e.g.,* entering into nonfinancial commodity forward contracts), as opposed to executing a swap, would not be considered evasion.[1032] As discussed above, the CFTC has provided an interpretation regarding the applicability of the anti-evasion rules to transactions that qualify for the forward exclusion. Another commenter requested that the CFTC clarify that the anti-evasion rules would not apply to transactions executed on a SEF because, before a SEF may list a swap, it must self-certify or voluntarily obtain CFTC permission to list that product.[1033] The CFTC has provided an interpretation discussed above to address this comment.

Two commenters expressed concern regarding the penalty to the counterparties to a transaction that is deemed to violate the CFTC's anti-evasion provisions.[1034] Pursuant to the final rule, when a transaction violates the anti-evasion rules, the CFTC will consider the transaction a swap. One of these commenters said that the non-evading party should not unilaterally become a party to a swap, and thus be subject to the regulatory requirements of the Dodd-Frank Act.[1035] This commenter believed the rule should be clear that only the ''evading'' party would become a party to a swap, but the ''non-evading'' party would not.[1036] The other comments believed that a transaction that is determined to have violated the CFTC's anti-evasion rules should be considered a swap only if it meets all other aspects of the statutory definition of the term ''swap.'' [1037] The CFTC agrees that the anti-evasion rules are not meant to ''punish the innocent,'' but rather to appropriately address the evading counterparty's or counterparties' failure to meet the requirements of the Dodd-Frank Act. Therefore, the CFTC has provided an interpretation described above about how a transaction, discovered to have evaded the CEA or the Dodd-Frank Act (and therefore, a swap under rule 1.3(xxx)(6) or subject to the provisions of Subtitle A under rule 1.6) will be treated after the evasion is discovered.

Furthermore, the CFTC agrees that a transaction that is determined to have violated the CFTC's anti-evasion rules will be considered a swap only if it meets the definition of the term ''swap,'' and has provided an interpretation to address this comment. In response to both comments, the CFTC also has provided an example to illustrate the concepts in the interpretation.

The CFTC received one comment regarding rules 1.3(xxx)(6)(iv) and 1.6(b). This commenter believed that a difference exists between ''documentation,'' which contains terms, conditions, etc. of an agreement, and the ''form or label.'' [1038] Thus, because a form or label may be duplicitously assigned to a transaction, this commenter agreed that neither the form nor the label should be dispositive.[1039] However, because documentation contains the substance of an agreement, this commenter believed that documentation should be dispositive in determining whether a given contract has been entered to willfully evade because the substance of a contract is derived from its documentation.[1040] Alternatively, this commenter requested that if the CFTC does not amend its proposal, the CFTC clarify what evidence or subject matter would be dispositive of willful evasion.[1041] The CFTC disagrees with these comments and has provided an interpretation discussed above that the documentation of an instrument, transaction, or entity is a relevant, but not dispositive, factor. This view not only is consistent with CFTC case law, and the CFTC's interpretations herein, but reduces the possibility of providing a potential roadmap for evasion.

Two commenters raised issues applicable to proposed rule 1.6 alone. One commenter believed that proposed rule 1.6 should not be adopted until the cross-border application of the swap provisions of Title VII is addressed.[1042] The CFTC disagrees and believes that the rule provides sufficient clarity to market participants even though the CFTC has not yet finalized guidance

[1026] Thus, for example, if a person, in seeking to evade Title VII, structures a product that is a privilege on a certificate of deposit, the CFTC's anti-evasion rules would not be implicated because CEA section 1a(47)(B)(iii), 7 U.S.C. 1a(47)(B)(iii), excludes such a product from the swap definition.

[1027] Rules 1.3(xxx)(6)(iv) and 1.6(b) provide that ''in determining whether a transaction has been willfully structured to evade, neither the form, label, nor written documentation of the transaction shall be dispositive.''

[1028] Proposing Release at 29866.

[1029] *Cargill* v. *Hardin,* 452 F.2d 1154, 1163 (8th Cir. 1971).

[1030] *See supra* part II.D.1.

[1031] *See* CME Letter; COPE Letter; IECA Letter; MarketAxess Letter; and WGCEF Letter.

[1032] *See* COPE Letter.

[1033] *See* MarketAxess Letter.

[1034] *See* IECA Letter and WGCEF Letter.

[1035] *See* IECA Letter.

[1036] *Id.*

[1037] *See* WGCEF Letter.

[1038] *See* CME Letter.

[1039] *Id.*

[1040] *Id.*

[1041] *Id.*

[1042] *See* ISDA Letter.

regarding the cross-border application of the swap provisions of the Dodd-Frank Act. The other commenters believed that the proposed rule text and interpretation does not fully explain how the CFTC would apply proposed rule 1.6 in determining whether a swap subject to foreign jurisdiction and regulated by a foreign regulator is evasive.[1043] As stated above, an agreement, contract, instrument or transaction that is found to have been willfully structured to evade will be subject to CEA provisions and the regulations thereunder pursuant to rule 1.6(c).

3. Interpretation Contained in the Proposing Release

The CFTC is restating the interpretation contained in the Proposing Release,[1044] but is providing additional clarification regarding certain types of circumstances that may (or may not) constitute an evasion of the requirements of Title VII. However, the CFTC notes that each activity will be evaluated on a case-by-case basis with consideration given to all relevant facts and circumstances.

In developing its interpretation, the CFTC considered legislative, administrative, and judicial precedent with respect to the anti-evasion provisions in other Federal statutes. For example, the CFTC examined the anti-evasion provisions in the Truth in Lending Act,[1045] the Bank Secrecy Act,[1046] and the Internal Revenue Code.[1047]

The CFTC will not consider transactions, entities, or instruments structured in a manner solely motivated by a legitimate business purpose to constitute willful evasion (''Business Purpose Test''). Additionally, relying on Internal Revenue Service (''IRS'') concepts, when determining whether particular conduct is an evasion of the Dodd-Frank Act, the CFTC will consider the extent to which the conduct involves deceit, deception, or other unlawful or illegitimate activity.

(a) Business Purpose Test

Interpretation

Consistent with the Proposing Release,[1048] the CFTC recognizes that transactions may be structured, and entities may be formed, in particular ways for legitimate business purposes, without any intention of circumventing the requirements of the Dodd-Frank Act with respect to swaps. Thus, in evaluating whether a person is evading or attempting to evade the swap requirements with respect to a particular instrument, entity, or transaction, the CFTC will consider the extent to which the person has a legitimate business purpose for structuring the instrument or entity or entering into the transaction in that particular manner. Although different means of structuring a transaction or entity may have differing regulatory implications and attendant requirements, absent other indicia of evasion, the CFTC will not consider transactions, entities, or instruments structured in a manner solely motivated by a legitimate business purpose to constitute evasion. However, to the extent a purpose in structuring an entity or instrument or entering into a transaction is to evade the requirements of Title VII with respect to swaps, the structuring of such instrument, entity, or transaction may be found to constitute willful evasion.[1049]

Although some commenters suggest that the determination that there is a legitimate business purpose, and the use of that concept as a relevant fact in the determination of the possibility of evasion, will not provide appropriate clarity, it is a recognized analytical method and would be useful in the overall analysis of potentially willful evasive conduct.

The CFTC fully expects that a person acting for legitimate business purposes within its respective industry will naturally weigh a multitude of costs and benefits associated with different types of financial transactions, entities, or instruments, including the applicable regulatory obligations. In that regard, and in response to commenters, the CFTC is clarifying that a person's specific consideration of regulatory burdens, including the avoidance thereof, is not dispositive that the person is acting without a legitimate business purpose in a particular case. The CFTC will view legitimate business purpose considerations on a case-by-case basis in conjunction with all other relevant facts and circumstances.

Moreover, the CFTC recognizes that it is possible that a person intending to willfully evade Dodd-Frank may attempt to justify its actions by claiming that they are legitimate business practices in its industry; therefore, the CFTC will retain the flexibility, via an analysis of all relevant facts and circumstances, to confirm not only the legitimacy of the business purpose of those actions but whether the actions could still be determined to be willfully evasive. For example, a person may attempt to disguise a product that may be a swap by employing accounting practices that are not appropriate for swaps. Whether or not the method of

[1043] *See* CME Letter.

[1044] *See* Proposing Release at 29865.

[1045] 15 U.S.C. 1604(a) provides, in relevant part, that the Federal Reserve Board: shall prescribe regulations to carry out the purposes of this subchapter * * *. [T]hese regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

In affirming the Board's promulgation of Regulation Z, the Supreme Court noted that anti-evasion provisions such as section 1604(a) evince Congress's intent to ''stress[] the agency's power to counteract attempts to evade the purposes of a statute.'' *Mourning* v. *Family Publ'ns Serv., Inc.,* 411 U.S. 356, 370 (1973) (citing *Gemsco* v. *Walling,* 324 U.S. 244 (1945) (giving great deference to a regulation promulgated under similar prevention-of-evasion rulemaking authority in the Fair Labor Standards Act)).

[1046] 31 U.S.C. 5324 (stating, in pertinent part, that ''[n]o person shall, for the purpose of evading the reporting requirements of [the Bank Secrecy Act (BSA) or any regulation prescribed thereunder] * * *. structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions''). The Federal Deposit Insurance Corporation regulations implementing the BSA require banks to report transactions that ''the bank knows, suspects, or has reason to suspect'' are ''designed to evade any regulations promulgated under the Bank Secrecy Act.'' 12 CFR 353.3 (2010).

[1047] The Internal Revenue Code makes it unlawful for any person willfully to attempt ''in any manner to evade or defeat any tax * * *.'' 26 U.S.C. 7201. While a considerable body of case law has developed under the tax evasion provision, the statute itself does not define the term, but generally prohibits willful attempts to evade tax.

[1048] Proposing Release at 29867.

[1049] As the CFTC observed in the Proposing Release, a similar concept applies with respect to tax evasion. *See* Proposing Release at 29867 n. 324. A transaction that is structured to avoid the payment of taxes but that lacks a valid business purpose may be found to constitute tax evasion. *See, e.g., Gregory* v. *Helvering,* 293 U.S. 465, 469 (1935) (favorable tax treatment disallowed because transaction lacked any business or corporate purpose). Under the ''sham-transaction'' doctrine, ''a transaction is not entitled to tax respect if it lacks economic effects or substance other than the generation of tax benefits, or if the transaction serves no business purpose.'' *Winn-Dixie Stores, Inc.* v. *Comm'r,* 254 F.3d 1313, 1316 (11th Cir. 2001) (citing *Knetsch* v. *United States,* 364 U.S. 361 (1960)). ''The doctrine has few bright lines, but 'it is clear that transactions whose sole function is to produce tax deductions are substantive shams.' '' *Id.* (quoting *United Parcel Serv. of Am., Inc.* v. *Comm'r,* 254 F.3d 1014, 1018 (11th Cir. 2001)). To be clear, though, while the Proposing Release references the use of the business purpose test in tax law, the CFTC is not using the legitimate business purpose consideration in the same manner as the IRS.

accounting or employed accounting practices are determined to be for legitimate business purposes, that alone will not be dispositive in determining whether it is willfully evasive according to either rule 1.3(xxx)(6) or 1.6.

Because transactions and instruments are regularly structured, and entities regularly formed, in a particular way for various, and often times multiple, reasons, it is essential that all relevant facts and circumstances be considered. Where a transaction, instrument, or entity is structured solely for legitimate business purposes, it is not willfully evasive. By contrast, where a consideration of all relevant facts and circumstances reveals the presence of a purpose that is not a legitimate business purpose, evasion may exist.

Comments

Two commenters believed the proposed business purpose test is inappropriate for determining if a transaction is structured to evade Title VII.[1050] One of these commenters stated that the CFTC misunderstood how the ''business purpose'' test is applied by the IRS in the tax evasion context resulting in misguided proposed interpretive guidance.[1051] As stated above, the CFTC believes that it is appropriate to consider legitimate business purposes in determining if a transaction is structured to evade Title VII. In response to this comment, although the interpretation references the use of legitimate business purpose in tax law, the CFTC is not bound to use the legitimate business purpose consideration in the same manner as the IRS and, accordingly, is not adopting the IRS's interpretation.

Two commenters urged the CFTC to clarify that considering the costs of regulation is a legitimate business purpose when structuring a transaction. Accordingly, they request that the CFTC clarify that entering into a transaction to avoid costly regulations, even though that transaction could otherwise be structured as a swap, will not be considered *per se* evasion/evasive.[1052] Finally, one commenter took issue with the statement that ''absent other indicia of evasion, [the CFTC] would not consider transactions, entities, or instruments in a manner solely motivated by a legitimate business purpose to constitute evasion.'' [1053] Because ''transactions, entities, or instruments'' are rarely structured a certain way solely for one purpose, this commenter believed such a statement does not give market participants any relief or guidance.[1054] The CFTC has addressed these comments received on the business purpose test through the clarifications to its interpretation discussed above and reiterates that the CFTC will consider all relevant facts and circumstances in determining whether an action is willfully evasive.

(b) Fraud, Deceit or Unlawful Activity

Interpretation

When determining whether a particular activity constitutes willful evasion of the CEA or the Dodd-Frank Act, the CFTC will consider the extent to which the activity involves deceit, deception, or other unlawful or illegitimate activity. This concept was derived from the IRS's delineation of what constitutes tax evasion, as elaborated upon by the courts. The IRS distinguishes between tax evasion and legitimate means for citizens to minimize, reduce, avoid or alleviate the tax that they pay under the Internal Revenue Code.[1055] Similarly, persons that craft derivatives transactions, structure entities, or conduct themselves in a deceptive or other illegitimate manner in order to avoid regulatory requirements should not be permitted to enjoy the fruits of their deceptive or illegitimate conduct.

Although it is likely that fraud, deceit, or unlawful activity will be present where willful evasion has occurred, the CFTC does not believe that these factors are prerequisites to an evasion finding. As stated throughout this release, the presence or absence of fraud, deceit, or unlawful activity is one fact (or circumstance) the CFTC will consider when evaluating a person's activity. That said, the anti-evasion rules do require willfulness, *i.e.* ''scienter.'' In response to the commenter who requests the CFTC define ''willful conduct,'' the CFTC will interpret ''willful'' consistent with how the CFTC has in the past, that a person acts ''willfully'' when they act either intentionally or with reckless disregard.[1056]

Comments

One commenter, although generally supportive of the use of the IRS ''tax evasion'' concept as a guidepost for this criterion, requested the CFTC provide examples of legitimate versus evasive conduct in a manner similar to what is contained in the Internal Revenue Manual.[1057] The CFTC does not believe it is appropriate to provide an example because such an example may provide a guidepost for evasion.

Two commenters suggested that a finding of fraud, deceit, or unlawful activity should be a prerequisite to any finding of evasion.[1058] As noted above, the CFTC disagrees that such activity should be a prerequisite to a finding of evasion, but its presence or absence is one relevant fact and circumstance the CFTC will consider. Finally, one commenter requested further guidance defining willful conduct in the context of deliberate and knowing wrongdoing.[1059] As noted above, the CFTC has considered the suggestion that the CFTC provide guidance on what defines ''willful behavior,'' with some commenters submitting that some definitional guidance should be offered or that the standard should be whether or not a transaction is ''lawful.'' [1060] The CFTC agrees with the need for legal clarity and believes that the concept of willfulness is a well-recognized legal concept of which there is substantial case law and legal commentary familiar to the financial industry.[1061]

[1050] *See* CME Letter and WGCEF Letter.

[1051] *See* CME Letter.

[1052] *See* ISDA Letter and WGCEF Letter.

[1053] *See* SIFMA Letter.

[1054] *Id.*

[1055] Whereas permissible means of reducing tax (or ''tax avoidance,'' as the IRS refers to the practice) is associated with full disclosure and explanation of why the tax should be reduced under law, tax evasion consists of the willful attempt to evade tax liability, and generally involves ''deceit, subterfuge, camouflage, concealment, or some attempt to color or obscure events or to make things seem other than they are.'' The IRS explains:

Avoidance of taxes is not a criminal offense. Any attempt to reduce, avoid, minimize, or alleviate taxes by legitimate means is permissible. The distinction between avoidance and evasion is fine, yet definite. One who avoids tax does not conceal or misrepresent. He/she shapes events to reduce or eliminate tax liability and, upon the happening of the events, makes a complete disclosure. Evasion, on the other hand, involves deceit, subterfuge, camouflage, concealment, some attempt to color or obscure events or to make things seem other than they are. For example, the creation of a bona fide partnership to reduce the tax liability of a business by dividing the income among several individual partners is tax avoidance. However, the facts of a particular investigation may show that an alleged partnership was not, in fact, established and that one or more of the alleged partners secretly returned his/her share of the profits to the real owner of the business, who, in turn, did not report this income. This would be an instance of attempted evasion. IRS, *Internal Revenue Manual,* part 9.1.3.3.2.1, available at *http://www.irs.gov/irm/part9/irm_09-001-003.html#d0e169.*

[1056] *See In re Squadrito,* [1990–1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,262 (CFTC Mar. 27, 1992) (adopting definition of ''willful'' in *McLaughlin* v. *Richland Shoe Co.,* 486 U.S. 128 (1987)).

[1057] *See* CME Letter.

[1058] *See* ISDA Letter and SIFMA Letter.

[1059] *See* ISDA Letter (citing *U.S.* v. *Tarallo,* 380 F.3d 1174, 1187 (9th Cir. 2004), and *Merck & Co.* v. *Reynolds,* 130 S. Ct. 1784, 1796 (2010)).

[1060] *See* CME Letter; ISDA Letter; and WGCEF Letter.

[1061] *See supra* note 1056.

B. SEC Position Regarding Anti-Evasion Rules

Section 761(b)(3) of the Dodd-Frank Act grants discretionary authority to the SEC to define the terms ''security-based swap,'' ''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'' subtitle B of Title VII (or amendments made by subtitle B).

The SEC did not propose rules under section 761(b)(3) regarding anti-evasion but requested comment on whether SEC rules or interpretive guidance addressing anti-evasion with respect to security-based swaps, security-based swap dealers, major security-based swap participants, or ECPs were necessary. Two commenters responded to the request for comment and recommended that the SEC adopt anti-evasion rules and interpretive guidance.[1062] One commenter suggested that the SEC model its anti-evasion rules and interpretive guidance on the CFTC's anti-evasion rules.[1063]

The SEC is not adopting anti-evasion rules under section 761(b)(3) at this time. The SEC notes that since security-based swaps are ''securities'' for purposes of the Federal securities laws, unless the SEC grants a specific exemption,[1064] all of the SEC's existing regulatory authority will apply to security-based swaps. Since existing regulations, including antifraud and anti-manipulation provisions, will apply to security-based swaps, the SEC believes that it is unnecessary to adopt additional anti-evasion rules for security-based swaps under section 761(b)(3) at this time.

VIII. Miscellaneous Issues

A. Distinguishing Futures and Options From Swaps

The Commissions did not propose rules or interpretations in the Proposing Release regarding distinguishing futures from swaps. One commenter requested that the CFTC clarify that nothing in the release was intended to limit a DCM's ability to list for trading a futures contract regardless of whether it could be viewed as a swap if traded over-the-counter or on a SEF, since futures and swaps are indistinguishable in material economic effects.[1065] This commenter further recommended that the CFTC adopt a final rule that further interprets the statutory ''swap'' definition.[1066]

The CFTC declines to provide the requested clarification or adopt a rule. Prior distinctions that the CFTC relied upon (such as the presence or absence of clearing) to distinguish between futures and swaps may no longer be relevant.[1067] As a result, it is difficult to distinguish between futures and swaps on a blanket basis as the commenter suggested. However, a case-by-case approach for distinguishing these products may lead to more informed decision-making by the CFTC. Moreover, the CFTC notes that a DCM may self-certify its contracts pursuant to Part 40 of the CFTC's rules,[1068] subject to the CFTC's oversight authority. If a DCM has a view that a particular product is a futures contract, it may self-certify the contract consistent with that view. The DCM also has a number of other options, including seeking prior approval from the CFTC, requesting an interpretation, or requesting a rulemaking if it is in doubt about whether a particular agreement, contract or transaction should be classified as a futures contract or a swap.

B. Transactions Entered Into by Foreign Central Banks, Foreign Sovereigns, International Financial Institutions, and Similar Entities

The swap definition excludes ''any agreement, contract, or transaction a counterparty of which is a Federal Reserve bank, the Federal Government, or a Federal agency that is expressly backed by the full faith and credit of the United States.'' [1069] Some commenters to the ANPR suggested that the Commissions should exercise their authority to further define the terms ''swap'' to similarly exclude transactions in which a counterparty is a foreign central bank, a foreign sovereign, an international financial institution (''IFI''),[1070] or similar organization. ANPR commenters advanced international comity, national treatment, limited regulatory resources, limits on the Commissions' respective extraterritorial jurisdiction, and international harmonization as rationales for such an approach. The Proposing Release was silent on this issue.[1071]

Comments

Several commenters asserted that swaps transactions to which an IFI is a counterparty should be excluded from the swap and security-based swap definitions.[1072] In addition to the arguments noted above, commenters asserted that certain IFIs have been granted certain statutory immunities by the United States, and that regulation under the Dodd-Frank Act of their

[1062] *See* Barnard Letter and Better Markets Letter.

[1063] *See* Barnard Letter.

[1064] *See* Effective Date and Implementation *infra* part IX.

[1065] *See* CME Letter.

[1066] *Id.* CME suggested that the CFTC modify the futures contract exclusion in CEA Section 1a(47)(B)(i) so that the modified language would read as follows: (B) EXCLUSIONS.—The term 'swap' does not include— (i) any contract for the sale of a commodity for future delivery listed for trading by a designated contract market (or option on such contract) * * * CME believes that such a rule would clarify the scope of Section 4(a) of the CEA, which makes it illegal to trade a futures contract except on or subject to the rules of a DCM.

CME believed that such a modification would clarify the scope of Section 4(a) of the CEA, 7 U.S.C. 6(a), which makes it unlawful to trade a futures contract except on or subject to the rules of a DCM.

[1067] *See, e.g.,* Swap Policy Statement, *supra* note 214.

[1068] 17 CFR Part 40.

[1069] CEA section 1a(47)(B)(ix), 7 U.S.C. 1a(47)(B)(ix).

[1070] 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.) The Bank for International Settlements, which also submitted a comment, is a bank in which the Federal Reserve and foreign central banks are members. Another commenter, KfW, is a corporation owned by the government of the Federal Republic of Germany and the German State governments and backed by the ''full faith and credit'' of the Federal Republic of Germany.

[1071] *But see* Dissent of Commissioner Sommers, Proposing Release at 29899.

[1072] *See* Letter from Günter Pleines and Diego Devos, Bank for International Settlements, dated July 20, 2011; Letter from Jacques Mirante-Péré and Jan De Bel, Council of Europe Development Bank, dated July 22, 2011; Letter from Isabelle Laurant, European Bank for Reconstruction and Development, dated July 22, 2011; Letter from A. Querejeta and B. de Mazières, European Investment Bank, dated July 22, 2011; Letter from J. James Spinner and Søren Elbech, Inter-American Development Bank, dated July 22, 2011; Letter from Lutze-Christian Funke and Frank Czichowski, KfW, dated August 12, 2011; Letter from Heikki Cantell and Lars Eibeholm, Nordic Investment Bank, dated August 2, 2011; and Letter from Vicenzo La Via, World Bank Group, dated July 22, 2011.

activities would be inconsistent with the grant of these immunities.

The CFTC declines to provide an exclusion from the swap definition along the lines suggested by these commenters.[1073] An exclusion from the swap definition for swap transactions entered into by foreign sovereigns, foreign central banks, IFIs and similar entities, would mean that swaps entered into by such entities would be completely excluded from Dodd-Frank regulation. Their counterparties, who may be swap dealers or major swap participants, or security-based swap dealers or major security-based swap participants, would have no regulatory obligations with respect to such swaps. These regulated counterparties could develop significant exposures to the foreign sovereigns, foreign central banks, IFIs and similar entities, without the knowledge of the Commissions.

In addition, swaps entered into by foreign sovereigns, foreign central banks, IFIs and similar entities undeniably are swaps. To be sure, the Commissions have adopted rules and interpretations to further define the term ''swap'' to exclude certain transactions, which prior to the enactment of the Dodd-Frank Act generally would not have been considered swaps. However, the CFTC is not using its authority to further define the term ''swap'' to effectively exempt transactions that are, in fact, swaps. While, as noted above, Congress included a counterparty-specific exclusion for swaps entered into by the Federal Reserve Board, the Federal government and certain government agencies, Congress did not provide a similar exemption for foreign central banks, foreign sovereigns, IFIs, or similar organizations.

C. Definition of the Terms ''Swap'' and ''Security-Based Swap'' as Used in the Securities Act

The SEC is adopting a technical rule that provides that the terms ''swap'' and ''security-based swap'' as used in the Securities Act [1074] have the same meanings as in the Exchange Act [1075] and the rules and regulations thereunder.[1076] The SEC is adopting such technical rule to assure consistent definitions of these terms under the Securities Act and the Exchange Act.

IX. Effective Date and Implementation

Consistent with sections 754 and 774 of the Dodd-Frank Act, the final rules and interpretations will be effective October 12, 2012. The compliance date for the final rules and interpretations also will be October 12, 2012; with the following exceptions:

- The compliance date for the interpretation regarding guarantees of swaps will be the effective date of the rules proposed in the separate CFTC release when such rules are adopted by the CFTC.
- Solely for the purposes of the 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 [1077] and the Exemptions for Security-Based Swaps,[1078] the compliance date for the final rules further defining the term ''security-based swap'' will be February 11, 2013.

The CFTC believes that it is appropriate to make the compliance date for the interpretation regarding guarantees of swaps the same as the effective date of the rules proposed in the separate CFTC release when such rules are adopted by the CFTC in order to relieve market participants from compliance obligations that would arise as a result of the interpretation. As described in the Exchange Act Exemptive Order and as provided in the SB Swaps Interim Final Rules, the exemptions granted pursuant to the Exchange Act Exemptive Order and the SB Swaps Interim Final Rules will expire upon the compliance date of the final rules further defining the terms ''security-based swap'' and ''eligible contract participant.'' The final rules further defining the term ''eligible contract participant,'' adopted in the Entity Definitions Release,[1079] were published in the **Federal Register** on May 23, 2012. The compliance date and the effective date for such final rules is the same, July 23, 2012. The SEC believes that establishing a compliance date for the definition of ''security-based swap'' solely for purposes of the Exchange Act Exemptive Order and the SB Swaps Interim Final Rules that is February 11, 2013 (i.e. 120 days after the effective date) is appropriate because doing so will leave in place the exemptions granted by the Exchange Act Exemptive Order and the SB Swaps Interim Final Rules for a period of time that is sufficient to facilitate consideration of that order and rule. Specifically, the SEC will consider the appropriate treatment of security-based swaps under the provisions of the Exchange Act not amended by the Dodd-Frank Act before expiration of the exemptions set forth in the Exchange Act Exemptive Order, and will consider the appropriate treatment of security-based swaps for purposes of the registration provisions of the Securities Act, the registration provisions of the Exchange Act, and the indenture qualification provisions of the Trust Indenture Act of 1939 before the expiration of the exemptions set forth in the SB Swaps Interim Final Rules.[1080]

If any provision of these final rules or interpretations, 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

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[1073] The commenters' suggested exclusion from the swap definition would also exclude their transactions from the security-based swap definition, which is based on the definition of swap.

[1074] *See* section 2(a)(17) of the Securities Act, 15 U.S.C. 77b(a)(17).

[1075] *See* sections 3(a)(69) of the Exchange Act, 15 U.S.C. 78c(a)(69), and 3(a)(68) of the Exchange Act, 15 U.S.C. 78c(a)(68). The definitions of the terms ''swap'' and ''security-based swap'' in the Exchange Act are the same as the definitions of these terms in the CEA. *See* section 1a of the CEA, 7 U.S.C. 1a.

[1076] *See* rule 194 under the Securities Act.

[1077] 76 FR 39927 (Jul. 7, 2011) (''Exchange Act Exemptive Order''). The Exchange Act Exemptive Order grants temporary relief and provides interpretive guidance to make it clear that a substantial number of the requirements of the Exchange Act do not apply to security-based swaps as a result of the revised definition of ''security'' going into effect on July 16, 2011. The Exchange Act Exemptive Order also provided temporary relief from provisions of the Exchange Act that allow the voiding of contracts made in violation of those laws.

[1078] Rule 240 under the Securities Act, 17 CFR 230.240, rules 12a–11 and 12h–1(i) under the Exchange Act 1934, 17 CFR 240.12a–11 and 240.12h–1(i), and Rule 4d–12 under the Trust Indenture Act of 1939, 17 CFR 260.4d–12 (''SB Swaps Interim Final Rules''). *See also* 76 FR 40605 (Jul. 11, 2011). The SB Swaps Interim Final Rules provide exemptions under the Securities Act, the Exchange Act, and the Trust Indenture Act of 1939 for those security-based swaps that prior to July 16, 2011, were security-based swap agreements and are defined as ''securities'' under the Securities Act and the Exchange Act as of July 16, 2011, due solely to the provisions of the Dodd-Frank Act. The SB Swaps Interim Final Rules exempt offers and sales of these security-based swaps from all provisions of the Securities Act, other than the Section 17(a) anti-fraud provisions, as well as exempt these security-based swaps from Exchange Act registration requirements and from the provisions of the Trust Indenture Act of 1939, provided certain conditions are met.

[1079] *See supra* note 12.

[1080] The SEC has received a request for certain permanent exemptions upon the expiration of the exemptions contained in the Exchange Act Exemptive Order. *See SIFMA SBS Exemptive Relief Request* (Dec. 5, 2011), which is available at *http://www.sec.gov/comments/s7-27-11/s72711-10.pdf.* The SEC also has received comments regarding the exemptions under the Securities Act, the Exchange Act, and the Trust Indenture Act of 1939. *See* Letter from Kenneth E. Bentsen, Jr., Executive Vice President, Public Policy and Advocacy, SIFMA, and Robert Pickel, Chief Executive Officer, ISDA, dated Apr. 20, 2012, which is available at *http://www.sec.gov/comments/s7-26-11/s72611-5.pdf.* The SEC is reviewing the request for exemptive relief and each related comment and will consider any appropriate actions regarding such request.

given effect without the invalid provision or application.

X. Administrative Law Matters—CEA Revisions

A. Paperwork Reduction Act

1. Introduction

The Paperwork Reduction Act of 1995 (''PRA'') imposes certain requirements on Federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA.[1081] An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. Certain provisions of this rule will result in new collection of information requirements within the meaning of the PRA. With the exception of the new ''book-out'' confirmation requirement discussed below, the CFTC believes that the burdens that will be imposed on market participants under rules 1.8 and 1.9 already have been accounted for within the SEC's calculations regarding the impact of this collection of information under the PRA and the request for a control number submitted by the SEC to OMB for rule 3a68–2 (''Interpretation of Swaps, Security-Based Swaps, and Mixed Swaps'') and rule 3a68–4 (''Regulation of Mixed Swaps: Process for Determining Regulatory Treatment for Mixed Swaps''). In response to this submission, OMB issued control number 3235–0685. The responses to these collections of information will be mandatory.[1082] The CFTC will protect proprietary information according to the Freedom of Information Act and 17 CFR part 145, headed ''Commission Records and Information.'' In addition, the CFTC emphasizes that section 8(a)(1) of the CEA [1083] strictly prohibits the Commission, unless specifically authorized by the CEA, from making public ''data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.'' The CFTC also is required to protect certain information contained in a government system of records pursuant to the Privacy Act of 1974.

2. Rules 1.8 and 1.9

As discussed in the proposal, Rules 1.8 and 1.9 under the CEA will result in new ''collection of information'' requirements within the meaning of the PRA. Rule 1.8 under the CEA will allow persons to submit a request for a joint interpretation from the Commissions regarding whether an agreement, contract or transaction (or a class thereof) is a swap, security-based swap, or mixed swap. Rule 1.8 provides that a person requesting an interpretation as to the nature of an agreement, contract, or transaction as a swap, security-based swap, or mixed swap must provide the Commissions with the person's determination of the nature of the instrument and supporting analysis, along with certain other documentation, including a statement of the economic purpose for, and a copy of all material information regarding the terms of, each relevant agreement, contract, or transaction (or class thereof). The Commissions also may request the submitting person to provide additional information. In response to the submission, the Commissions may issue a joint interpretation regarding the status of that agreement, contract, or transaction (or class of agreements, contracts, or transactions) as a swap, security-based swap, or mixed swap.

Rule 1.9 of the CEA enables persons to submit requests to the Commissions for joint orders providing an alternative regulatory treatment for particular mixed swaps. Under rule 1.9, a person will provide to the Commissions a statement of the economic purpose for, and a copy of all material information regarding, the relevant mixed swap. In addition, the person will provide the specific alternative provisions that the person believes should apply to the mixed swap, the reasons the person believes it would be appropriate to request an alternative regulatory treatment, and an analysis of: (i) The nature and purposes of the specified provisions; (ii) the comparability of the specified provisions to other statutory provisions of Title VII of the Dodd-Frank Act and the rules and regulations thereunder; and (iii) the extent of any conflicting or incompatible requirements of the specified provisions and other statutory provisions of Title VII and the rules and regulations thereunder. The Commissions also may request the submitting person to provide additional information.

(a) Information Provided by Reporting Entities

The burdens imposed by rules 1.8 and 1.9 under the CEA are the same as the burdens imposed by the SEC's rules 3a68–2 and 3a68–4. Therefore, the burdens that will be imposed on market participants under rules 1.8 and 1.9 already have been accounted for within the SEC's calculations regarding the impact of this collection of information under the PRA and the request for a control number submitted by the SEC to OMB.[1084]

(b) Information Collection Comments

In the Proposing Release, the CFTC invited public comment on the reporting and recordkeeping burdens discussed above with regard to rules 1.8 and 1.9. Pursuant to 44 U.S.C. 3506(c)(2)(B), the CFTC solicited comments in order to: (i) Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the CFTC, including whether the information will have practical utility; (ii) evaluate the accuracy of the CFTC's estimate of the burden of the proposed collections of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collections of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

No comments were received with respect to the reporting and recordkeeping burdens discussed in the proposing release. In response to the request for a control number by the SEC, OMB issued control number 3235–0685.

3. Book-Out Confirmation

As noted above, the CFTC believes that its interpretation which clarifies that oral book-out agreements must be followed in a commercially reasonable timeframe by a confirmation in some type of written or electronic form would result in a new ''collection of information'' requirement within the meaning of the PRA. Therefore, the CFTC is submitting the new ''book-out'' information collection to OMB for review in accordance with 44 U.S.C. 3506(c)(2)(A) and 5 CFR 1320.8(d). The CFTC will, by separate action, publish in the **Federal Register** a notice on the paperwork burden associated with the interpretation's requirement that oral book-outs be followed in a commercially reasonable timeframe by confirmation in some type of written or electronic form in accordance with 5 CFR 1320.8 and 1320.10. If approved, this new collection of information will be mandatory.

[1081] 44 U.S.C. 3501 *et seq.*

[1082] As discussed below, the ''collection of information'' related to the new ''book out'' confirmation requirement was not included in the SEC's submission and will be the subject of a request for a control number by the CFTC to OMB.

[1083] 7 U.S.C. 12(a)(1).

[1084] 44 U.S.C. 3501–3521. *See also* 44 U.S.C. 3509 and 3510.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA'') requires that agencies consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact.[1085] 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).

With respect to the proposed release, while the CFTC provided an RFA statement that the proposed rule would have a direct effect on numerous entities, specifically DCMs, SDRs, SEFs, SDs, MSPs, ECPs, FBOTs, DCOs, and certain ''appropriate persons'' who relied on the Energy Exemption,[1086] the Chairman, on behalf of the CFTC, certified that the rulemaking would not have a significant economic effect on a substantial number of small entities. Comments on that certification were sought.

In the Proposing Release, the CFTC provided that it previously had established that certain entities subject to the CFTC's jurisdiction—namely, DCMs, DCOs and ECPs—are not small entities for purposes of the RFA.[1087] As the CFTC previously explained, because of the central role they play in the regulatory scheme concerning futures trading, the importance of futures trading in the national economy, and the financial requirements needed to comply with the regulatory requirements imposed on them under the CEA, DCMs and DCOs have long been determined not to be small entities.[1088] Based on the definition of ECP in the Commodity Futures Modernization Act of 2000 (''CFMA'') and the legislative history underlying that definition, the CFTC determined that ECPs were not small entities.[1089] In light of its past determination, and the increased thresholds on ECPs added by the Dodd-Frank Act making it more difficult for entities to qualify as an ECP, the CFTC determined in its proposed rulemakings that ECPs are not small entities.

Furthermore, the CFTC provided that certain entities that would be subject to the proposed rule—namely SDs, MSPs, SDRs, SEFs, and FBOTs—are entities for which the CFTC had not previously made a size determination for RFA purposes. The CFTC determined that these entities should not be considered small entities based on their size and characteristics analogous to non-small entities that pre-dated the adoption of Dodd-Frank,[1090] and certified in rulemakings that would have an economic impact on these entities that these entities are not small entities for RFA purposes.[1091]

Finally, the CFTC recognized that, in light of the CFTC's proposed withdrawal of the Energy Exemption, the proposed rule could have an economic impact on certain ''appropriate persons'' who relied on the Energy Exemption. The Energy Exemption listed certain ''appropriate persons'' that could rely on the exemption and also required that, to be eligible for this exemption, an ''appropriate person must have demonstrable capacity or ability to make or take delivery.'' The Energy Exemption stated: ''in light of the general nature of the current participants in the market, the CFTC believes that smaller commercial firms, which cannot meet [certain] financial criteria, should not be included.'' [1092] Therefore, the CFTC did not believe that the ''appropriate persons'' eligible for the Energy Exemption, and who may be affected by its withdrawal, are ''small entities'' for purposes of RFA. Moreover, as previously discussed, the CFTC is expanding the Brent Interpretation to all nonfinancial commodities for both swaps and future delivery definitions and is clarifying that certain alternative delivery procedures discussed in the Energy Exemption will not disqualify a transaction from the forward contract exclusion under the Brent Interpretation.[1093] Thus, to the extent any entities, small or otherwise, relied on the Energy Exemption, such entities can now rely on the expanded Brent Interpretation to qualify for the forward contract exclusion. Accordingly, the withdrawal of the Energy Exemption will not result in a significant economic impact on any entities.

With respect to this rulemaking, which includes interpretations, as well as general rules of construction and definitions that will largely be used in other rulemakings, the CFTC received one comment respecting its RFA certification. The commenter, an association that represents producers, generators, processors, refiners, merchandisers and commercial end users of nonfinancial energy commodities, including energy and natural gas, contended that the CFTC's overall new jurisdiction under the Dodd-Frank Act over ''swaps'' and the burdens that the CFTC's rules place on nonfinancial entities, including small entities such as its members [1094] that execute such swaps, can only be determined after the rules and interpretations in the product definitions rulemaking are finalized. Moreover, the commenter asserted that its small entity members seek to continue their use of nonfinancial commodity ''swaps'' only to hedge the commercial risks of their not-for profit public service activities. The commenter concluded that the CFTC should conduct a regulatory flexibility analysis for the entire mosaic of its rulemakings under the Dodd-Frank Act, taking into consideration the products definition rulemaking.

The commenter did not provide specific information on how the further defining of the terms swap, security-based swap and security-based swap agreement, providing regulations regarding mixed swaps, and providing regulations governing books and records requirements for security-based swap agreements would have a significant impact on a substantial number of small entities. Nonetheless, the CFTC has reevaluated this rulemaking in light of the commenter's statements. Upon consideration, the CFTC declines to consider the economic impacts of the entire mosaic of rules under the Dodd-

[1085] 5 U.S.C. 601 *et seq.*

[1086] *See* 76 FR 29868–89.

[1087] *See respectively,* Policy Statement and Establishment of Definitions of ''Small Entities'' for Purposes of the Regulatory Flexibility Act, *supra* note 331, at 18619 (DCMs); *A New Regulatory Framework for Clearing Organizations,* 66 FR 45604, 45609 (Aug. 29, 2001) (DCOs); *Opting Out of Segregation,* 66 FR 20740, 20743 (Apr. 25, 2001) (ECPs).

[1088] *See respectively,* Policy Statement and Establishment of Definitions of ''Small Entities'' for Purposes of the Regulatory Flexibility Act, *supra* note 331, at 18619 (DCMs); A New Regulatory Framework for Clearing Organizations, 66 FR 45604, 45609, Aug. 29, 2001 (DCOs).

[1089] *See Opting Out of Segregation*. 66 FR 20740, 20743, Apr. 25, 2001 (ECPs).

[1090] *See* 76 FR 29868–89.

[1091] *See* respectively, Registration of Swap Dealers and Major Swap Participants, 77 FR 2613, 2620, Jan. 19, 2012 (swap dealers and major swap participants); Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest, 75 FR 63732, 63745, Oct. 18, 2010 (SEFs); Swap Data Repositories, 76 FR 54538, 54575, Sept. 1, 2011; Registration of Foreign Boards of Trade, 76 FR 80674, 80698, Dec. 23, 2011 (FBOTs).

[1092] Energy Exemption, *supra* note 207.

[1093] *See supra* part II.B.2.(a)(i)(C).

[1094] *See* ETA Letter. In general, ETA states that the Small Business Administration (''SBA'') has determined that many of its members are ''small entities'' for purposes of the RFA. *Id.* (references the comment letter filed by the NRECA, APPA and LLPC as the ''Not-for-Profit Electric Coalition'' in response to the Commodity Option NOPR's (76 FR 6095) assertion that there are no ECPs that are ''small entities'' for RFA purposes).

Frank Act, since an agency is only required to consider the impact of how it exercises its discretion to implement the statute through a particular rule. In all rulemakings, the CFTC performs an RFA analysis for that particular rule.

Moreover, as the commenter mentioned, most of the transactions into which its members enter are based on nonfinancial commodities. The CFTC has provided interpretations in this release clarifying the forward exclusion in nonfinancial commodities from the swap definition (and the forward exclusion from the definition of ''future delivery''), including forwards with embedded volumetric options, and separately, has provided for a trade option exemption.[1095] The CFTC also has provided an interpretation that certain customary commercial transactions are excluded from the swap definition.[1096]

Accordingly, for the reasons stated in the proposal and the foregoing discussion in response to the comment received, the CFTC continues to believe that the rulemaking will not have a significant impact on a substantial number of small entities. Therefore, the Chairman, on behalf of the CFTC, hereby certifies pursuant to 5 U.S.C. 605(b) that the rules will not have a significant impact on a substantial number of small entities.

C. Costs and Benefits Considerations

Section 15(a) of the CEA requires the CFTC to consider the costs and benefits of its actions before promulgating a regulation or issuing certain orders under the CEA.[1097] Section 15(a) further specifies that the costs and benefits shall be evaluated in light of the following five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The CFTC considers the costs and benefits resulting from its discretionary determinations with respect to the Section 15(a) factors. The CFTC also considers, qualitatively, costs and benefits relative to the status quo, that is, the pre-Dodd Frank Act regulatory regime, for historical context to help inform the reader.

In the Proposing Release, the CFTC assessed the costs and benefits of the proposed rules in general, followed by assessments of the costs and benefits of each of the rules, taking into account the considerations described above. The CFTC also requested comment on these assessments, and a number of comments were received. In this Adopting Release, the CFTC will again assess the costs and benefits of the rules in general followed by the individual rules in this rulemaking, for each case taking into account the above considerations and the comments received. These costs and benefits, to the extent identified and, where possible, quantified have helped to inform the decisions of and the actions taken by the CFTC that are described throughout this release.

1. Introduction

Prior to the adoption of Title VII, swaps and security-based swaps were by and large unregulated. The Commodity Futures Modernization Act of 2000 (''CFMA'') excluded financial over-the-counter swaps from regulation under the CEA, provided that trading occurred only among ''eligible contract participants.'' [1098] Swaps based on exempt commodities—including energy and metals—could be traded among ECPs without CFTC regulation, but certain CEA provisions against fraud and manipulation continued to apply to these markets. No statutory exclusions were provided for swaps on agricultural commodities by the CFMA, although they could be traded under certain regulatory exemptions provided by the CFTC prior to its enactment. Swaps based on securities were subject to certain SEC enforcement authorities, but the SEC was prohibited from prophylactic regulation of such swaps.

In the fall of 2008, an economic crisis threatened to freeze U.S. and global credit markets. The Federal government intervened to buttress the stability of the U.S. financial system.[1099] The crisis revealed the vulnerability of the U.S. financial system and economy to widespread systemic risk resulting from, among other things, poor risk management practices of certain financial firms and the lack of supervisory oversight for financial institutions as a whole.[1100] More specifically, the crisis demonstrated the need for regulation of the over-the-counter derivatives markets.[1101]

On July 21, 2010, President Obama signed the Dodd-Frank Act into law. Title VII of the Dodd-Frank Act established a comprehensive new regulatory framework for swaps and security-based swaps. As discussed above, the legislation was enacted, among other reasons, to reduce risk, increase transparency, and promote market integrity within the financial system, including by: (i) Providing for the registration and comprehensive regulation of swap dealers, security-based swap dealers, major swap participants, and major security-based swap participants; (ii) imposing clearing and trade execution requirements on swaps and security-based swaps, subject to certain exceptions; (iii) creating rigorous recordkeeping and real-time reporting regimes; and (iv) enhancing the rulemaking and enforcement authorities of the Commissions with respect to, among others, all registered entities and intermediaries subject to the Commissions' oversight.[1102]

[1095] *See* Commodity Options, 77 FR 25320, Apr. 27, 2012.

[1096] To the extent the transactions entered into by ETA members are traded or executed on Regional Transmission Organizations and Independent System Operators, or entered into between entities described in section 201(f) of the Federal Power Act, they may be addressed through the public interest waiver process described in CEA section 4(c)(6).

[1097] 7 U.S.C. 19(a).

[1098] *See* 7 U.S.C. 1a(12) (2006).

[1099] On October 3, 2008, President Bush signed the Emergency Economic Stabilization Act of 2008, which was principally designed to allow the U.S. Treasury and other government agencies to take action to help to restore liquidity and stability to the U.S. financial system (*e.g.,* the Trouble Asset Relief Program—also known as TARP—under which the U.S. Treasury was authorized to purchase up to $700 billion of troubled assets that weighed down the balance sheets of U.S. financial institutions). *See* Public Law 110–343, 122 Stat. 3765 (2008).

[1100] *See* Financial Crisis Inquiry Commission, ''The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States,'' Jan. 2011, at xxvii, available at *http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf*.

[1101] *Id.* at 25 (concluding that ''enactment of * * * [the Commodity Futures Modernization Act of 2000 (''CFMA'')] to ban the regulation by both the Federal and State governments of over-the-counter (OTC) derivatives was a key turning point in the march toward the financial crisis.''). See also id. at 343 (''Lehman, like other large OTC derivatives dealers, experienced runs on its derivatives operations that played a role in its failure. Its massive derivatives positions greatly complicated its bankruptcy, and the impact of its bankruptcy through interconnections with derivatives counterparties and other financial institutions contributed significantly to the severity and depth of the financial crisis.'') and *id.* at 353 (''AIG's failure was possible because of the sweeping deregulation of [OTC] derivatives, [* * *] including capital and margin requirements that would have lessened the likelihood of AIG's failure. The OTC derivatives market's lack of transparency and of effective price discovery exacerbated the collateral disputes of AIG and Goldman Sachs and similar disputes between other derivatives counterparties.'').

[1102] The CFTC has provided a table in the Appendix that cross-references the costs and benefits considerations of the final rules effectuated by the Product Definitions in order to provide more transparency with respect to this qualitative assessment of the programmatic costs. *See* Appendix, ''Rules Effectuated by Product Definitions.'' The CFTC is not providing a quantitative estimate of total programmatic costs, because it cannot be reliably estimated at this time. Many rules have not been finalized, including

Continued

Section 721 of the Dodd-Frank Act amends the Commodity Exchange Act (''CEA'') by adding definitions of the terms ''swap,'' ''security-based swap,'' and ''security-based swap agreement.'' Section 712(d)(1) provides that the CFTC and the SEC, in consultation with the Federal Reserve Board, shall jointly further define those terms. Section 712(a)(8) provides further that the Commissions shall jointly prescribe such regulations regarding ''mixed swaps'' as may be necessary to carry out the purposes of Title VII of the Dodd-Frank Act (''Title VII''). Section 712(d)(2) requires the Commissions, in consultation with the Federal Reserve Board, to jointly adopt rules governing books and records requirements for security-based swap agreements.

Under the comprehensive framework for regulating swaps and security-based swaps established in Title VII, the CFTC is given regulatory authority over swaps, the SEC is given regulatory authority over security-based swaps, and the Commissions jointly are to prescribe such regulations regarding mixed swaps as may be necessary to carry out the purposes of Title VII. In addition, the SEC is given antifraud authority over, and access to information from, certain CFTC-regulated entities regarding security-based swap agreements, which are a type of swap related to securities over which the CFTC is given regulatory and enforcement authority.

The statutory definitions of ''swap'' and ''security-based swap'' in Title VII are detailed and comprehensive. The Dodd-Frank Act directs the Commissions, among other things, to ''further define'' these terms; it does not direct the Commissions to provide definitions for them, which are already provided for in the statute. Thus, even in the absence of these rules, the Dodd-Frank Act would require regulating products that meet the statutory definitions of these terms as swaps and security-based swaps. Consequently, a large part of the costs and benefits resulting from the regulation of swaps and security-based swaps derives from the Dodd-Frank Act itself and not from these rules that further define swaps.

Several commenters to the ANPR issued by the Commissions regarding the definitions expressed a concern that the product definitions could be read broadly to include certain types of transactions that previously had never been considered swaps or security-based swaps. In response to those comments, the rules and interpretations clarify that certain traditional insurance products, consumer and commercial agreements, and loan participations are not swaps or security-based swaps, which will increase legal certainty and lower the costs of assessing whether a product is a swap or security-based swap for market participants. In this regard, the rules and interpretations are intended to reduce unnecessary burdens on persons using such agreements, contracts, or transactions, the regulation of which under Title VII may not be necessary or appropriate to further the purposes of Title VII.

In addition, the CFTC is clarifying the scope of the forward contract exclusion [1103] for nonfinancial commodities from the statutory swap definition to provide legal certainty for market participants as to which transactions will qualify for the exclusion. In this regard, the CFTC is clarifying the circumstances under which market participants may rely on past CFTC guidance regarding the forward exclusion from the definition of ''future delivery,'' and in particular the Brent Interpretation for booked-out transactions,[1104] with respect to the forward exclusion from the swap definition. The CFTC is extending the Brent Interpretation to all nonfinancial commodities, and is withdrawing the Energy Exemption as proposed, [1105] with certain clarifications. The final interpretation with clarifications in response to comments should enhance legal certainty regarding the forward exclusions.

While the statutory definitions of swap and security-based swap are detailed and comprehensive, the rules further clarify whether particular types of transactions are swaps or security-based swaps. For example, foreign exchange forwards and swaps are defined as swaps, subject to the Treasury Secretary's determination to exempt them from the swap definition. The statute provides that certain provisions of the CEA apply to foreign exchange forwards and swaps, even if the Treasury Secretary determines to exempt them, and the rules reflect this. Specifically, these transactions still would be subject to certain requirements for reporting swaps, and swap dealers and major swap participants engaging in such transactions still would be subject to certain business conduct standards. The rules also clarify that, because certain foreign exchange products do not fall within the definitions of foreign exchange swap and forward, such products are not subject to the Treasury Secretary's determination to exempt. Outside of the foreign exchange suite of products, the rules and interpretations clarify that certain transactions are swaps or security-based swaps. These products include forward rate agreements, certain contracts for differences, swaptions and forward swaps. The rules and the interpretations are intended to increase clarity and legal certainty for market participants with respect to these products.

Next this release addresses the relationship between swaps and security-based swaps and how to distinguish them. The Commissions are clarifying whether particular agreements, contracts or transactions that are subject to Title VII of the Dodd-Frank Act (which are referred to as ''Title VII Instruments'' in this release) are swaps, security-based swaps or both (i.e., mixed swaps). In addition, the Commissions are clarifying the use of the term ''narrow-based security index'' in the security-based swap definition. In general, the CFTC has jurisdiction over Title VII instruments on broad-based security indexes, while the SEC has jurisdiction over Title VII instruments on narrow-based security indexes. This release clarifies that the existing criteria for determining whether a security index is narrow-based, and the past guidance of the Commissions regarding those criteria in the context of security futures, apply to Title VII instruments. Credit default swaps (''CDS'') also are subject to this same jurisdictional division—CDS on broad-based security indexes are regulated by the CFTC, while CDS on narrow-based security indexes (as well as CDS on single name securities or loans) generally are regulated by the SEC. This release provides new criteria tailored to CDS for determining whether a CDS is based on an index that is a narrow-based security index. Also, it explains the term ''index'' and adopts a final rule governing tolerance and grace periods for Title VII instruments on security indexes traded on trading platforms. These rules and interpretations generally are designed to provide clarity and enhanced legal certainty regarding the appropriate classification of Title VII instruments as swaps, security-based swaps or mixed swaps, so that market participants may ascertain the applicable regulatory requirements more easily.

This release anticipates that mixed swaps, which are both swaps and security-based swaps, will be a narrow category, but lists a few examples of

capital and margin which may have significant costs. Any estimate made of the programmatic costs of the Product Definitions would be unreliable and therefore may be misleading.

[1103] *See supra* part II.B.2.a).

[1104] *See supra* part II.B.2.a)i)(B).

[1105] *See supra* part II.B.2.a)i)(C).

mixed swaps and interprets how to distinguish one type of TRS that is a mixed swap from another that is not. This release addresses the regulatory treatment of bilateral, uncleared mixed swaps where one counterparty is a dual registrant with the CFTC and SEC. It also establishes a process for requesting a joint order from the Commissions to determine the appropriate regulatory treatment of mixed swaps that do not fall into the category of mixed swaps where one counterparty is a dual registrant. Concerning ''security-based swap agreements'' (or SBSAs), this release explains what types of transactions are SBSAs and includes rules that provide that there will not be additional books and records requirements regarding SBSAs other than those that have been proposed by the CFTC for swaps in order to avoid duplicative regulation and costs.

This release also includes rules establishing a process for members of the public to request a joint interpretation from the Commissions regarding whether a Title VII instrument is a swap, security-based swap or a mixed swap. The process includes a deadline for a decision, as well as a requirement that if the Commissions do not issue a joint interpretation within the prescribed time period, each Commission must publicly provide the reasons for not having done so.

Finally, this release includes anti-evasion rules and related interpretations adopted by the CFTC, which in general would apply to agreements, contracts, transactions and entities that are willfully structured to evade Dodd-Frank requirements.

2. Costs and Benefits of the Definitions—In General

The rules and interpretations in this Adopting Release: further define the terms ''swap,'' ''security-based swap,'' and ''security-based swap agreement;'' provide for the regulation of ''mixed swaps;'' and address books and records requirements for security-based swap agreements. In the discussion that follows, the CFTC considers the costs and benefits resulting from its own discretionary determinations with respect to the section 15(a) factors.

There are ''programmatic'' costs and benefits as well as ''assessment'' costs of the Product Definitions. Programmatic costs result from subjecting certain agreements, contracts, or transactions to the regulatory regime of Title VII.[1106] Effectiveness of the Products Definitions will trigger effectiveness of any statutory provision or regulation that depends, in whole or in part, on the effectiveness of this final rulemaking. By fulfilling the statutory mandate, many of the programmatic benefits of Title VII and the CFTC's implementing regulations are triggered, including risk reduction, increasing transparency, and promoting market integrity and, by extension, the increased possibility of preventing or reducing the severity of another global financial crisis such as occurred in 2008. Delimiting the scope of the terms ''swap,'' ''security-based swap,'' ''security-based swap agreement,'' and ''mixed swaps'' also helps to determine the scope of activities and entities that will be subject to the various Title VII regulatory requirements. Requirements for clearing and trade execution, capital and margin, business conduct, and reporting and recordkeeping, all of which have been or will be implemented in other CFTC rules, will lead to programmatic costs that have been or will be addressed in the CFTC's rules to implement those requirements. When considering the programmatic costs and benefits of the Product Definitions, the CFTC recognizes the scope of activities and entities affected by the further Product Definitions by reference to the other final rulemakings under Title VII accomplished to date. The costs that parties will incur to assess whether certain agreements, contracts, or transactions are ''swaps,'' ''security-based swaps,'' ''security-based swap agreements,'' or ''mixed swaps'' that are subject to the Title VII regulatory regime, and, if so, costs to assess whether such Title VII instrument is subject to the regulatory regime of the SEC or the CFTC are referred to herein as assessment costs.

In general, many commenters have suggested that the statutory definitions of swap and security-based swap are overbroad in that they could be viewed to include agreements, contracts, and transactions that the market had not considered to be swaps or security-based swaps prior to the enactment of the Dodd-Frank Act, are (or could be) swaps or security-based swaps. Thus, in response to these comments, the CFTC has engaged in a qualitative analysis of various agreements, contracts, and transactions of which the CFTC is aware and that commenters have brought to its attention. Based on this analysis, the CFTC has established rules and interpretations to identify agreements, contracts, and transactions that are swaps or security-based swaps where the statutory definition may be inadequate or ambiguous. In developing the further definitions, the CFTC has endeavored to narrow the scope of the terms ''swap'' and ''security-based swap'' without excluding agreements, contracts and transactions that the CFTC has determined should be regulated as swaps and security-based swaps. Narrowing the scope of the statutory definitions should reduce the overall programmatic costs of Title VII because fewer agreements, contracts, and transactions will be subject to the full panoply of Title VII regulation. Narrowing the scope of the statutory definitions should also increase the net programmatic benefits of the CFTC's Title VII regulations because the CFTC is targeting in the Product Definitions rulemaking agreements, contracts and transactions that the CFTC has determined, after considering comments received and undertaking a qualitative analysis, are swaps or security-based swaps. The CFTC anticipates that applying the full panoply of Title VII regulation to only those agreements, contracts or transactions that the CFTC has determined are swaps or security-based swaps will be most effective in achieving the net benefits of Title VII regulation under the Dodd-Frank Act.

(a) Costs

The scope of the terms ''swap,'' ''security-based swap,'' ''security-based swap agreement,'' and ''mixed swap'' is an important factor in determining the range of activities and entities that will be subject to various requirements set forth in the Dodd-Frank Act, such as trade execution, clearing, reporting, registration, business conduct, and capital requirements. Complying with these requirements, which will be implemented in other rules by the CFTC, are programmatic costs, which also have been or will be addressed in the CFTC's rules to implement those requirements.[1107]

The CFTC believes that the rulemaking to further define the terms ''swap,'' ''security-based swap,'' ''security-based swap agreement,'' and ''mixed swap'' is consistent with how market participants understand these products. The further definitions increase legal certainty and thereby reduce assessment costs by clarifying that certain products that meet the requirements of the applicable rules and interpretations, such as traditional insurance products, are not swaps.

(b) Benefits

Many of the benefits of Title VII and the CFTC's implementing regulations, including risk reduction, increasing

[1106] *See* Appendix, ''Rules Effectuated by Product Definitions.''

[1107] *See* Appendix, ''Rules Effectuated by Product Definitions.''

transparency, and promoting market integrity are programmatic benefits of the Products Definitions since they are effectuated by Product Definitions. These programmatic benefits are difficult to quantify and measure. Moreover, these benefits can be expected to manifest themselves over the long run and be distributed over the market as a whole.

The CFTC believes that the final rules and interpretations can be consistently applied by substantially all market participants to determine which agreements, contracts, or transactions are, and which are not, swaps, security-based swaps, security-based swap agreements, or mixed swaps. The benefits of the individual rules and interpretations are discussed in their respective sections below.

(c) Comments and Consideration of Alternatives

The CFTC requested comment on the costs and benefits of the proposed rules and interpretations regarding the definitions in general for market participants, markets and the public. Further, the CFTC requested comment as to whether there are any aspects of the proposed rules and interpretive guidance regarding the definitions that are both burdensome to apply and not helpful to achieving clarity as to the scope of the defined terms, and whether there are less burdensome means of providing clarity as to the scope of the defined terms.

A commenter [1108] argued that a proper cost-benefit analysis can only be performed once an integrated and complete mosaic of rules is available for analysis and doubted that the definitions impose no independent costs. The CFTC has considered, qualitatively, the costs and benefits of the entire mosaic of CFTC rules under the Dodd-Frank Act in this rulemaking. Due to data limitations and other uncertainty, the CFTC cannot perform a meaningful quantitative analysis, yet. The CFTC considers in this rulemaking the costs and benefits of how the Commissions are exercising their discretion in further defining the Product Definitions because Congress included in the Dodd-Frank Act statutory definitions of these terms, over which the CFTC has no discretion. Moreover, the CFTC has considered the independent costs (i.e. costs imposed through exercising its discretion) that the Products Definitions may impose through its determinations as discussed below.

Another commenter [1109] contended that the costs and benefits considerations in the Proposing Release were not based on any empirical data and are not consistent with the expected costs of compliance anticipated by market participants. However, the CFTC cannot do a comprehensive empirical analysis regarding costs and benefits of the Products Definitions before actual data is available when the swap regulatory regime has been implemented in full. Moreover, the CFTC did use some empirical estimates in its costs and benefits considerations in the Proposing Release, namely in assessment costs for the process to seek an interpretation of whether a product is a swap, security-based swap, or mixed swap, as well as in the process to determine regulatory treatment for mixed swaps.[1110] Commenters did not submit data or other information to support an argument that the CFTC's estimates were inaccurate.

Commenters [1111] expressed concern about costs from regulatory uncertainty imposed on swaps market participants resulting from other Title VII rulemakings not yet being final. The consideration of thousands of letters and the process of due deliberation and reasoned decision-making by the CFTC has caused delays. Nevertheless, the CFTC is working with deliberate speed to complete the rulemakings, and eventually this particular type of legal uncertainty will be eliminated.

A commenter [1112] requested that inter-affiliate swaps be exempt from the swap definition, arguing that regulating such swaps may increase costs to consumers and undermine efficiencies from the use of centralized hedging affiliates. The CFTC anticipates that it will address inter-affiliate swaps in a subsequent rulemaking.

Several commenters [1113] argued that foreign central banks, foreign sovereigns, international financial institutions, such as multilateral development banks, and similar organizations should be exempt from swap regulations, since regulations would impose costs on these entities. Specifically, a commenter [1114] asserted that multilateral development banks should not have to register or be subject to clearing and margin requirements and requested that multilateral development banks' transactions be exempted from the definition of a swap. As explained above, these transactions are swaps. In addition, the proposed exclusion is overbroad because it would mean that swaps and security-based swaps entered into by foreign central banks, foreign sovereigns, international financial institutions, and similar organizations would be completely excluded from Dodd-Frank regulation. Their counterparties, who may be swap dealers and other regulated entities, would have no regulatory obligations with respect to such swaps, and could develop significant exposures without the knowledge of the CFTC, other regulators and market participants. If these transactions were not swaps, then no market participant would be obligated to report them to a U.S.-registered swap data repository or real-time report them. This lack of transparency might distort swap pricing and impede proper risk management in as much as the market may not be aware of the risk entailed in these opaque transactions and might thwart price discovery.

The Commissions did not propose rules or interpretations on how to distinguish futures from swaps. A commenter requested that the CFTC clarify that nothing in the release was intended to limit a DCM's ability to list for trading a futures contract regardless of whether it could be viewed as a swap if traded over-the-counter or on a SEF, since futures and swaps are ''indistinguishable in material economic effects.'' [1115] The commenter further recommended that the CFTC adopt a final rule that amends the statutory definition of the term ''swap'' by adding to the futures contract exclusion in CEA Section 1a(47)(B)(i) the following language after the word ''delivery'': ''Listed for trading by a designated contract market.'' The same commenter believed that such a rule would clarify the scope of Section 4(a) of the CEA,[1116] which makes it illegal to trade a futures contract except on or subject to the rules of a DCM.[1117]

Although it is potentially more costly to a DCM in terms of providing additional analysis to support listing a futures contract on its exchange, the CFTC is not adopting the distinction the commenter advocates. Prior distinctions that the CFTC relied upon (such as the presence or absence of clearing) to distinguish between futures and swaps

[1108] *See* ETA Letter. *See also* IECA Letter II (requesting a comprehensive costs benefits analysis on all of Title VII).

[1109] *See* WGCEF Letter.

[1110] *See* Proposing Release at 29874.

[1111] *See* FIA Letter; IIB Letter; and ISDA Letter.

[1112] *See* Shell Trading Letter.

[1113] *See* CEB Letter; EIB Letter; and World Bank Letter.

[1114] *See* World Bank Letter.

[1115] *See* CME Letter.

[1116] 7 U.S.C. 6(a).

[1117] *See* CME Letter.

may no longer be relevant.[1118] As a result, it is difficult to distinguish between futures and swaps on a blanket basis as the commenter suggested. However, a case-by-case approach for distinguishing these products may lead to more informed decision-making by the CFTC.

The CFTC notes that a DCM may self-certify its contracts pursuant to Part 40 of the CFTC's rules,[1119] subject to the CFTC's oversight authority. If a DCM has a view that a particular product is a futures contract, it may self-certify the contract consistent with that view. The DCM also has a number of other options, including seeking prior approval from the CFTC, requesting an interpretation, or requesting a rulemaking if it is in doubt about whether a particular agreement, contract or transaction should be classified as a futures contract or a swap.

3. Costs and Benefits of Rules and Interpretations Regarding Insurance

Rule 1.3(xxx)(4)(i) under the CEA clarifies that agreements, contracts or transactions that satisfy its provisions will not be swaps or security-based swaps. Specifically, the term ''swap'' and ''security-based swap'' does not include an agreement, contract, or transaction under rule 1.3(xxx)(4)(i)(A) that, by its terms or by law, as a condition of performance on the agreement, contract, or transaction: (i) Requires the beneficiary of the agreement, contract, or transaction to have an insurable interest that is the subject of the agreement, contract, or transaction and thereby carry the risk of loss with respect to that interest continuously throughout the duration of the agreement, contract, or transaction; (ii) requires that loss to occur and be proved, and that any payment or indemnification therefor be limited to the value of the insurable interest; (iii) is not traded, separately from the insured interest, on an organized market or over-the-counter; and (iv) with respect to financial guaranty insurance only, in the event of payment default or insolvency of the obligor, any acceleration of payments under the policy is at the sole discretion of the insurer (the ''Product Test'').

Rule 1.3(xxx)(4)(i)(B) under the CEA provides that for an agreement, contract, or transaction that meets the Product Test to be excluded from the swap and security-based swap definitions as insurance, it must be provided: (i) By a person that is subject to supervision by the insurance commissioner (or similar official or agency) of any State or by the United States or an agency or instrumentality thereof, and such agreement, contract, or transaction is regulated as insurance applicable State law or the laws of the United States (the ''first prong''); (ii) directly or indirectly by the United States, any State, or any of their respective agencies or instrumentalities, or pursuant to a statutorily authorized program thereof (the ''second prong''); (iii) in the case of reinsurance only, by a person to another person that satisfies the Provider Test, provided that: such person is not prohibited by applicable State law or the laws of the United States from offering such agreement, contract, or transaction to such person that satisfies the Provider Test; the agreement, contract, or transaction to be reinsured satisfies the Product Test or is one of the Enumerated Products; and except as otherwise permitted under applicable State law, the total amount reimbursable by all reinsurers for such agreement, contract, or transaction may not exceed the claims or losses paid by the cedant; or (iv) in the case of non-admitted insurance by a person who: is located outside of the United States and listed on the Quarterly Listing of Alien Insurers as maintained by the International Insurers Department of the National Association of Insurance Commissioners; or meets the eligibility criteria for non-admitted insurers under applicable State law (the ''Provider Test'').

In response to commenters' requests that the Commissions codify the proposed interpretation regarding certain enumerated types of insurance products in the final rules, the interpretation is being codified in paragraph (i)(C) of rule 1.3(xxx)(4) under the CEA. In addition, in response to comments, the Commissions are expanding and revising the list of traditional insurance products. As adopted, the rule provides that the terms ''swap'' and ''security-based swap'' will not include an agreement, contract, or transaction that is provided in accordance with the conditions set forth in the Provider Test and is one of the following types of products (collectively, ''Enumerated Products''): surety bonds; fidelity bonds; life insurance; health insurance; long-term care insurance; title insurance; property and casualty insurance; annuities; disability insurance; insurance against default on individual residential mortgages (commonly known as private mortgage insurance, as distinguished from financial guaranty of mortgage pools); and reinsurance (including retrocession) of any of the foregoing. Based on comments received, the Commissions are adding three products to the list of products as proposed, adding reinsurance (including retrocession) of any of the traditional insurance products included in the list, and deleting a requirement applicable to annuities that they must be subject to tax treatment under section 72 of the Internal Revenue Code.

The Commissions are also clarifying that the Product Test, the Provider Test and the Enumerated Products in the rules are a non-exclusive safe harbor (the ''Insurance Safe Harbor''), such that if a product fails the Insurance Safe Harbor, that does not necessarily mean that the product is a swap or security-based swap—further analysis may be required in order to make that determination.

Rule 1.3(xxx)(4)(ii) provides a ''grandfather'' for insurance transactions (as opposed to insurance products), pursuant to which transactions that are entered into on or before the effective date of the Product Definitions will not fall within the definition of swap or security-based swap, provided that, at such time that it was entered into, the transaction was provided in accordance with the Provider Test.

The CFTC is interpreting the term ''swap'' (that is not a security-based swap or mixed swap) to include a guarantee of such swap, to the extent that a counterparty to a swap position would have recourse to the guarantor in connection with the position. The CFTC is persuaded that when a swap has the benefit of a guarantee, the guarantee is an integral part of that swap. The CFTC finds that a guarantee of a swap (that is not a security-based swap or mixed swap) is a term of that swap that affects the price or pricing attributes of that swap. When a swap counterparty typically provides a guarantee as credit support for its swap obligations, the market will not trade with that counterparty at the same price, on the same terms, or at all without the guarantee. The guarantor's resources are added to the analysis of the swap; if the guarantor is financially more capable than the swap counterparty, the analysis of the swap becomes more dependent on the creditworthiness of the guarantor. The CFTC anticipates that a ''full recourse'' guarantee would have a greater effect on the price of a swap than a ''limited'' or ''partial recourse'' guarantee; nevertheless, the CFTC is determining that the presence of any guarantee with recourse, no matter how robust, is price forming and an integral part of a guaranteed swap. The CFTC's

[1118] *See, e.g.,* Swap Policy Statement, *supra* note 214.

[1119] 17 CFR Part 40.

interpretation of the term ''swap'' to include guarantees of swap does not limit or otherwise affect in any way the relief provided by the Insurance Grandfather. In a separate release, the CFTC will address the practical implications of interpreting the term ''swap'' to include guarantees of swaps (the ''separate CFTC release'').

(a) Costs

A market participant will need to ascertain whether an agreement, contract, or transaction satisfies the criteria set forth in rule 1.3(xxx)(4). This analysis will have to be performed prior to entering into the agreement, contract, or transaction to ensure that the relief provided by the Insurance Safe Harbor is available. The CFTC expects that potential costs associated with any possible uncertainty cited by commenters as to whether an agreement, contract, or transaction that the participants consider to be insurance could instead be regulated as a swap would be greater without the Insurance Safe Harbor than the cost of the analysis under the final rule herein.

Although the Insurance Safe Harbor is designed to mitigate costs associated with legal uncertainty and misclassification of products, to the extent that it inadvertently fails to exclude certain types of insurance products from the definitions, these failures could lead to costs for market participants entering into agreements, contracts, or transactions. Some insurance products might inadvertently be subjection to regulation as swaps. To the extent that the Insurance Safe Harbor leads to the inadvertent misclassification of some swaps as insurance, costs for market participants entering into agreements, contracts, or transactions that are inadvertently regulated as insurance products, and not as swaps, may increase.[1120] Similarly, insurance products inadvertently mischaracterized as swaps could impose additional costs on market participants, who could be required to meet certain regulatory requirements applicable to swaps.

Assessment costs should be minimal or non-existent for traditional insurance products,[1121] but for a new and novel insurance product that is more complex, the costs of analysis may be greater. Nevertheless, it is anticipated that such cases will be infrequent. Moreover, it may be difficult to assess whether products that do not fall within the Insurance Safe Harbor are swaps or security-based swaps rather than insurance. Market participants may need to request an interpretation from the Commissions regarding such products, or obtain an opinion of counsel, which will involve certain costs.[1122] However, the CFTC expects such cases will arise less frequently in light of the increased clarity provided by the rule. An alternative to a safe harbor approach under the rule—that failure to meet the rule and interpretation would automatically mean that the product is a swap and not insurance—would likely impose greater costs on market participants and result in more frequent misclassification of products.

The CFTC is interpreting the term ''swap'' (that is not a security-based swap or mixed swap) to include a guarantee of such swap, to the extent that a counterparty to a swap position would have recourse to the guarantor in connection with the position. The CFTC anticipates minimal or no assessment costs from the interpretation with respect to guarantees of swaps.[1123] The CFTC does, however, anticipate that there will be some programmatic costs associated with the requirements that it will propose for guarantees of swaps in the separate CFTC release.[1124] The CFTC will carefully consider those costs in that rulemaking.

(b) Benefits

Subjecting traditional insurance products to Title VII could, absent exception, prevent individuals who are not ECPs from obtaining insurance to protect their properties or families against accidental hazards or risks,[1125] or require insurance sold to individuals who are not ECPs to be traded on exchanges and be cleared. The Commissions have found no evidence that Congress intended them to be regulated as swaps or security-based swaps. In light of the above considerations, the Commissions have determined to provide the Insurance Safe Harbor and Insurance Grandfather in the final rules in order to assure market participants that those agreements, contracts, or transactions that meet their conditions will not fall within the swap or security-based swap definitions. Limiting the number of unexpected product classification outcomes for market participants provides the benefit of predictability when entering into their transactions

The business of insurance is already subject to established pre-Dodd-Frank Act regulatory regimes. Requirements that may work well for swaps and security-based swaps may not be appropriate for traditional insurance products. To the extent that the final rules distinguish insurance from swaps and security-based swaps, the CFTC should be able to tailor rules for specific

[1120] Improperly characterizing swaps as insurance may theoretically cause market participants that are not licensed insurance companies to become licensed insurance companies, if applicable, thus imposing costs of complying with state insurance regulation.

[1121] The CFTC anticipates that traditional insurance products will either be easy to identify from the list of Enumerated Products or will unambiguously satisfy the Products Test.

[1122] The CFTC believes that $27,000 represents a reasonable estimate of the upper end of the range of the costs to undertake the legal analysis of the status of an agreement, contract, or transaction as a swap or security-based swap. The average cost incurred by market participants in connection with assessing whether an agreement, contract, or transaction is a swap or security-based swap is based upon the estimated amount of time that staff believes will be required for both in-house counsel and outside counsel to apply the definition. Staff estimates that some agreements, contracts, or transactions will clearly satisfy the Insurance Safe Harbor, Insurance Grandfather and an in-house attorney, without the assistance of outside counsel, will be able to make a determination in less than one hour. Based upon data 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), staff estimates that the average national hourly rate for an in-house counsel is $378. If an agreement, contract, or transaction is more complex, the CFTC estimates the analysis will require approximately 30 hours of in-house counsel time and 40 hours of outside counsel time. The CFTC estimates the costs for outside legal services to be $400 per hour. This is based on an estimated $400 per hour cost for outside legal services. This is the same estimate used by the SEC for these services in the release involving Exemptions for Security-Based Swaps Issued By Certain Clearing Agencies, Release No. 33–9308 (Mar. 30, 2012), 77 FR 20536 (Apr. 5, 2012). Accordingly, on the high end of the range the CFTC estimates the cost to be $27,340 ($11,340 (based on 30 hours of in-house counsel time ✖ $378) + $16,000 (based on 40 hours of outside counsel ✖ $400). The estimate is rounded to two significant digits to avoid the impression of false precision of the estimate.

[1123] Because a guarantee is a common and well-understood product, that has been used in commerce since long before the existence of swaps markets, the CFTC anticipates that whether a guarantee is present or not will be obvious.

[1124] As a result of interpreting the term ''swap'' (that is not a security-based swap or mixed swap) to include a guarantee of such swap, to the extent that a counterparty to a swap position would have recourse to the guarantor in connection with the position, and based on the reasoning set forth in the Entity Definitions Release in connection with major swap participants, the CFTC will not deem holding companies to be swap dealers as a result of guarantees to certain U.S. entities that are already subject to capital regulation. This interpretation mitigates the programmatic costs imposed on potential swap dealers by not attributing to a guarantor swap positions of a guaranteed entity that is already subject to capital regulation.

[1125] An individual is considered an ECP if the 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 and who enters into the agreement, contract, or transaction in order to manage the risk associated with an asset owned or liability incurred, or reasonable likely to be owned or incurred, by the individual.'' Section 1a(18)(A)(xi) of the CEA, 7 U.S.C. 1a(18)(A)(xi).

products that are swaps or security-based swaps to achieve Title VII regulatory objectives. In adopting the Insurance Safe Harbor, the CFTC has sought to achieve those net benefits that may be obtained from not supplanting existing insurance regulation that are consistent with the regulatory objectives of Title VII.

Without the Insurance Safe Harbor, market participants might be more uncertain about whether an agreement, contract, or transaction is an insurance product rather than a swap. Rule 1.3(xxx)(4) is intended to reduce the potential uncertainty of what constitutes a swap by setting forth clear and objective criteria for distinguishing an agreement, contract, or transaction that is insurance from a swap. Providing such an objective rule and explanation mitigates the potential additional costs of petitioning the Commissions, or obtaining an opinion of counsel, about whether an agreement, contract, or transaction is insurance or a swap.

The objective criteria provided by the rule also will aid sound risk management practices because it will be easier for market participants to decide whether a particular agreement, contract, or transaction is insurance or a swap.

Further, the CFTC anticipates that the interpretation of the term ''swap'' to include guarantees of swaps and the separate CFTC release will provide programmatic benefits by enabling the CFTC and market participants to receive more price-forming data about swaps, which may help improve price discovery for swaps. The CFTC will carefully consider these and other benefits in the separate CFTC release.

(c) Comments and Consideration of Alternatives

The CFTC requested comment on the costs and benefits of proposed rule 1.3(xxx)(4) and interpretive guidance to distinguish between insurance products and swaps for market participants, markets, and the public. Several commenters [1126] argued that any additional requirement beyond the requirement of the rules that a product is a regulated insurance product creates legal uncertainty and imposes costs. Specifically, a commenter [1127] asserted that it is a burden to introduce conditions that are neither universal nor fundamental, such as showing a continuing risk of loss for some insurance contracts. Another commenter [1128] argued that legal uncertainty may result in conflicting interpretations, which can be a significant burden for financial guaranty transactions that typically require the delivery of a legal opinion.

The Commissions have expanded the list of insurance products excluded from the swap definition to cover certain traditional insurance products that commenters have brought to their attention and that the Commissions have determined are not swaps. The Commissions are also clarifying that the Insurance Safe Harbor does not imply or presume that an agreement, contract or transaction that does not meet its requirements is a swap or security-based swap, but will require further analysis of the applicable facts and circumstances, including the form and substance of the agreement, contract, or transaction, to determine whether it is insurance, and thus not a swap or security-based swap. With regard to financial guaranty in particular, the acceleration of payment criterion is designed to reflect market practice and aid appropriate product classification. The Commissions are stating that they intend to interpret concepts upon which the Product Test relies that are derived from state law consistently with the existing and developing laws of the relevant state(s) governing the agreement, contract, or transaction in question. However, the Commissions note their authority to diverge from state law if the Commissions become aware of evasive conduct. While the CFTC cannot anticipate under what circumstances or how often the Commissions might diverge from state law, the CFTC believes that there will be more consistent than inconsistent interpretations. Accordingly, the rules do not present the increased burden or legal uncertainty that these commenters suggested.

Several commenters also requested that the Commissions codify the proposed interpretive guidance regarding enumerated insurance products in rule text on the basis that codification would enhance legal certainty, and thereby reduce costs.[1129] The Commissions have decided to include a list of products in rule text in response to these commenters concerns.

A commenter proposed that the sole test for determining whether an agreement, contract or transaction is insurance should be whether it is subject to regulation as insurance by the insurance commissioner of the applicable state(s).[1130] While the commenter's test is potentially easier and thus may be less costly to apply than the Commissions' test, it would be inadequate because, as explained in section II.B.1.(d) above, it would essentially delete the product prong of the insurance safe harbor, and thus begging the question of how to distinguish insurance from swaps and security-based swaps and allowing state insurance regulators to supplant the Commissions' role in further defining, or determining what is, a swap. Further, market participants might misconstrue the commenter's test in close cases to mean that any activity permitted by the insurance commissioner of the relevant state(s) may not be regulated as swaps or security-based swaps. However, insurance companies are in many circumstances permitted by state insurance regulators to enter into swaps or security-based swaps, illustrating that the fact that while an insurance company may enter into an agreement, contract or transaction, it does not necessarily mean that such agreement, contract or transaction is insurance. Further, the domain of insurance regulation may change and then this commenter's test would induce an evolving boundary between state and CFTC regulation.

Several commenters suggested an approach in which insurance products that qualify for the exclusion contained in section 3(a)(8) of the Securities Act of 1933 would be excluded from the swap definition.[1131] One commenter argued that ''Section 3(a)(8) has long been recognized as the definitive provision as to where Congress intends to separate securities products that are subject to SEC regulation from 'insurance' and 'annuity' products that are to be left to state insurance regulation'' and that the section 3(a)(8) criteria are well understood and have a long history of interpretation by the SEC and the courts.[1132] Other commenters suggest that because section 3(a)(8) includes both a product and a provider requirement, if the Commissions include it in their final rules, it should be a requirement separate from the Product Test and the Provider Test, and should extend to insurance products that are securities.[1133]

While the Commissions agree that the section 3(a)(8) criteria have a long history of interpretations by the SEC and the courts, the Commissions find that it is inappropriate to apply the section 3(a)(8) criteria in this context. Although section 3(a)(8) contains some

[1126] *See* AFGI Letter; AIA Letter; and ISDA Letter.

[1127] *See* ISDA Letter.

[1128] *See* AFGI Letter.

[1129] *See* ACLI Letter; NAIC Letter; and RAA Letter.

[1130] *See* MetLife Letter.

[1131] *See* supra note 162

[1132] *See* supra note 163.

[1133] *See* supra note 164.

conditions applicable to insurance providers that are similar to the prongs of the Provider Test, it does not contain any conditions that are similar to the prongs of the Product Test. Moreover, section 3(a)(8) provides an exclusion from the Securities Act and the CFTC has no jurisdiction under the Federal securities laws. Congress directed both agencies to further define the terms ''swap'' and ''security-based swap.'' As such, the Commissions find that it is more appropriate to have a standalone rule that incorporates features that distinguish insurance products from swaps and security-based swaps and over which both Commissions will have joint interpretative authority.

Another commenter proposed the following test for an agreement, contract, or transaction to be insurance:

> [It] [e]xists for a specified period of time;
>
> Where the one party to the contract promises to make one or more payments such as money, goods or services;
>
> In exchange for another party's promise to provide a benefit of pecuniary value for the loss, damage, injury, or impairment of an identified interest of the insured as a result of the occurrence of a specified event or contingency outside of the parties' control; and
>
> Where such payment is related to a loss occurring as a result of a contingency or specified event.[1134]

This test may not represent a less costly alternative to the Commissions' test in light of its complexity, and in any event would not distinguish swaps and security-based swaps from insurance more effectively than the Commissions' test for two reasons. The requirements of a specified term and the payment of premiums are present in both insurance products and in agreements, contracts, or transactions that are swaps or security-based swaps, and therefore such requirements do not help to distinguish between them. A test based solely on these requirements, then, would be over-inclusive and exclude from the Dodd-Frank regulatory regime agreements, contacts, and transactions that have not traditionally been considered insurance. Also, the third and fourth requirements of the commenter's test collapse into the Product Prong's requirement that the loss must occur and be proved, and any payment or indemnification therefor must be limited to the value of the insurable interest.

Another commenter offered a 3-part test[1135] in lieu of the Commissions' test:

(1) The insurance contract must be issued by an insurance company and subject to state insurance regulation;

(2) The insurance contract must be the type of contract issued by insurance companies; and

(3) The insurance contract must not be of a type that the CFTC and SEC determine to regulate.[1136]

The commenter stated that its approach does not contain a definition of insurance, and for that reason believes that is preferable to the Commissions' approach, which it believes creates legal uncertainty because any attempted definition of insurance has the potential to be over- or under-inclusive.[1137]

While the commenter's test may appear simpler on its face, the CFTC does not believe that it represents a less costly alternative. The first two requirements of the commenter's test do not help to distinguish swaps from insurance; the third provides no greater certainty than the Commissions' facts and circumstances approach. Moreover, as discussed in section II.B.1(d) above, the Commissions' rules and related interpretations are not intended to define insurance. Rather, they provide a safe harbor for certain types of traditional insurance products by reference to factors that may be used to distinguish insurance from swaps and security-based swaps. Agreements, contracts, and transactions that do not qualify for the Insurance Safe Harbor may or may not be swaps, depending upon the facts and circumstances. Thus, the Commissions' test neither creates legal uncertainty as suggested by the commenter, nor the costs associated with such uncertainty.

Another commenter proposed different approaches for existing products and new products. According to the commenter, if an existing type of agreement, contract or transaction is currently reportable as insurance in the provider's regulatory and financial reports under a state or foreign jurisdiction's insurance laws, then that agreement, contract or transaction would be insurance rather than a swap or security-based swap. On the other hand, for new products, if this approach is inconclusive, the commenter recommended that the Commissions use the product prong of the Commissions' test only.[1138]

The commenter's proposal may represent a less costly alternative than the Commissions' test. However, rather than treating existing products and new products differently, the Commissions as discussed above are providing ''grandfather'' protection for agreements, contracts, and transactions entered into on or before the effective date of the Products Definitions. Moreover, the commenter's test would eliminate the provider test for new products, which the Commissions believe is important to help prevent products that are swaps or security-based swaps from being characterized as insurance.

In sum, the CFTC finds that, while some of the alternatives proposed by commenters may appear less costly to apply than the Commissions' test, in all cases they would sweep out of the Dodd-Frank Act regulatory regime for swaps agreements, contracts, and transactions that have not historically been considered insurance, and that should, in appropriate circumstances, be regulated as swaps or security-based swaps. Accordingly, the CFTC does not find these alternative tests proposed by commenters to be better tools than the Insurance Safe Harbor for limiting the scope of the statutory definitions of swap and security-based swap. Excluding agreements, contracts, and transactions that are, in fact, swaps from the further definition of the term ''swap'' is inconsistent with the CFTC's regulatory objectives and could increase risk to the U.S. financial system.

Three commenters provided comments regarding the treatment of guarantees of swaps. Two commenters[1139] opposed treating insurance or guarantees of swaps as swaps. Suggesting that the products are not economically similar, one commenter argued that insurance wraps of swaps do not ''necessarily replicate the economics of the underlying swap, and only following default could the wrap provider end up with the same payment obligations as a wrapped defaulting swap counterparty.''[1140] This commenter also stated that the non-insurance guarantees are not swaps because the result of most guarantees is that the guarantor is responsible for monetary claims against the defaulting party, which in this commenter's view is a different obligation than the arrangement provided by the underlying swap itself.[1141]

One commenter supported treating financial guaranty insurance of a swap or security-based swap as itself a swap or a security-based swap. This commenter argued that financial guaranty insurance of a swap or security-based swap transfers the risk of counterparty non-performance to the guarantor, making it an embedded and essential feature of the insured swap or

[1134] *See* NAIC Letter.

[1135] *See also* CAI Letter and Nationwide Letter.

[1136] *See* ACLI ANPR Letter.

[1137] *See* ACLI Letter.

[1138] *See* AIA Letter.

[1139] *See* AFGI Letter, ISDA Letter.

[1140] ISDA Letter.

[1141] *Id.*

security-based swap. This commenter further argued that the value of such swap or security-based swap is largely determined by the likelihood that the proceeds from the financial guaranty insurance policy will be available if the counterparty does not meet its obligations.[1142] This commenter maintained that financial guaranty insurance of swaps and security-based swaps serves a similar function to credit default swaps in hedging counterparty default risk.[1143]

While the CFTC is not further defining guarantees of swaps to be swaps, the CFTC is persuaded that when a swap (that is not a security-based swap or mixed swap) has the benefit of a guarantee, the guarantee and related guaranteed swap should be analyzed together. The events surrounding the failure of AIG Financial Products (''AIGFP'') highlight how guarantees can cause major risks to flow to the guarantor.[1144] The CFTC finds that the regulation of swaps and the risk exposures associated with them, which is an essential concern of the Dodd-Frank Act, would be less effective if the CFTC did not interpret the term ''swap'' to include a guarantee of a swap.

Two commenters cautioned against unnecessary and duplicative regulation. One commented that, because the underlying swap, and the parties to it, will be regulated and reported to the extent required by Title VII, there is no need for regulation of non-insurance guarantees.[1145] The other commented that an insurance policy on a swap would be subject to state regulation; without addressing non-insurance guarantees, this commenter stated that additional Federal regulation would be duplicative.[1146] The CFTC disagrees with these arguments. As stated above, the CFTC is treating financial guaranty insurance of swaps and all other guarantees of swaps in a similar manner because they are functionally or economically similar products. If a guarantee of a swap is not treated as an integral part of the underlying swap, price forming terms of swaps and the risk exposures associated with the guarantees may remain hidden from regulators and may not be regulated appropriately. Moreover, treating guarantees of swaps as part of the underlying swaps ensures that the CFTC will be able to take appropriate action if, after evaluating information collected with respect to the guarantees and the underlying swaps, such guarantees of swaps are revealed to pose particular problems in connection with the swaps markets. The separate CFTC release clarifies the limited practical effects of the CFTC's interpretation, which should address industry concerns regarding duplicative regulation.

One commenter also argued that regulating financial guaranty of swaps as swaps would cause monoline insurers to withdraw from the market, which could adversely affect the U.S. and international public finance, infrastructure and structured finance markets, given that insuring a related swap often is integral to the insurance of municipal bonds and other securities.[1147] The CFTC finds this argument unpersuasive. The CFTC understands that the 2008 global financial crisis severely affected most monolines and only one remains active in U.S. municipal markets. Thus, it appears that the monolines have, for the most part, already exited these markets. In addition, as stated above, the separate CFTC release clarifies the limited practical effects of the CFTC's interpretation, which should address industry concerns.

4. Costs and Benefits of the Withdrawing the Energy Exemption and Interpretation Regarding the Forward Contract Exclusion From the Swap Definition

The CFTC is clarifying that the forward contract exclusion from the swap definition for nonfinancial commodities should be read consistently with the forward contract exclusion from the CEA definition of the term ''future delivery.'' In that regard, the CFTC is retaining the Brent Interpretation and extending it to apply to all nonfinancial commodities, and withdrawing the Energy Exemption, which had extended the Brent Interpretation regarding the forward contract exclusion from the term ''future delivery'' to energy commodities other than oil, as it is no longer necessary. Although the CFTC is withdrawing the Energy Exemption, the CFTC is providing that certain alternative delivery procedures, such as physical netting agreements, that are mentioned in the Energy Exemption, are consistent with the intent of the book out provision in the Brent Interpretation—provided that the parties had a bona fide intent, when entering into the transactions, to make or take (as applicable) delivery of the commodity covered by those transactions. The CFTC also is providing an interpretation regarding documentation of orally booked-out transactions.

In addition, the CFTC is clarifying that its prior guidance regarding commodity options embedded in forward contracts should be applied as well to the treatment of forward contracts in nonfinancial commodities that contain embedded options under the Dodd-Frank Act. The final interpretation also explains the CFTC's position with regard to forwards with embedded volumetric optionality, including an explanation of how it would treat some of the specific contracts described by commenters, such as full requirements contracts. It also explains the CFTC's view with respect to certain contractual provisions, such as liquidated damages and renewable/evergreen provisions that do not disqualify the transactions in which they are contained from the forward exclusions. The CFTC has also provided an interpretation regarding nonfinancial commodities, including environmental commodities, and interpretations concerning physical exchange transactions, fuel delivery agreements, certain physical commercial agreements, and energy management agreements.

(a) Costs

The CFTC's statement that it will construe the forward contract exclusion consistently with respect to the definitions of the terms ''swap'' and ''future delivery,'' as discussed herein, will not impose any new material costs on market participants. It also will establish a uniform interpretation of the forward contract exclusion from the definitions of both statutory terms, which will avoid the significant costs that some commenters state would result if the forward contract exclusion were construed differently in these two contexts.[1148] In addition, the CFTC's

[1142] *See* Better Markets Letter.

[1143] *See* Better Markets Letter.

[1144] ''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.'' Congressional Oversight Panel, *The AIG Rescue, Its Impact on Markets, and the Government's Exit Strategy* 20 (2010).

[1145] *See* ISDA Letter.

[1146] *See* AFGI Letter.

[1147] *See* AFGI Letter. Of the members of AFGI, only Assured Guaranty (or its affiliates) is currently writing financial guaranty insurance policies on U.S. municipal obligations.

[1148] *See* EEI Letter (''Without legal certainty as to the regulatory treatment of their forward contracts, EEI's members and other end users who rely on the forward contract exclusion likely will face higher transaction costs due to greater uncertainty. These increased transaction costs may include: (i) More volatile or higher commodity prices; and (ii) increased credit costs, in each case caused by changes in market liquidity as end users change the way they transact in the commodity markets. A single regulatory approach that uses the same criteria to confirm that a forward contract is

Continued

clarification regarding the continued viability of the alternative delivery procedures in the Energy Exemption should reduce costs to the industry by conferring legal certainty that their transactions may continue to have these procedures without losing their eligibility for the forward exclusions.

As noted in section II.B.2.(a)(ii) above, the CFTC has explained its position regarding nonfinancial commodities. This should help the industry to determine whether their transactions are eligible for the forward exclusions, and consequently reduce costs to the industry for transactions involving non-financial commodities such as renewable energy credits that may be eligible for the forward exclusions. The final interpretation regarding forwards with embedded volumetric optionality should reduce costs to the industry, because these transactions may qualify for the forward exclusions from the swap and ''future delivery'' definitions. The explanation of how the CFTC will view specific contracts mentioned by commenters under this interpretation should enhance legal certainty and thereby reduce costs.

The clarification that certain contractual provisions do not disqualify transactions from the forward exclusion also should reduce costs to the industry by providing increased legal certainty that these provisions will not render their transactions subject to Dodd-Frank Act regulation. Similar cost reductions should be achieved through enhanced legal certainty provided by the CFTC's interpretations of physical exchange transactions, fuel delivery agreements, and certain physical commercial agreements, all of which may qualify for the forward exclusions under these interpretations. The interpretation regarding energy management agreements, which provides that the fact that a particular transaction is done under the auspices of such agreements does not alter the nature of that transaction, should likewise enhance legal certainty and reduce costs. While the CFTC's interpretation regarding documentation of oral book-outs—that an oral book-out be followed by a confirmation in a commercially reasonable time in written or electronic form—may impose costs for industries that do not document their orally booked out transactions, the CFTC believes that this requirement is consistent with prudent business practices and is necessary to prevent abuse of the Brent safe harbor.

Market participants will need to assess whether products are forward contracts that qualify for the forward exclusions from the swap and future delivery definitions, and may need to request an interpretation regarding such products, or obtain an opinion of counsel, which will involve certain costs. [1149]

(b) Benefits

The CFTC's interpretations regarding the forward exclusions should provide market participants with greater legal certainty regarding whether their transactions qualify for the forward exclusion from the swap definition, which should facilitate commercial merchandising activity. For example, the interpretation regarding forwards with embedded volumetric options should facilitate commercial merchandising activity of the electricity, natural gas, and other industries that employ these contracts where delivery quantities are flexible, while the conditions in the interpretations should help to assure that these contracts are bona fide forwards.

In addition, the interpretation should result in the appropriate classification of transactions as commercial merchandising transactions (and thus forward contracts) that are not subject to Title VII regulation. This will enhance market participants' efficient use of the swaps markets and, as described above, reduce costs on industry. Documenting oral book-outs should promote good business practices and aid the CFTC in preventing evasion through abuse of the forward exclusion. Finally, the CFTC's interpretation regarding commercial market participants should ensure that the forward exclusions may only be used for commercial merchandising activity and not for speculative purposes. [1150]

The CFTC's position regarding nonfinancial commodities should help the industry to determine whether their transactions are eligible for the forward exclusions, which should facilitate commercial merchandising activity for transactions involving non-financial commodities such as renewable energy credits that may be eligible for the forward exclusions.

(c) Comments and Consideration of Alternatives

The CFTC requested comment in the Proposing Release on the costs and benefits of the proposed interpretive guidance regarding the forward contract exclusion and the withdrawal of the Energy Exemption for market participants, markets and the public.

Several commenters requested that the CFTC codify its proposed guidance regarding the forward contract exclusion in rule text to provide greater legal certainty, which they argued may mitigate costs.[1151] However, upon consideration, the CFTC is not codifying its interpretation in rule text. As discussed in section II.B.2.(a)(i), above, the CFTC has never codified its prior interpretations of the forward contract exclusion with respect to the future delivery definition as a rule or regulation. Publishing an interpretation in this release is consistent with the manner in which the CFTC has interpreted the forward exclusion in the past. The additional research costs associated with an interpretation as opposed to codification in the Code of Federal Regulations will be small, because the CFTC has placed this interpretation, and all other product interpretations, in this adopting release for the convenience of practitioners. Moreover, courts may rely upon agency interpretations; thus, the CFTC believes that codification would not mitigate costs much.

excluded from the Commission's jurisdiction over swaps and futures will reduce this uncertainty and the associated costs to end users.'' (footnote omitted)).

[1149] The CFTC believes that $20,000 represents a reasonable estimate of the upper end of the range of the costs to undertake the legal analysis of the status of an agreement, contract, or transaction as a forward contract that qualifies for the forward exclusions. The average cost incurred by market participants in connection with assessing whether an agreement, contract, or transaction is a forward contract is based upon the estimated amount of time that staff believes will be required for both in-house counsel and outside counsel to apply the definition. The staff estimates that costs associated with determining whether an agreement, contract, or transaction is a forward contract will range up to $20,000 after rounding to two significant digits. Staff estimates that some agreements, contracts, or transactions will clearly fall within the Brent safe harbor, and an internal attorney, without the assistance of outside counsel, will be able to make a determination in less than one hour. Based upon data from SIFMA's *Management & Professional Earnings in the Securities Industry 2011* (modified by CFTC staff to account for an 1800-hour-work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead), staff estimates that the average national hourly rate for an internal attorney is $378. If an agreement, contract, or transaction is more complex, the CFTC estimates the analysis will require approximately 20 hours of in-house counsel time and 30 hours of outside counsel time. The CFTC estimates the costs for outside legal services to be $400 per hour. Accordingly, on the high end of the range the CFTC estimates the cost to be $19,560 ($7,560 (based on 20 hours of in-house counsel time × $378) + $12,000 (based on 30 hours of outside counsel × $400) which is then rounded to two significant digits to $20,000.

[1150] If contracts are being used for speculative purposes they are probably swaps and should be subject regulation under Title VII.

[1151] *See* BGA Letter; COPE Letter; ETA Letter; FERC Staff Letter; and Just Energy Letter.

Some commenters[1152] argued that physical options should be considered forward contracts excluded from the definition of a swap, because increased regulation would cause harm to physical commodity markets without providing significant benefits. The statutory definition of ''swap'' provides that options—including physical options—are swaps. Accordingly, the CFTC may not exclude such options from the swap definition. Further, treating physical options as forward contracts would be inconsistent with longstanding CFTC precedent. Nonetheless, the CFTC has provided relief using its plenary authority under CEA Section 4c(b)[1153] over commodity options through the trade option exemption. While certain capacity contracts on RTOs and ISOs and certain contracts entered into by section 201(f) entities may be considered options and therefore would be swaps, regulation of these contracts may be addressed through the public interest waiver process in CEA section 4(c)(6).

Several commenters[1154] argued that renewable energy credits should not be swaps; rather, renewable energy credits should be considered nonfinancial commodities eligible for the forward exclusion from the swap definition. They asserted that swap regulations would raise transaction costs making it more difficult and expensive to support renewable energy. The CFTC is clarifying that renewable energy credits are nonfinancial commodities and that transactions therein are eligible for the forward exclusion if they satisfy the terms thereof. So if these transactions meet the forward exclusion, they will bear no increased costs.

A commenter[1155] requested that tolling contracts be considered forwards and not swaps, seeking to avoid unnecessary cost of regulatory uncertainty and unintended conflict between the CFTC and other regulators. The CFTC has not provided blanket interpretations regarding particular products in the rulemaking, but has provided an interpretation regarding the forward contract exclusions provided above in section II.B.2. To the extent a commenter still is uncertain about the treatment of a specific type of transaction, the commenter may request an interpretation from the CFTC.

Another commenter argued more generally that any embedded option (for example, price, quantity, delivery point, delivery date, contract term) that does not permit a unilateral election of financial settlement based upon the value change in an underlying cash market should not render the contract a swap.[1156] While the commenter's approach with respect to ''any'' embedded option may result in lower costs for market participants because more contracts likely would be excluded as forwards from the swap definition and thus not be subject to regulation under the Dodd-Frank Act, such an expansive approach may inappropriately classify contracts as forwards. The CFTC is providing an interpretation with respect to forwards with embedded volumetric options to address commenters' concerns. The CFTC is also explaining its position above regarding price optionality, optionality with respect to delivery points and delivery dates specifically in response to the commenter's letter, and optionality as to certain contract terms (such as evergreen and renewal provisions) to address particular concerns raised by commenters.

Another commenter suggested that an option to purchase or sell a physical commodity, whether embedded in a forward contract or stand alone, should either (i) fall within the statutory forward exclusion from the swap definition, or (ii) alternatively, if deemed by the CFTC to be a swap, should be exempt from the swap definition pursuant to a modified trade option exemption pursuant to CEA Section 4c(b).[1157] Although this proposal may on its face appear to be simpler than the CFTC's, it is substantively similar to the one the CFTC is adopting. The CFTC has modified the proposed interpretive guidance regarding forwards with embedded options as discussed in section II.B.2.(b)(ii) above; contracts with embedded options that are swaps under the final interpretation may nevertheless qualify for the modified trade option exemption recently adopted by the CFTC.[1158] The CFTC is not adopting an approach that forwards with any type of embedded option should fall within the statutory forward exclusion from the swap definition. Such an approach would be overbroad because it would exclude contracts that are not appropriately classified as forwards. The commenter also requested that trade option exemptions be granted for physical commodities. The costs and benefits of the trade option exemption are addressed in that rulemaking.

Another commenter urged the CFTC to broadly exempt commercial forward contracting from swap regulation by generally excluding from the swap definition any forward contract with embedded optionality between end users ''whose primary purpose is consistent with that of an 'end user', and in which any embedded option is directly related to 'end use.' ''[1159]

While this alternative may appear to be less costly than the CFTC's interpretation, its vagueness may create significant legal uncertainty about the scope of the forward exclusion, which may increase costs on market participants. Even if this approach does represent a lower cost alternative, however, it is overbroad and likely would result in the inappropriate classification of transactions as forward contracts, and thus would not achieve the CFTC's objective of appropriately classifying transactions that should qualify for the forward exclusions.

Another commenter believed that the CFTC's ''facts and circumstances'' approach to forwards with embedded options does not provide the legal certainty required by nonfinancial entities engaging in commercial contracts in the normal course of business.[1160] The commenter further argued that many option-like contract terms could be determined to ''target the delivery term'' under a facts and circumstances analysis. Accordingly, the commenter believed that the CFTC should provide in its rules that an embedded option or embedded optionality will not result in a nonfinancial forward being a swap

[1152] *See* Just Energy Letter; NEMA Letter; NGSA/NCGA Letter; ONEOK Letter; and WGCEF Letter.

[1153] 7 U.S.C. 6c(b).

[1154] *See* 3Degrees Letter; AWEA Letter; CERP Letter; EMA Letter; GreenX Letter; PMAA/NEFI Letter; REMA Letter; and WGCEF Letter.

[1155] *See* California Utilities Letter.

[1156] *See* COPE Letter, Appendix.

[1157] *See* WGCEF Letter; 7 U.S.C. 6c(b).

[1158] *See Commodity Options,* 77 FR 25320, April 27, 2012. 17 CFR 32.3. Encana Marketing (USA) Inc. (''Encana'') believes that the guidance on forwards with embedded options should include embedded physical delivery options because it asserts that many of the contracts currently used by participants in the wholesale natural gas market contain an option for the physical delivery of natural gas. *See* Encana Letter. To the extent that Encana's comment goes beyond volumetric optionality, commodity options are discussed above in section II.B.2.(b)(i).

[1159] *See* NMPF Letter.

[1160] *See* ETA Letter at 19 n. 47. Similarly, COPE comments that a nonfinancial commodity forward contract that, ''by its terms,'' is intended to settle physically should be permitted to contain optionality without being transformed into a swap unless such optionality negates the physical settlement element of the contract. That is, if one party can exercise an option to settle the contract financially based upon the value change in an underlying cash market, then the intent for physical settlement is not contained in ''the four corners of the contract'' and may render the contract a swap. COPE Letter. While COPE's approach may impose less costs on market participants (as more transactions likely would qualify for the forward exclusion, as discussed in section II.B.2.(b)(ii), above, the CFTC has eschewed approaches to the forward exclusion that rely on the ''four corners of the contract,'' which can provide a roadmap to evasion of statutory requirements.

unless: (1) Delivery is optional; (2) financial settlement is allowed; and (3) transfer and trading of the option separately from the forward is permitted.[1161]

The CFTC has long applied a facts and circumstances approach to the forward exclusion, including with respect to forwards with embedded options, an approach with which market participants are familiar. That approach balances the need for legal certainty against protecting market participants, market integrity and the risk of providing opportunities for evasion.[1162] By contrast, the commenter's bright-line approach may be simpler to apply, but could undermine market integrity and creates greater evasion opportunities. Moreover, the CFTC's additional interpretation noted above, including clarification about the meaning of the phrase ''target the delivery term,'' and forwards with embedded volumetric optionality, provides enhanced legal certainty in response to the commenter's concerns, which should mitigate the costs of the CFTC's approach to market participants.[1163]

Another commenter [1164] stated its view that the full costs of applying the Dodd-Frank regulatory apparatus to physical energy transactions, or of energy companies being forced to abandon full-requirements bilateral contracting will significantly increase the costs to be paid by U.S. consumers. The CFTC is sensitive to these concerns. The CFTC is providing relief for full-requirements contracts so long as they satisfy the conditions set forth in the interpretation.

The CFTC is also providing relief for other types of physical energy contracts that may qualify for the forward exclusions. Separately, the CFTC has provided relief for trade options in another rulemaking.[1165]

5. Loan Participations

In the Proposing Release, the Commissions proposed guidance that they do not interpret the swap and security-based swap definitions to include loan participations in which: (i) The purchaser is acquiring a current or future direct or indirect ownership interest in the related loan; and (ii) the loan participations are ''true participations'' (the participant acquires a beneficial ownership interest in the underlying loans). One commenter expressed concern with the second prong of the proposed guidance. Specifically, the commenter said that the ''true participation'' requirement may result in the improper classification of loan participations as swaps, because LMA-style loan participations may not qualify. Moreover, because of legal uncertainty associated with the ''true participation'' terminology derived from U.S. bankruptcy law, LSTA-style loan participations may be subject to improper classification as well. The commenter proposed an alternative test described in section II.B.3., above.

The Commissions largely are adopting the recommendation from the commenter regarding the Commissions' proposed guidance concerning loan participations as not swaps or security-based swaps, with certain modifications. This reduces costs for market participants because the Commissions' test for loan participations from the proposal included a ''true participation'' requirement that commenters suggested is subject to legal uncertainty. Benefits of the rule include enhanced legal certainty that loan participations that meet the requirements of the interpretation are not swaps, which should facilitate loan participation market activity.

6. Interpretation Regarding Commercial/Consumer Transactions

The Commissions are stating that certain customary consumer and commercial transactions that have not previously been considered swaps or security-based swaps do not fall within the statutory definitions of those terms. Specifically with regard to consumer transactions, the Commissions are adopting as proposed the interpretation that certain transactions entered into by consumers (natural persons) as principals or their agents primarily for personal, family or household purposes would not be considered swaps or security-based swaps. The Commissions have added to the list of consumer transactions certain residential fuel storage contracts; service contracts; consumer options to buy, sell or lease real or personal property; and certain consumer guarantees of loans (credit cards, automobile, and mortgage). The Commissions have also clarified that consumer transactions used to purchase nonfinancial energy commodities are not swaps or security-based swaps. With respect to commercial transactions, the Commissions are adopting as proposed the interpretation that certain commercial transactions involving customary business arrangements (whether or not involving a for-profit entity) would not be considered swaps or security-based swaps. The Commissions also are clarifying that commercial loans by the Federal Home Loan Banks and Farm Credit Institutions are not swaps. Finally, the Commissions are explaining the factors characteristic of consumer and commercial transactions that the Commissions will consider in determining whether other consumer and commercial transactions that are not specifically listed in the interpretation should be considered swaps or security-based swaps.

(a) Costs

The CFTC believes that the forgoing interpretation should mitigate costs because it increases legal certainty that specific customary consumer and commercial transactions are not swaps or security-based swaps subject to Dodd-Frank regulation. As a result of this interpretation, consumers and industry participants will not have to seek legal advice regarding whether these transactions are swaps or security-based swaps. The interpretation regarding commercial loans made by the Federal Home Loan Banks and Farm Credit Institutions also reduces costs by not subjecting these transactions to additional Dodd-Frank Act regulation. To the extent a customary consumer or commercial transaction is not included in the interpretation, consumers and market participants may incur costs in seeking an interpretation from the Commissions regarding the status of their transactions or an opinion of counsel. However, the CFTC has emphasized that the lists are not exclusive, and has provided the factors it will consider for determining whether other consumer and commercial transactions that are not specifically listed in the interpretation should be considered swaps or security-based swaps, which should assist consumers and market participants in deciding whether to seek an interpretation and thus mitigate these costs.

(b) Benefits

The foregoing interpretation provides increased legal certainty benefits for market participants and should ensure that customary consumer and commercial transactions, which have never been considered swaps or security-based swaps, will not be subject to Dodd-Frank Act regulation, and may facilitate consumer and

[1161] *See* ETA Letter.

[1162] *See also* NCFC Letter (supporting the CFTC's guidance because it provides legal certainty).

[1163] *See also Commodity Options,* 77 FR 25320, 25324 n. 25, April 27, 2012 (discussing the CFTC's conclusion that an ''option[] to redeem'' under the USDA Commodity Credit Corporation's marketing loan program constitutes a cotton producer's contractual right to repay its marketing loan and ''redeem'' the collateral (cotton) to sell in the open market).

[1164] *See* IECA II Letter.

[1165] *See Commodity Options,* 77 FR 25320, April 27, 2012.

commercial activity. As discussed above, the interpretation regarding the factors that the Commissions will consider in determining whether transactions that are not listed in the interpretation are swaps or security-based swaps should assist market participants in determining whether to seek an interpretation regarding such transactions. Therefore, this interpretation helps to mitigate costs of legal uncertainty.

(c) Comments and Consideration of Alternatives

Several commenters believed that the proposed interpretive guidance regarding consumer/commercial transactions does not provide sufficient legal certainty and request that the Commissions codify such guidance in regulations in order to provide greater legal certainty, which may mitigate costs.[1166] The Commissions decline to codify the interpretation into rule text. The interpretation is intended to provide guidance to assist consumers and commercial and non-profit entities in evaluating whether certain arrangements that they enter into will be regulated as swaps or security-based swaps. The interpretation is intended to allow the flexibility necessary, including the consideration of the applicable facts and circumstances by the Commissions, in evaluating consumer and commercial arrangements to ascertain whether they may be swaps or security-based swaps. The representative characteristics and factors taken together are indicators that a consumer or commercial arrangement is not a swap or security-based swap, and the Commissions have provided specific examples demonstrating how these characteristics and factors apply to some common types of consumer and commercial arrangements. However, as the interpretation is not intended to be a bright-line test for determining whether a particular consumer or commercial arrangement is a swap or security-based swap, if the particular arrangement does not meet all of the identified characteristics and factors, the arrangement will be evaluated based on its particular facts and circumstances. Also, the courts may rely on the interpretation and as such, the CFTC does not believe that the adoption of rule text as opposed to an interpretation will mitigate costs associated with perceived legal uncertainty.[1167]

A commenter[1168] asserted that Federal courts will have to hear more disputes, because proposed CFTC jurisdiction would pre-empt significant aspects of state and Federal law concerning the purchase and sale of goods and services. This rulemaking includes safe-harbors from the definition of a swap for customary consumer and commercial transactions. The Commissions have expanded the list of consumer transactions that are excluded from the swap definition. While it may be possible that Federal courts will nevertheless hear more disputes, that would be a result of the statutory swap definition and not from the interpretation being adopted by the Commissions (which should reduce the number of such disputes).

Another commenter[1169] agreed with the general factors proposed for identifying agreements, contracts, or transactions that are not swaps, but requested additional clarity with respect to particular transactions. Specifically, the commenter requested that commercial loans and financing facilities with embedded interest rate options should not be considered swaps. To clarify, interest rate options are swaps. As discussed in section II.B.3. above, plain vanilla interest rate options embedded in a loan, such as rate locks, rate caps and rate collars, are not swaps. If a product is more complex, it may be appropriate for the CFTC to consider it in response to a specific request for interpretation.

7. Residential Exchange Program (''REP'')

The REP[1170] was established by Congress ''[t]o extend the benefits of low cost Federal System hydro power to residential and small farm electric power consumers throughout the Pacific Northwest Region.''[1171] A commenter requests that the CFTC further define the term ''swap'' to exclude consumer benefits under the Pacific Northwest Electric Power Planning and Conservation Act of 1980 (''Northwest Power Act'')[1172] and transactions under the REP[1173] to allow a subsidy to continue to be received by residential and small farm utilities.

The Commissions do not consider the REP transactions described by the commenter to be swaps or security-based swaps. Consequently, this rulemaking clarifies that Dodd-Frank regulatory costs will not be imposed on REPs and allows the subsidy to continue to be provided to residential and small farm utilities.

8. Costs and Benefits of Rule Regarding Foreign Exchange Products and Forward Rate Agreements

CFTC rule 1.3(xxx)(2) under the CEA explicitly defines the term ''swap'' to include an agreement, contract, or transaction that is a cross-currency swap, currency option, foreign currency option, foreign exchange option, foreign exchange rate option, foreign exchange forward, foreign exchange swap, forward rate agreement, and non-deliverable forward involving foreign exchange, unless such agreement, contract, or transaction is otherwise excluded by section 1a(47)(B) of the CEA. Rule 1.3(xxx)(3) provides that: (i) A foreign exchange forward or a foreign exchange swap shall not be considered a swap if the Secretary of the Treasury makes the determination described in CEA section 1a(47)(E)(i); and (ii) notwithstanding any such determination, certain provisions of the CEA will apply to such a foreign exchange forward or foreign exchange swap (specifically, the reporting requirements in section 4r of the CEA[1174] and regulations thereunder and, in the case of a swap dealer or major swap participant that is a party to a foreign exchange swap or foreign exchange forward, the business conduct standards in section 4s of the CEA[1175] and regulations thereunder). Rule 1.3(xxx)(3) further clarifies that a currency swap, cross-currency swap, currency option, foreign currency option, foreign exchange option, foreign exchange rate option, or non-deliverable forward involving foreign exchange is not a foreign exchange forward or foreign exchange swap subject to a determination by the Secretary of the Treasury as described in the preamble.

The Commissions are also clarifying that a bona fide foreign exchange spot transaction, *i.e.,* a foreign exchange transaction that is settled on the customary timeline[1176] of the relevant

[1166] *See* ETA Letter; ICEA Letter; and Just Energy Letter.

[1167] The additional research costs associated with an interpretation as opposed to codification in the Code of Federal Regulations will be small, because the CFTC has placed this interpretation, and all other products interpretations, in this adopting release for the convenience of practitioners.

[1168] *See* IECA Letter.

[1169] *See* FCC Letter.

[1170] The BPA refers to the implementation of Section 5(c) of the Northwest Power Act, 16 U.S.C. 839c(c), as the ''Residential Exchange Program.''

[1171] *Id.* at 3.

[1172] 16 U.S.C. Chapter 12H.

[1173] *See* Bonneville Letter.

[1174] 7 U.S.C. 6r.

[1175] 7 U.S.C. 6s.

[1176] As discussed in section II.C.2.(c) above, in general, a foreign exchange transaction will be considered a bona fide spot transaction if it settles via an actual delivery of the relevant currencies within two business days. However a foreign exchange transaction with a longer settlement

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spot market, is not within the definition of the term ''swap.'' In addition, the interpretation clarifies that retail foreign currency options described in CEA Section 2(c)(2)(B) are not swaps. This clarification allows market participants to engage in these transactions with non-ECP customers who would otherwise have to engage in on-exchange transactions.

(a) Costs

In complying with rule 1.3(xxx)(2), a market participant will need to ascertain whether an agreement, contract, or transaction is a swap under the definition. This analysis will have to be performed upon entering into the agreement, contract, or transaction. However, any costs associated with this analysis are expected to be less than the costs of doing the same analysis absent the rule, particularly given potential confusion in the event of a determination by the Secretary of the Treasury that foreign exchange forwards and/or foreign exchange swaps not be considered swaps. To the extent that rule 1.3(xxx)(2) improperly includes certain types of agreements, contracts, and transactions in the swap definition, and therefore the imposition of additional requirements and obligations, these requirements and obligations could lead to costs for market participants entering into such agreements, contracts, or transactions. However, the CFTC has carefully considered each of the agreements, contracts and transactions described above that it is further defining as swaps under rule 1.3(xxx)(2) and believe that they are appropriately classified as such, subject to the statutory exclusions.

(b) Benefits

Because the statutory definition of the term ''swap'' includes a process by which the Secretary of the Treasury may determine that certain agreements, contracts, and transactions that meet the statutory definition of a ''foreign exchange forward'' or ''foreign exchange swap,'' respectively,[1177] shall not be considered swaps, the CFTC is concerned that application of the definition, without further clarification, may cause uncertainty about whether, if the Secretary of the Treasury makes such a determination, certain agreements, contracts, or transactions would be swaps. Rule 1.3(xxx)(3) increases legal certainty that a currency swap, cross-currency swap, currency option, foreign currency option, foreign exchange option, foreign exchange rate option, or non-deliverable forward involving foreign exchange, is a swap (unless it is otherwise excluded by the statutory definition of the term ''swap''). The rule also increases legal certainty that reporting requirements, and business conduct requirements for swap dealers and major swap participants, are applicable to foreign exchange forwards and foreign exchange swaps even if the Secretary of the Treasury determines that they should not be considered swaps, and is consistent with the statute. The CFTC also is concerned that confusion could be generated by the ''forward'' label of non-deliverable forwards involving foreign exchange, and forward rate agreements. Rule 1.3(xxx)(2) increases legal certainty that these types of agreements, contracts, and transactions are swaps.

Providing such a rule to market participants to determine whether certain types of agreements, contracts, or transactions are swaps alleviates additional costs to persons of inquiring with the Commissions, or obtaining an opinion of counsel, about whether such agreements, contracts, or transactions are swaps. In addition, such a rule regarding the requirements that apply to foreign exchange forwards and foreign exchange swaps that are subject to a determination by the Secretary of the Treasury similarly alleviates additional costs to persons of inquiring with the Commissions, or obtaining an opinion of counsel, to determine the requirements that are applicable to such foreign exchange forwards and foreign exchange swaps. As with the other rules comprising the Product Definitions, enhanced legal certainty will help market participants to engage in sound risk management practices, which will benefit both market participants and the public.

The interpretation concerning bona fide foreign exchange spot transactions should result in the appropriate classification of such transactions as not subject to Dodd-Frank Act regulation. The interpretation regarding retail foreign currency options subject to CEA Section 2(c)(2)(B) as not swaps provides clarity and reduces costs for market participants, who could not offer the product to non-ECP customers off-exchange in accordance with the provisions of CEA Section 2(c)(2)(B).

In addition, including certain FX transactions, forward rate agreements and certain other transactions in the swap definition protects the public by explicitly subjecting these transactions to Dodd-Frank regulation.

(c) Comments and Consideration of Alternatives

The CFTC requested comment as to the costs and benefits of proposed rules 1.3(xxx)(2) and (3). As discussed in the preamble, some commenters[1178] argued that non-deliverable foreign exchange forward transactions should be regulated as foreign exchange forwards, because regulating them as swaps would increase the cost of hedging foreign currency exposures in emerging markets.

Non-deliverable forward transactions do not satisfy the statutory definition of foreign exchange forwards, as explained in section II.C.2.(b)(ii), *supra.* They do satisfy the swap definition, however. Accordingly, the CFTC lacks discretion not to define them as swaps.

9. Costs and Benefits of Rule Regarding Title VII Instruments on Futures on Foreign Sovereign Debt Under Exchange Act Rule 3a12–8

Rule 1.3(bbbb) provides that a Title VII instrument that is based on or references a qualifying foreign futures contract on the debt securities of one or more of the 21 enumerated foreign governments is a swap and not a security-based swap if the Title VII instrument satisfies the following conditions:

- The futures contract on which the Title VII instrument is based or that is referenced must be a qualifying foreign futures contract (as defined in rule 3a12–8) on the debt securities of any one or more of the 21 enumerated foreign governments that satisfies the conditions of rule 3a12–8;
- The Title VII instrument is traded on or through a board of trade (as defined in section 1a(6) of the CEA);
- The debt securities on which the qualifying foreign futures contract is based or referenced and any security used to determine the cash settlement amount pursuant to the fourth condition below are not registered under the Securities Act or the subject of any American depositary receipt registered under the Securities Act;
- The Title VII instrument may only be cash settled; and
- The Title VII instrument is not entered into by the issuer of the securities upon which the qualifying

period concluding with the actual delivery of the relevant currencies may be considered a bona fide spot transaction depending on the customary timeline of the relevant market. In particular, a foreign exchange transaction that is entered into solely to effect the purchase or sale of a foreign security is a bona fide spot transaction where certain conditions are met.

[1177] CEA section 1a(24), 7 U.S.C. 1a(24)(definition of a ''foreign exchange forward''); CEA section 1a(25), 7 U.S.C. 1a(25)(definition of a ''foreign exchange swap'').

[1178] *See* CEIBA Letter; Covington Letter; ISDA Letter; and MFA Letter.

foreign futures contract is based or referenced (including any security used to determine the cash payment due on settlement of such Title VII instrument), an affiliate (as defined in the Securities Act and the rules and regulations thereunder) [1179] of the issuer, or an underwriter with respect to such securities.

Only those Title VII instruments that are based on qualifying foreign futures contracts on the debt securities of the 21 enumerated foreign governments and that satisfy these five conditions will be swaps. The final rules are intended to provide consistent treatment (other than with respect to method of settlement) of qualifying foreign futures contracts and Title VII instruments based on qualifying foreign futures contracts on the debt securities of the 21 enumerated foreign governments.[1180] The Commissions understand that many of the qualifying foreign futures contracts on the debt securities of the 21 enumerated foreign governments trade with substantial volume through foreign trading venues under the conditions set forth in rule 3a12–8 [1181] and permitting swaps on such futures contracts subject to similar conditions would not raise concerns that such swaps could be used to circumvent the conditions of rule 3a12–8 and the Federal securities laws concerns that such conditions are intended to protect.[1182] Further, providing consistent treatment for qualifying foreign futures contracts on the debt securities of the 21 enumerated foreign governments and Title VII instruments based on futures contracts on the debt securities of the 21 enumerated foreign governments will allow trading of these instruments through DCMs on which such futures are listed. There may also be cross-margining benefits when different contracts are margined at the same derivatives clearing organization, such as may be the case if a swap on a futures contract and a corresponding futures contract trade on the same DCM. This cross-margining would enhance sound risk management practices.

The CFTC believes that the assessment cost associated with determining whether a swap on certain futures contracts on foreign government securities constitute a swap or security-based swap under rule 1.3(bbbb) should be minimal. Currently, qualifying foreign futures contracts on debt securities of the 21 enumerated foreign governments are traded on exchanges or boards of trade. Market participants may look at the exchange or board of trade listing to determine what they are. Therefore, the assessment, in accordance with the rule, would primarily focus on whether such swap itself is traded on or through a board of trade; whether the swap is cash-settled; whether the futures is traded on a board of trade; whether any security used to determine the cash settlement amount are not registered under the Securities Act or the subject of any American depositary receipt registered under the Securities Act; and whether the swap is entered into by the foreign government issuing the debt securities upon which the qualifying futures contract is based or referenced, an affiliate of such foreign government or an underwriter of such foreign government securities. All of these determinations may be readily and quickly ascertained by the parties entering into the agreement, contract, or transaction. Therefore, the assessment costs associated with rule 1.3(bbbb) should be nominal because parties should be able to make assessments in less than an hour.

10. Costs and Benefits of Rules and Interpretations Regarding Title VII Instruments Where the Underlying Reference Is a Security Index

Historically, the market for index CDS did not divide along jurisdictional divisions between the CFTC and SEC; [1183] however, the Dodd-Frank Act created a jurisdictional divide between swaps and security-based swaps. Under the jurisdictional division, the CFTC has jurisdiction over Title VII instruments based on non-narrow-based security indexes while the SEC has jurisdiction over Title VII instruments based on narrow-based security indexes. The SEC also has jurisdiction over Title VII instruments based on a single security or loan, and certain events related to an issuer of securities or issuers of securities in a narrow-based security index.

Rule 1.3(yyy)(1) under the CEA provides that, for purposes of the security-based swap definition, the term ''narrow-based security index'' would have the same meaning as the statutory definition set forth in CEA section 1a(35), and the rules, regulations, and orders issued by the Commissions relating to such definition. As a result, except where the new rules the Commissions are adopting provide for other treatment, market participants generally will be able to use the Commissions' past guidance in determining whether certain Title VII instruments based on a security index are swaps or security-based swaps.

The Commissions are promulgating additional rules and providing interpretations regarding Title VII instruments based on a security index. The interpretations and additional rules set forth new narrow-based security index criteria with respect to indexes composed of securities, loans, or issuers of securities referenced by an index CDS. The interpretations and rules also address the definition of an ''index'' and the treatment of broad-based security indexes that become narrow-based and narrow-based indexes that become broad-based, including rule provisions regarding tolerance and grace periods for swaps on security indexes that are traded on CFTC-regulated and SEC-regulated trading platforms.

(a) Costs

In complying with the rules and interpretations, a market participant will need to ascertain whether a Title VII instrument is a swap or a security-based swap according to the criteria set forth in the definitions of the terms ''issuers of securities in a narrow-based security index'' and ''narrow-based security index'' as used in the security-based swap definition. This analysis will have to be performed prior to the execution of, but no later than an offer to enter into, a Title VII instrument, and when the material terms of a Title VII instrument are amended or modified, to ensure compliance with rules 1.3(yyy), 1.3(zzz) or 1.3(aaaa).

However, any such costs are expected to be less than the costs of doing the same analysis absent the rules, which the CFTC believes would be more difficult and lead to greater uncertainty. In particular, rule 1.3(yyy) allows market participants to reduce the costs of determining whether a Title VII instrument based on a security index, other than an index CDS, is a swap or security-based swap by clarifying that they will be able to use the

[1179] *See, e.g.,* rule 405 under the Securities Act, 17 CFR 230.405.

[1180] The Commissions note that the final rules provide consistent treatment of qualifying foreign futures contracts on the debt securities of the 21 enumerated foreign governments and Title VII instruments based on qualifying foreign futures contracts on the debt securities of the 21 enumerated foreign governments unless the Title VII instrument is entered into by the issuer of the securities upon which the qualifying foreign futures contract is based or referenced (including any security used to determine the cash payment due on settlement of such Title VII instrument), an affiliate of the issuer, or an underwriter with respect to such securities.

[1181] *See supra* note 716 and accompanying text.

[1182] *See supra* note 712 and accompanying text.

[1183] For example, index CDS and single name CDS have typically been traded on the same trading desk, and customers have typically held their positions in a single account. The CFTC notes that the jurisdictional divide will impact among other things portfolio margining.

Commissions' past guidance regarding narrow-based security index in making that determination. In the context of index CDS, the Commissions' past guidance regarding narrow-based security indexes does not establish criteria on whether index CDS is a swap or a security-based swap. Accordingly, without further explanation, it would not be clear on which side of the CFTC/SEC jurisdictional divide index CDS would fall. CFTC rules 1.3(zzz) and 1.3(aaaa) allow market participants to reduce the costs of determining whether an index CDS is a swap or a security-based swap by providing a test with objective criteria that is similar to a test with which they already are familiar in the security futures context, yet tailored to index CDS in particular.

Additionally, absent rule 1.3(yyy), which applies the tolerance period rules, if a security index underlying a Title VII instrument traded on a trading platform migrated from being broad-based to being narrow-based, market participants may suffer disruption of their ability to offset or enter into new Title VII instruments, and incur additional costs as a result.

DCMs and SEFs will incur costs in assessing whether an index underlying a Title VII instrument is broad-based, in monitoring the index for migration from broad to narrow-based. There will also be other costs resulting from the migration such as delisting costs. Such migration costs are mitigated by the tolerance period of 45 business days over three calendar months which should reduce the incidence of migration. Similarly, the three-month grace period following an indexes failure of the tolerance period should mitigate delisting and other costs. There will be a range of assessment costs depending on how customized the index underlying an index CDS is.[1184]

In determining whether a Title VII instrument is a swap or a security-based swap, market participants will need to apply the criteria found in CFTC rules 1.3(yyy), 1.3(zzz) and 1.3(aaaa). Market participants may conduct such analysis in-house or employ outside third-party service providers to conduct such analysis. The costs associated with obtaining such outside professional services would vary depending on the relevant facts and circumstances, particularly the composition of the index. The CFTC believes, however, that $20,000 represents a reasonable estimate of the upper end of the range of the costs of obtaining the services of outside professional in undertaking the analysis.[1185] The CFTC believes that some index CDS based on an established index would not need the assistance of outside counsel, and a determination can be made in less than one hour. If an agreement, contract, or transaction is more complex, the CFTC estimates the analysis will require up to approximately 20 hours of in-house counsel time and 30 hours of outside counsel time.

(b) Benefits

Rules 1.3(zzz) and 1.3(aaaa) clarify the treatment of an index CDS as either a swap or a security-based swap by setting forth objective criteria for meeting the definition of the terms ''issuers of securities in a narrow-based security index'' and ''narrow-based security index,'' respectively. These objective rules alleviate additional costs to persons trading index CDS of inquiring with the Commissions, or obtaining an opinion of counsel, to make complex determinations regarding whether an index is broad- or narrow-based, and whether an index CDS based on such an underlying index is a swap or security-based swap.

Also, rules 1.3(zzz) and 1.3(aaaa) should reduce the potential for market participants to use an index CDS to evade regulations, because they set objective requirements relating to the concentration of the notional amount allocated to each reference entity or security included in the index, as well as the eligibility conditions for reference entities and securities. Finally, these rules benefit the public by requiring that the providers of index CDS make publicly available sufficient information regarding the reference entities in an index underlying the index CDS. By requiring that such information be made publicly available, rules 1.3(zzz) and 1.3(aaaa) seek to assure the transparency of the index components that will be beneficial to market participants who trade such instruments and to the public.

Separately, rule 1.3(yyy) addresses exchange-traded swaps based on security indexes where the underlying index migrates from broad-based to narrow-based. The rule includes provisions that many market participants are familiar with from security futures trading. The CFTC believes that by using a familiar regulatory scheme, market participants will be able to more readily understand the rule as compared to a wholly new regulatory scheme. Also, the use of a ''tolerance period'' for swaps on security indexes that migrate from broad-based to narrow-based also creates greater clarity by establishing a 45-day timeframe (and subsequent grace period) on which market participants may rely. This tolerance period results in cost savings when compared to the alternative scenario where no tolerance period is provided and a migration of an index from broad-based to narrow-based would result in potential impediments to the ability of market participants to offset their swap positions.

Finally, the Commissions are stating that the determination of whether a Title VII instrument is a swap, a security-based swap, or both (*i.e.,* a mixed swap), is made prior to the execution of, but no later than an offer to enter into, the Title VII instrument. If the security index underlying a Title VII instrument migrates from being broad-based to being narrow-based, or vice versa, during the life of a Title VII instrument, the characterization of that Title VII instrument would not change from its initial characterization regardless of whether the Title VII instrument was entered into bilaterally or was executed through a trade on or subject to the rules of a DCM, SEF, FBOT, security-based SEF, or NSE. Absent this interpretation, market participants potentially would need to expend additional resources to continually monitor their swaps to see if the indexes on which they are based have migrated from broad-based to narrow-based. Since the rule provides that the initial determination prevails regardless of whether the underlying index migrates from broad-based to narrow-based, market participants do

[1184] Additionally, the number of components in an index may impact the assessment costs based on having to determine whether the indexes components satisfy the various tests within the rule.

[1185] The average cost incurred by market participants in connection with assessing whether an agreement, contract, or transaction is a swap or security-based swap is based upon the estimated amount of time that staff believes will be required for both in-house counsel and outside counsel to apply the definition. The staff estimates that costs associated with determining whether an agreement, contract, or transaction is a swap or security-based swap will range up to $20,000 after rounding to two significant digits. Staff estimates that some index CDS will be standard and an internal attorney, without the assistance of outside counsel will be able to make a determination in less than one hour. Based upon data from SIFMA's *Management & Professional Earnings in the Securities Industry 2011* (modified by CFTC staff to account for an 1800-hour-work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead), staff estimates that the average national hourly rate for an internal attorney is $378. If an agreement, contract, or transaction is more complex, the CFTC estimates the analysis will require approximately 20 hours of in-house counsel time and 30 hours of outside counsel time. The CFTC estimates the costs for outside legal services to be $400 per hour. Accordingly, on the high end of the range the CFTC estimates the cost to be $19,560 ($7,560 (based on 20 hours of in-house counsel time × $378) + $12,000 (based on 30 hours of outside counsel x $400) which is then rounded to two significant digits to $20,000.

not need to expend these monitoring costs.

(c) Comments and Consideration of Alternatives

A commenter asserted that the regulatory complexity for index CDS is not worth the high compliance costs.[1186] The statute provides that the CFTC has jurisdiction over swaps on broad-based security indices, and the SEC has jurisdiction over swaps on narrow-based security indices, single securities or loans, and certain events related to the issuers of securities. The Commissions need to establish criteria for index CDS, because their past guidance regarding narrow-based security indices does not address them. Without further explanation, it would not be clear on which side of the CFTC/SEC jurisdictional division certain products would fall. The number and concentration limits are derived from criteria that Congress has imposed in the security futures context. The public information availability test does not require that index constituents satisfy all of its requirements; rather, the constituents may satisfy any one of them for the index to be broad-based, and there is a de minimis level for noncompliance.

Another commenter[1187] stated that the proposed interpretation needs to be clearer on loan-based swap transactions and that it is costly to determine whether a particular set of loans or borrowers meets the Commissions' public information availability requirement. The Commissions are clarifying that a TRS on two or more loans is not subject to the broad-based/narrow-based jurisdictional divide, but is a swap under the CFTC's jurisdiction. With respect to loan index CDS, the Commissions believe that the index CDS rules, including the public information availability requirement, should apply to indexes of loans underlying index CDS. However, the Commissions are amending the proposed rules to include loans within the categories of instruments to be aggregated for the total principal amount of debt outstanding threshold of the public information availability requirement, and will aggregate outstanding debt of affiliates for purposes of the test, which the CFTC believes should address the commenter's concerns.

A commenter[1188] pointed out that there may be costs to relist index-based CDS when the index stops being, or becomes, broad-based. Another commenter[1189] believed that the public information availability test will cause indices to switch between narrow-based and broad-based classification, which could result in unnecessary cost, confusion, and market disruption.

The statutory framework requires delisting and relisting. These costs are mitigated by the tolerance period for migration, which may help to prevent frequent migration of indices from broad-based to narrow-based or vice versa. Moreover, it is the case for both on and off-exchange Title VII instruments that the Commissions are stating that the determination of whether a Title VII instrument on a security index is a swap or security-based swap is made prior to execution, but no later than the offer to enter into the instrument, and remains the same throughout the life of the instrument. Accordingly, even if the public information availability test would cause indexes underlying index CDS to migrate as suggested by a commenter, that will not affect the classification of outstanding index CDS entered into prior to such migration. However, if an amendment or change is made to such outstanding index CDS that would cause it to be a new purchase or sale of such index CDS, that could affect the classification of such outstanding index CDS.

A commenter asserted that extending the ''grace period'' from three months to six months would ease any disruption or dislocation associated with the delisting process with respect to an index that has migrated from broad to narrow, or narrow to broad, and that has failed the tolerance period.[1190] The commenter further suggested that where an index CDS migrates, for entities operating both a SEF and a security-based SEF, such entities should be permitted to move the index from one platform to the other simply by providing a notice to the SEC and CFTC.

The Commissions are adopting the proposed rules without modification. As discussed in Section III.G.5(b) above, the Commissions note that the three-month grace period applicable to security futures was mandated by Congress in that context,[1191] and the commenter has provided no data or evidence for its request that the Commissions diverge from that grace period and provide for a longer grace period with respect to swaps and security-based swaps. The Commissions believe that the three-month grace period is similarly appropriate to apply in the context of an index that has migrated to provide sufficient time to execute off-setting positions. With respect to the commenter's other suggestion that entities operating both a SEF and a security-based SEF should be able to move the index from one platform to another where an index CDS migrates simply by filing a notice with the SEC and CFTC, the Commissions do not believe that this proposal is within the scope of this rulemaking.

Many commenters offered alternatives to the various tests in proposed rules 1.3(zzz) and 1.3(aaaa).[1192] As discussed more fully above in Section III.G.3.(b), the Commissions have incorporated many of the suggested alternatives into the final rules and interpretations and rejected, after careful consideration, other suggested alternatives. For example, three commenters requested that the Commissions revise the affiliation definition that applies when calculating the number and concentration criteria to require a majority control affiliation threshold, rather than the 20 percent threshold in the proposed rules.[1193] As discussed in section III.G.3.(b) above, the Commissions are modifying the affiliation definition that applies when calculating the number and concentration criteria in response to commenters to use an affiliation test based on majority ownership. Based on commenters' letters, the Commissions understand that the current standard CDS documentation and the current approach used by certain index providers for index CDS with respect to the inclusion of affiliated entities in the same index use majority ownership rather than 20 percent ownership to determine affiliation. The Commissions are persuaded by commenters that in the case of index CDS only it is more appropriate to use majority ownership because majority-owned entities are more likely to have their economic interests aligned and be viewed by the market as part of a group. The Commissions believe that revising the affiliation definition in this manner for purposes of calculating the number and concentration criteria responds to commenters' concerns that the percentage control threshold may inadvertently include entities that are not viewed as part of a group. Thus, as revised, the affiliation definition will include only those reference entities or issuers included in an index that satisfy

[1186] *See* ISDA Letter.

[1187] *See* LSTA Letter.

[1188] *See* MarketAxess Letter.

[1189] *See* Markit Letter.

[1190] *See* MarketAxess Letter.

[1191] *See* July 2006 Debt Index Rules. The Commissions are not aware of any disruptions caused by the three-month grace period in the context of security futures.

[1192] *See* section III.G.3.(b).

[1193] *See* ISDA Letter; Markit Letter; and SIFMA Letter.

the more than 50 percent (i.e., majority ownership) control threshold.

Due to the high compliance costs resulting from the public information availability test in particular, a commenter [1194] argued that the Commissions should abandon that test. The final rules retain the public information availability test, which does not present significant compliance costs because it does not require that constituents satisfy all of the requirements and permits a de minimis level of noncompliance.

One commenter offered an alternative to the public information availability test based on the volume of trading.[1195] After careful consideration and as described more fully above in section II.G.3.(b), above, the Commissions are not adopting a volume based test either as a replacement or alternative for the public information availability test. A volume based test would not be readily ascertainable with respect to certain underlying components which are not exchange traded or do not satisfy listing standards. The public information availability test allows for more flexibility with respect to the components included in indexes underlying index CDS than a volume-based test. Individual components in an index CDS may not satisfy a volume-based test but could otherwise satisfy one of the criteria of the public information availability test. The public information availability test is similar to the test in the rules for debt security indexes, which, as noted above, apply in the context of Title VII Instruments. The public information availability test, accordingly, provides a consistent set of rules under which index compilers and market participants can analyze the characterization of index CDS.

In the public information availability test, one commenter proposed moving the outstanding debt threshold from $1 billion to $100 million.[1196] As stated above, the CFTC believes that the $1 billion debt threshold, which is the same amount as the outstanding debt threshold in the rules for debt security indexes, is set at the appropriate level to achieve the objective that such entities are likely to have public information available about them.[1197] However, the adopted rules expand on the types of debt that are counted toward the $1 billion debt threshold to include any indebtedness, including loans, so long as such indebtedness in not a revolving credit facility.

In response to a request for comment by the Commissions, two commenters believed that the presence of a third-party index provider would assure that sufficient information is available regarding the index CDS itself, but neither commenter provided an analysis to explain how or whether a third-party index provider would be able to provide information about the underlying securities or issuers of securities in the index.[1198] Accordingly, the Commissions are not adopting this alternative.

A commenter [1199] argued that legal uncertainty would present a burden to market participants absent the Commissions clarifying the status of swaps on shares of exchange traded funds that reference broad-based security indices. However, market participants can request a clarification through the interpretation process established herein by the Commissions.

II. Costs and Benefits of Processes To Determine Whether a Title VII Instrument is a Swap, Security-Based Swap, or Mixed Swap, and To Determine Regulatory Treatment for Mixed Swaps

(a) Costs

Rule 1.8 under the CEA allows persons to submit a request for a joint interpretation from the Commissions regarding whether an agreement, contract or transaction (or a class of agreements, contracts, or transactions) is a swap, security-based swap, or mixed swap. The CFTC estimates the cost of submitting a request for a joint interpretation pursuant to rule 1.8 would be a cost of about $7,700 for internal company or individual time and associated costs of $12,000 for the services of outside professionals.[1200] Once such a joint interpretation is made, however, other market participants that seek to transact in the same agreement, contract, or transaction (or class thereof) would have regulatory clarity about whether it is a swap, security-based swap, or mixed swap, so the CFTC expects the aggregate costs of submitting joint interpretations to decrease over time as joint interpretations are issued and the number of new requests decrease as a result.

Separately, CFTC rule 1.9 under the CEA allows persons to submit a request for a joint order from the Commissions regarding an alternative regulatory treatment for particular mixed swaps. This process applies except with respect to bilateral, uncleared mixed swaps where one of the parties to the mixed swap is dually registered with the CFTC as a swap dealer or major swap participant and with the SEC as a security-based swap dealer or major security-based swap participant. With respect to bilateral uncleared mixed swaps where one of the parties is a dual registrant, the rule provides that such mixed swaps would be subject to the regulatory scheme set forth in rule 1.9 in order to provide clarity as to the regulatory treatment of such mixed swaps.

The CFTC estimates that the cost of submitting a request for a joint order seeking an alternative regulatory treatment for a particular mixed swap would be approximately $31,000.[1201] Absent such a process, though, market participants that desire or intend to enter into such a mixed swap (or class thereof) would be required pursuant to

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[1194] *See* SIFMA Letter.

[1195] *See* Markit Letter.

[1196] *Id.*

[1197] *See supra* part III.G.3(b)(iii); *See Securities Offering Reform,* Release No. 33–8591 (Jul. 19, 2005), 70 FR 44722 (Aug. 3, 2005) (discussing economic analysis involved in determining the $1 billion threshold for non-convertible securities in the context of well-known seasoned issuers).

[1198] *See* ISDA Letter and SIFMA Letter.

[1199] *See* Anon. Letter.

[1200] This estimate is based on information indicating that the average costs associated with preparing and submitting a no-action request to the SEC staff in connection with the identification of whether certain products are securities, which the CFTC believes is a process similar to the process under rule 1.8. The staff estimates that costs associated with such a request will cost approximately $20,000. The CFTC estimates the analysis will require approximately 20 hours of in-house counsel time and 30 hours of outside counsel time. Based upon data from SIFMA's *Management & Professional Earnings in the Securities Industry 2011* (modified by CFTC staff to account for an 1800-hour-work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead), staff estimates that the average national hourly rate for an internal attorney is $378. The CFTC estimates the costs for outside legal services to be $400 per hour. Accordingly, the CFTC estimates the cost to be $20,000 ($7,560 (based on 20 hours of in-house counsel time × $378) + $12,000 (based on 30 hours of outside counsel × $400) rounded to two significant digits to $20,000 to submit a joint request for interpretation.

[1201] This estimate is based on information indicating that the average costs associated with preparing and submitting a no-action request to the SEC staff in connection with the identification of whether certain products are securities, which the CFTC believes is a process similar to the process under rule 3a68–4(c). The staff estimates that costs associated with such a request will cost approximately $31,000. The CFTC estimates the analysis will require approximately 30 hours of in-house counsel time and 50 hours of outside counsel time. Based upon data from SIFMA's *Management & Professional Earnings in the Securities Industry 2011* (modified by CFTC staff to account for an 1800-hour-work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead), staff estimates that the average national hourly rate for an internal attorney is $378. The CFTC estimates the costs for outside legal services to be $400 per hour. Accordingly, the CFTC estimates the cost to be $31,000 ($11,340 (based on 30 hours of in-house counsel time × $378) + $20,000 (based on 50 hours of outside counsel × $400) rounded to two significant digits to submit a joint request for interpretation.

Title VII of the Dodd-Frank Act to comply with all regulatory requirements applicable to both swaps and security-based swaps. The CFTC believes that the cost of such dual regulation would likely be at least as great, if not greater, than the costs of the process set forth in rule 1.9 to request an alternative regulatory treatment for such the mixed swap. The rule regarding bilateral uncleared mixed swaps where at least one party is a dual registrant does not entail any additional costs, and may reduce costs for dual registrants that enter into such mixed swaps by eliminating potentially duplicative or inconsistent regulation.

(b) Benefits

The CFTC believes that the rules that enable market participants to submit requests for joint interpretations regarding the nature of various agreements, contracts, or transactions, and requests for joint orders regarding the regulatory treatment of mixed swaps will help to create a more level playing field (since the joint interpretations and joint orders will be available to all market participants) regarding which agreements, contracts, or transactions constitute swaps, security-based swaps, or mixed swaps, and the regulatory treatment applicable to particular mixed swaps. The joint interpretations and joint orders will be available to all market participants. The availability of such joint interpretations and joint orders regarding the scope of the definitions and the regulatory treatment of mixed swaps will reduce transaction costs and thereby promote the use of Title VII instruments for risk management and other purposes.

The product interpretation process established by the Commissions has a 120-day deadline. This deadline will facilitate new products coming to market relatively quickly. Further, the process holds the Commissions accountable because they will have to state why they are not providing an interpretation when they decline to do so.

(c) Comments and Consideration of Alternatives

A commenter [1202] recommended that the Commissions require that market participants disaggregate mixed swaps and enter into separate simultaneous transactions so that they cannot employ mixed swaps to obscure the underlying substance of transactions.[1203] The Commissions are not adopting any rules or interpretations to require disaggregation of mixed swaps into their separate components, as the Dodd-Frank Act specifically contemplated that there would be mixed swaps comprised of both swaps and security-based swaps. Moreover, the CFTC believes that requiring market participants to disaggregate their agreements, contracts, or transactions into swaps and security-based swaps may limit the freedom of contract or discourage innovation of financial products and potentially increase transaction costs for swap market participants.

12. Costs and Benefits of SBSA Books and Records, and Data, Requirements

CFTC rule 1.7 under the CEA would clarify that there would not be books and records or data requirements regarding SBSAs other than those that would exist for swaps. The rule alleviates any additional books and records or information costs to persons who are required to keep and maintain books and records regarding, or collect and maintain data regarding, SBSAs because the rule does not require such persons to keep or maintain any books and records, or collect and maintain any data, regarding SBSAs that differs from the books, records, and data required regarding swaps.

Specifically, rule 1.7 would require persons registered as SDRs to: i) keep and maintain books and records regarding SBSAs only to the extent that SDRs are required to keep and maintain books and records regarding swaps; and ii) collect and maintain data regarding SBSAs only to the extent that SDRs are required to collect and maintain data regarding swaps. In addition, rule 1.7 would require persons registered as swap dealers or major swap participants to keep and maintain books and records, including daily trading records, regarding SBSAs only to the extent that those persons would be required to keep and maintain books and records regarding swaps.

Because rule 1.7 imposes no requirements with respect to SBSAs other than those that exist for swaps, rule 1.7 would impose no costs other than those that are required with respect to swaps in the absence of rule 1.7. Rule 1.7 provides clarity by establishing uniform requirements regarding books and records, and data collection, requirements for swaps and for SBSAs. No comments were received with respect to Rule 1.7.

13. Costs and Benefits of the Anti-Evasion Rules and Interpretation

The CFTC is exercising the anti-evasion rulemaking authority granted to it by the Dodd-Frank Act. Generally, CFTC rule 1.3(xxx)(6) under the CEA defines as a swap any agreement, contract, or transaction that is willfully structured to evade the provisions of Title VII governing the regulation of swaps. Further, CFTC rule 1.6 under the CEA would prohibit activities conducted outside the United States, including entering into agreements, contracts, and transactions and structuring entities, to willfully evade or attempt to evade any provision of the CEA as enacted by Title VII or the rules and regulations promulgated thereunder.

As opposed to providing a bright-line test, rule 1.3(xxx)(6) would apply to agreements, contracts, and transactions that are willfully structured to evade and rule 1.6 would apply to entering into agreements, contracts, or transactions to evade (or as an attempt to evade) and structuring entities to evade (or as an attempt to evade) subtitle A of Title VII governing the regulation of swaps. Although this test does not provide a bright line, it helps ensure that would-be evaders cannot willfully structure their transactions or entities for the purpose of evading the requirements of subtitle A of Title VII. The CFTC also is explaining some circumstances that may constitute an evasion of the requirements of subtitle A of Title VII, while at the same time preserving the CFTC's ability to determine, on a case-by-case basis, with consideration given to all the facts and circumstances, that other types of transactions or actions constitute an evasion of the requirements of the statute or the regulations promulgated thereunder.

(a) Costs

Market participants may incur costs when deciding whether a particular transaction or entity could be construed as being willfully structured to evade subtitle A of Title VII of the Dodd-Frank Act; however, the rules and related interpretations explain what constitutes evasive conduct, which should serve to mitigate such costs.

(b) Benefits

Absent the proposed anti-evasion rules and related interpretations, price discovery might be impaired because markets would not be informed about those transactions, since through evasion such transactions would not comply with Dodd-Frank Act regulatory requirements. Additionally, certain risks could increase in a manner that the CFTC would not be able to measure accurately. The anti-evasion rules and related interpretations will bring the appropriate scope of transactions and

[1202] *See* Better Markets Letter.

[1203] *Id.*

entities within the regulatory framework established by the Dodd-Frank Act, which will better allow the CFTC to assure transparency and protect the U.S. financial system from certain risks that could go undetected through evasive conduct.

(c) Comments and Consideration of Alternatives

A commenter [1204] asserted that a market participant should be able to enter into a transaction or structure an instrument or entity to avoid higher regulatory burdens and attendant costs as long as the transaction or entity has an overriding business purpose. Another commenter [1205] noted that the CFTC recognized in the Proposing Release that choosing to do a security-based swap over a swap to lessen a regulatory burden does not constitute evasion in itself, but expressed the view that this should not be limited to a choice between structuring a transaction as a swap and security. In this commenter's view, parties must be able to legitimately consider all relevant factors, including the cost and burden of regulation, in making their structuring choices. Another commenter [1206] requested that the CFTC make clear that movements away from swaps towards physical trades that reduce regulatory burdens will not be considered evasion under the final rule. A different commenter [1207] argued that the anti-evasion proposal is overly broad and unnecessarily limits the ability of market participants to choose between legitimate structuring alternatives. Finally, another commenter [1208] believes that the proposed rules will create an ''impossible burden'' on the innocent (non-evading) party.

Activity conducted solely for a legitimate business purpose, absent other indicia of evasion, does not constitute evasion as described in the CFTC's interpretation. The CFTC has clarified that consideration of regulatory burdens, including evidence of regulatory avoidance, is not dispositive of whether there has been evasion or not, but should be considered along with all other relevant facts and circumstances. For example, activities structured as securities instead of swaps and transactions that meet the forward exclusion are not evasion per se. The CFTC has clarified that it will impose appropriate sanctions on the willful evader for violation of the CEA and CFTC regulations and not on non-evading parties.

A commenter suggests that an alternative standard for a finding of evasion should be ''whether the transaction is lawful or not'' under the CEA, CFTC rules and regulations, orders, or other applicable federal, state or other laws.[1209] While the commenter's alternative standard for evasion may impose lower costs on market participants because it is a bright-line test, the CFTC is not adopting it. The commenter's alternative standard would blur the distinction between whether a transaction (or entity) is lawful and whether it is structured in a way to evade Dodd-Frank and the CEA. The anti-evasion rules provided herein are concerned with the latter conduct, not the former.[1210] Thus, the CFTC does not believe it is appropriate to limit the enforcement of its anti-evasion authority to only unlawful transactions.

CEA Section 15(a) Summary:

(1) Protection of Market Participants and the Public

Including certain foreign exchange transactions, forward rate agreements and certain other transactions in the swap definition protects the public by subjecting these transactions to Dodd-Frank regulation. Similarly, the anti-evasion rules protect market participants against evasive conduct that would take away the protection afforded to them under Dodd-Frank regulation.

(2) Efficiency, Competitiveness, and the Financial Integrity of Markets

The CFTC believes that the final rules and interpretations can be consistently applied by substantially all market participants to determine which agreements, contracts, or transactions are, and which are not, swaps, security-based swaps, security-based swap agreements, or mixed swaps. This may improve resource allocation efficiency as market participant may not have to incur the cost of petitioning the Commissions or obtaining an opinion of counsel to determine the status of agreements, contracts or transactions as frequently as would be necessary without the rules or interpretations.

Moreover, the Commissions' statement that the determination of whether a Title VII instrument is a swap, a security-based swap, or both (*i.e.,* a mixed swap), is made prior to the execution of, but no later than an offer to enter into, the Title VII instrument, and remains the same throughout the instrument's life (absent amendment of the instrument), improves resource allocation efficiency because, without this interpretation, market participants potentially would need to expend additional resources to continually monitor their swaps to see if the indexes on which they are based have migrated from broad-based to narrow-based. The tolerance and grace periods for index CDS traded on CFTC and SEC-regulated trading platforms should lower the frequency of index migration and attendant costs, also improving resource allocation efficiency.

(3) Price Discovery

Not exempting swaps from foreign central banks, foreign sovereigns, international financial institutions, such as multilateral development banks, and similar organizations helps improve transparency and price discovery through disclosure that might otherwise not occur. Market participants will be informed about the prices of these transactions. Furthermore, they will be better informed about the risks that these transactions entail.

The CFTC's interpretation of the term ''swap'' to include guarantees of swaps that are not security-based swaps or mixed swaps and the separate CFTC release will enable the CFTC and market participants to receive more price-forming data about such swaps, which help improve price discovery for swaps. Without anti-evasion rules, price discovery might be impaired, since market participants would otherwise not be informed about relevant but evasive swap transactions.

(4) Sound Risk Management Practices

Properly classifying transactions as swaps or not swaps may lead to sound risk management practices, because the added clarity provided by the rules and interpretations herein will enable market participants to consider whether a particular agreement, contract, or transaction is a swap, prior to entering into such agreement, contract or transaction.

The business of insurance is already subject to established pre-Dodd-Frank Act regulatory regimes. Requirements that may work well for swaps and security-based swaps may not be appropriate for traditional insurance products. To the extent that the final rules distinguish insurance from swaps and security-based swaps, the CFTC believes that the Commissions should be able to tailor rules for specific

[1204] *See* CME Letter.

[1205] *See* ISDA Letter.

[1206] *See* COPE Letter.

[1207] *See* SIFMA Letter.

[1208] *See* IECA Letter II.

[1209] *See* WGCEF Letter.

[1210] If a transaction is unlawful, the CFTC (or another authority) may be able to bring an action alleging a violation of the applicable rule, regulation, order or law.

products that are swaps or security-based swaps to achieve Title VII regulatory objectives. In adopting the Insurance Safe Harbor, the CFTC believes that the Commissions seek to achieve those net benefits that may be obtained from not supplanting existing insurance regulation.

Documenting oral book-outs should promote good business practices and aid the CFTC in preventing evasion through abuse of the forward exclusion.

Title VII instruments on qualifying foreign futures contracts on debt securities of one of the 21 enumerated foreign governments is a swap and not a security-based swap if the Title VII instrument satisfies certain conditions. The classification may provide cross-margining benefits when swap contracts and the futures contract are margined at the same derivatives clearing organization, and thus, may enhance sound risk management practices.

Other Public Interest Considerations

Documenting oral book-outs should promote good business practices and aid the CFTC in preventing evasion through abuse of the forward exclusion.

The product interpretation process established by the Commissions has a 120-day deadline. This deadline will facilitate new products coming to market relatively quickly. Further, the process holds the Commissions accountable, because they will have to state why they are not providing an interpretation when they decline to do so.

The rule for books and records requirements for SBSAs does not impose new recordkeeping requirements on SBSAs, but relies on existing recordkeeping requirements for swaps, which avoids unnecessary regulation.

APPENDIX—RULES EFFECTUATED BY THE PRODUCT DEFINITIONS

Agricultural Swaps	Makes no distinction between agricultural swaps and other swaps.	76 FR 49291, 49297, Aug. 10, 2011
Commodity Options	Exempts subject to conditions certain options on physical commodities where parties are commercials or ECPs. The option results in physical delivery of the underlying.	77 FR 25320, 25331, Apr. 27, 2012
CPO/CTA compliance obligations	Rescinds the exemption from CPO registration; rescinds relief from the certification requirement for annual reports provided to operators of certain pools offered only to qualified eligible persons (QEPs; modifies the criteria for claiming relief); and require the annual filing of notices claiming exemptive relief under several sections of the Commission's regulations. Finally, the adopted amendments include new risk disclosure requirements for CPOs and CTAs.	77 FR 11252, 11275, Feb. 24, 2012
Business Conduct Standards for SDs and MSPs With Counterparties.	Applies to SDs and (except where indicated) MSPs and prohibits certain abusive practices, requires disclosures of material information to counterparties and requires SDs/MSPs to undertake certain due diligence relating to their dealings with counterparties. Certain rules do not apply to transactions initiated on a swap execution facility (SEF) or designated contract market (DCM) when the SD/MSP does not know the identity of the counterparty prior to execution.	77 FR 9734, 9805, Feb. 17, 2012
SD and MSP Recordkeeping, Reporting, and Duties Rules; FCMs and IBs Conflicts of Interest Rules; and Chief Compliance Officer Rules for SDs, MSPs, and FCMs.	Establishes reporting, recordkeeping, and daily trading records requirements for SDs and MSPs; establishes and governs the duties of SDs and MSPs; establishes conflicts of interest requirements for SDs, MSPs, FCMs, and IBs; establishes the designation, qualifications, and duties of the chief compliance officers (CCOs) of FCMs, SDs, and MSPs and describes the required contents of the annual report detailing a registrant's compliance policies and activities, to be prepared by the chief compliance officer and furnished to the CFTC.	77 FR 20128, 20166, Apr. 3, 2012
Position Limits for Futures and Swaps	Establishes limits on speculative positions in 28 selected physical commodity futures and swaps.	76 FR 71626, 71662, Nov. 18, 2011
Real-Time Public Reporting of Swap Transaction Data.	Establishes regulations concerning the real-time public reporting of swap transactions and pricing data.	77 FR 1182, 1232, Jan. 9, 2012
Swap Data Recordkeeping and Reporting Requirements.	Establishes swap data recordkeeping and reporting requirements for registered entities and counterparties.	77 FR 2136, 2176, Jan. 13, 2012
Swap Data Repositories: Registration Standards, Duties and Core Principles.	Establishes regulations concerning the registration and regulation of swap data repositories.	76 FR 54538, 54572, Sept. 1, 2011
Registration of SDs and MSPs	Establishes the process for the registration of SDs and MSPs	77 FR 2613, 2623, Jan. 19, 2012

XI. Administrative Law Matters—Exchange Act Revisions

A. Economic Analysis

1. Overview

The SEC is sensitive to the costs and benefits of its rules. In adopting the final rules in this release, the SEC has been mindful of the costs and benefits associated with these rules which provide fundamental building blocks for the Title VII regulatory regime established by Congress. In addition, 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 will promote competition, efficiency, and capital formation.[1211] Moreover, section 23(a)(2) of the Exchange Act requires the SEC, when adopting rules under the Exchange Act, to consider the impact such rules would have on competition. Section 23(a)(2) also prohibits the SEC from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the

[1211] 15 U.S.C. 78c(f).

purposes of the Exchange Act.[1212] The SEC requested comment on all aspects of the costs and benefits of the proposed rules in the Proposing Release,[1213] and any effect these rules may have on competition, efficiency, and capital formation.

These final rules implement the mandate of Title VII that the CFTC and the SEC, in consultation with the Federal Reserve Board, jointly further define the terms ''swap,'' ''security-based swap,'' and ''security-based swap agreement.'' [1214] The rules adopted in this release may be divided into three categories:

First, the Commissions are adopting rules that will assist market participants in determining whether particular agreements, contracts, and transactions fall within or outside the swap and security-based swap definitions (*i.e.,* identifying products subject to Title VII). The final rules provide: (1) An Insurance Safe Harbor for those agreements, contracts, and transactions that the Commissions believe Congress does not intend to be Title VII instruments; [1215] (2) a ''grandfather'' for those insurance agreements, contracts, or transactions (as opposed to insurance product categories) entered into on or before the effective date of the Product Definitions provided that, when the parties entered into such agreement, contract, or transaction, it was provided in accordance with the Provider Test; [1216] and (3) further definition of the term ''swap'' to specifically list certain enumerated products and not include certain foreign exchange forwards and foreign exchange swaps.[1217]

Second, the Commissions are adopting rules that will assist market participants in determining whether a particular Title VII instrument is a swap subject to CFTC regulation, a security-based swap subject to SEC regulation, or a mixed swap subject to regulation by the CFTC and the SEC (*i.e.,* mapping the jurisdictional divide between the CFTC and the SEC). Specifically, Title VII instruments that are CDS referencing a security index or a group or index of issuers of securities or obligations of issuers of securities may be swaps subject to CFTC regulation or security-based swaps subject to SEC regulation, depending on whether such Title VII instruments are based on events relating to ''issuers of securities in a narrow-based security index'' or events relating to securities in a ''narrow-based security index''.[1218] The final rules further define the terms ''issuers of securities in a narrow-based security index'' and ''narrow-based security index'' for purposes of this analysis.[1219] Further, the Commissions are adopting rules that provide tolerance and grace periods for Title VII instruments based on a security index that are traded on certain trading platforms where the security index may temporarily move from being within the ''narrow-based security index'' definition to being outside (*e.g.,*. moving from narrow-based to broad-based, or vice versa.) [1220] Additionally, the Commissions are providing clarification that a Title VII instrument based on a qualifying foreign futures contract on the debt securities of one or more of the 21 enumerated foreign governments is a swap and not a security-based swap, if certain conditions are met.[1221]

Third, the Commissions are adopting rules that provide: (1) A regulatory framework for certain mixed swaps and a process for market participants to request that the Commissions issue a joint order determining the appropriate regulatory treatment of certain other mixed swaps [1222] and (2) a process for market participants to request a joint interpretation from the Commissions regarding whether a particular Title VII instrument is a swap, security-based swap, or mixed swap.[1223] The final rules also provide that market participants have no additional books and records requirements for SBSAs other than those for swaps.[1224]

In considering the economic consequences of the final rules, the SEC acknowledges the regulatory regime that was in place prior to the enactment of Title VII. Prior to the enactment of Title VII, swaps and security-based swaps were by-and-large unregulated. The Commodity Futures Modernization Act of 2000 (''CFMA'') created a regulatory regime that prohibited the SEC from regulating security-based swap agreements,[1225] though it provided the SEC with limited enforcement authority over such instruments with respect to fraud, manipulation, and insider trading.[1226] Title VII created an entirely new regulatory regime to regulate swaps, security-based swap agreements and security-based swaps.

2. Economic Analysis Considerations

The rules adopted in this release implicate different types of potential costs and benefits. First, there are costs,

[1212] 15 U.S.C. 78w(a)(2).

[1213] *See* Proposing Release at 29885.

[1214] *See* section 712(d)(1) of the Dodd-Frank Act.

[1215] *See supra* part II.B.1.

[1216] *See supra* part II.B.1.c).

[1217] *See supra* part II.C.2.

[1218] *See* section 3(a)(68)(A)(ii)(III) of the Exchange Act, 15 U.S.C. 78c(a)(68)(A)(ii)(III).

[1219] *See supra* part III.G.

[1220] *See supra* part III.G.5.

[1221] *See supra* part III.E.

[1222] *See supra* part IV.

[1223] *See supra* part VI.

[1224] *See supra* part V.

[1225] The CFMA added section 206A to the GLBA, 15 U.S.C. 78c note, to define the term ''swap agreement'' to mean any agreement, contract, or transaction between ECPs, the material terms of which (other than price and quantity) are subject to individual negotiation, that fall within certain categories of transactions. Additionally, the CFMA added section 206B to the GLBA, 15 U.S.C. 78c note, which defined a ''security-based swap agreement'' to mean a swap agreement (as defined in section 206A of the GLBA) on which a material term is based on the price, yield, value, or volatility of any security or any group or index of securities, or any interest therein. Furthermore, the CFMA added section 206C to the GLBA, 15 U.S.C. 78c note, which defined a ''non-security-based swap agreement'' to mean any swap agreement (as defined in section 206A of the GLBA) that is not a security-based swap agreement (as defined in section 206B of the GLBA). Title VII amended the definition of the term ''swap agreement'' (discussed in footnote 1284) and repealed the definition of the terms ''security-based swap agreement'' and ''non-security-based agreement.'' *See* sections 762(a) and (b) of the Dodd-Frank Act. However, Title VII also added a new definition of the term ''security-based swap agreement'' in section 3(a)(78) of the Exchange Act, 15 U.S.C. 78c(a)(78), that is generally consistent with the repealed definition, except that the new definition excludes security-based swaps. Accordingly, Title VII provides jurisdiction to the CFTC for security-based swap agreements, such as Title VII Instruments based on broad-based securities indexes, and also retains the SEC's jurisdiction over such instruments in instances of fraud, manipulation, or insider trading.

[1226] The CFMA excluded from the definition of the term ''security'' the term ''security-based swap agreement'' as well as the term ''non-security based swap agreement'' (as those terms are defined in section 206B and 206C (respectively) of the GLBA, 15 U.S.C. 78c note). *See* sections 2A(a) and (b)(1) of the Securities Act, 15 U.S.C. 77b–1(a) and (b)(1), and sections 3A(a) and (b)(1) of the Exchange Act, 15 U.S.C. 78c–1(a) and (b)(1). Furthermore, the CFMA explicitly prohibited the SEC from registering, or requiring, recommending, or suggesting the registration under the Securities Act and the Exchange Act of any security-based swap agreement (as defined in section 206B of the GLBA). *See* section 2A(b)(2) of the Securities Act, 15 U.S.C. 77b–1(b)(2), and section 3A(b)(2) of the Exchange Act, 15 U.S.C. 78c–1(b)(2). The CFMA also made explicit that the SEC is prohibited from either (1) promulgating, interpreting, or enforcing rules or (2) issuing orders of general applicability under the Securities Act or Exchange Act in a manner that imposes or specifies reporting or recordkeeping requirements, procedures, or standards as prophylactic measures against fraud, manipulation, or insider trading with respect to any security-based swap agreement (as defined in section 206B of the GLBA). However, the CFMA did provide the SEC with limited enforcement authority under section 10(b) of the Exchange Act, 15 U.S.C. 78j(b), and the rules promulgated thereunder that prohibit fraud, manipulation, or insider trading (but not rules imposing or specifying reporting or record-keeping requirements, procedures, or standards as prophylactic measures against fraud, manipulation, or insider trading). Furthermore, the CFMA applies judicial precedents under sections 9, 10(b), 15, 16, 20, and 21A of the Exchange Act, 15 U.S.C. 78i, 78j(b), 78o, 78p, 78t, and 78u–1, as well as section 17(a) of the Securities Act, 15 U.S.C. 77q(a), to security-based swap agreements (as defined in section 206B of the GLBA) to the same extent as they apply to securities.

as well as benefits, arising from subjecting certain agreements, contracts, or transactions to the regulatory regime of Title VII. The SEC refers to these costs and benefits as ''programmatic'' costs and benefits. Additionally, there are costs that parties will incur to assess whether certain agreements, contracts, or transactions are indeed subject to the Title VII regulatory regime, and, if so, costs to assess whether such Title VII instrument is subject to the regulatory regime of the SEC or the CFTC. The SEC refers to these costs as ''assessment'' costs.[1227]

The programmatic costs and benefits and the assessment costs raise distinct analytic issues. First, the SEC recognizes that the Product Definitions, while integral to the regulatory requirements that will be imposed on the swap and security-based swap markets pursuant to Title VII, do not themselves establish the scope or nature of those substantive requirements or their related costs and benefits. The SEC anticipates that the rules implementing the substantive requirements under Title VII will be subject to their own economic analysis, but final rules have not yet been adopted that would subject agreements, contracts, or transactions, or entities that act as intermediaries (such as security-based swap dealers (''SBS dealers'') or major security-based swap participants (''MSBSPs'')) or provide market infrastructures (such as clearing agencies, trade repositories and trade execution facilities), to such substantive requirements. The costs and benefits described below are therefore those that may arise in connection with: (1) Determining whether certain agreements, contracts, or transactions are Title VII instruments (*i.e.,* the assessment costs) and (2) subjecting those agreements, contracts, or transactions that are Title VII instruments, determined based on the statutory definitional lines that the Commissions are further defining, to a complete and fully effective complement of Title VII statutory and regulatory requirements. In addition, the discussion below addresses the costs and benefits arising from security-based swaps being within the definition of security under the Securities Act and the Exchange Act. Once a Title VII Instrument is determined to be a security-based swap, the security-based swap will be a security subject to the full panoply of the Federal securities laws. Such treatment will give rise to costs and benefits, including those that apply to securities generally. Security-based swaps may be subject to additional costs to the extent that there are overlapping regulatory requirements arising from the Title VII regulatory requirements and those Federal securities laws requirements that apply to securities generally. The SEC has already taken action to address some of such overlapping or inconsistent requirements[1228] and will continue to evaluate other needed actions, if any, to minimize any such overlapping regulatory implications.

Second, in determining the appropriate scope of these rules, the SEC considers the types of agreements, contracts, or transactions that should be regulated as swaps, security-based swaps, or mixed swaps under Title VII in light of the purposes of the Dodd-Frank Act, the overall regulatory framework, the historical treatment of the instruments and other regulatory frameworks, and the data currently available to the SEC. The SEC has sought to further define the terms ''swap,'' ''security-based swap,'' and ''mixed swap'' to address the status of agreements, contracts, and transactions that are appropriate to regulate as swaps, security-based swaps and mixed swaps within the purposes of Title VII and not to include those agreements, contracts, and transactions that historically have not been considered to be swaps or security-based swaps thereby not imposing unnecessary or inappropriate Title VII costs and burdens on parties engaging in agreements, contracts, and transactions. In addition, the SEC recognizes that these rules may have effects on competition, efficiency, and capital formation as a result of certain agreements, contracts, and transactions being determined to fall under or outside the Title VII regulatory regime, or as a result of the jurisdictional divide between the SEC and CFTC as mandated by the statute.

In the sections below, the SEC begins by recognizing that the Title VII regulatory regime has programmatic benefits and costs, as well as assessment costs. These costs and benefits have informed the decisions and the actions taken that are described throughout the release. Accordingly, the analysis below includes references to the discussions of the decisions and actions taken by the Commissions set forth above in other parts of this release. Finally the SEC discusses the effects of these rules on competition, efficiency, and capital formation.

3. Programmatic Benefits and Costs

By enacting Title VII, Congress created a regulatory regime for swaps and security-based swaps that previously did not exist.[1229] Title VII amendments to the Exchange Act impose, among other requirements, the following: (1) Registration and comprehensive oversight of SBS dealers and MSBSPs;[1230] (2) reporting of security-based swaps to a registered security-based swap data repository (''SB SDR''), or to the SEC (if the security-based swap is uncleared and no SB SDR will accept the security-based swap for reporting), and dissemination of the security-based swap market data to the public;[1231] (3) clearing of security-based swaps at a registered clearing agency (or a clearing agency that is exempt from registration) if the SEC makes a determination that such security-based swaps are required to be cleared, unless an exception from the mandatory clearing requirement applies;[1232] and (4) if a security-based

[1227] The SEC expects that the benefits resulting from further defining the terms ''swap,'' ''security-based swap,'' and ''mixed swap'' will likely accrue primarily at the programmatic level. To the extent appropriate, given the purposes of Title VII, the Commissions have sought to mitigate the costs persons will incur in connection with determining whether the instrument is a swap, security-based swap, or mixed swap.

[1228] *See Order Pursuant to Sections 15F(b)(6) and 36 of the Securities Exchange Act of 1934 Granting Temporary Exemptions and Other Temporary Relief, Together With Information on Compliance Dates for New Provisions of the Securities Exchange Act of 1934 Applicable to Security-Based Swaps, and Request for Comment,* Release No. 34–64678 (June 15, 2011), 76 FR 36287 (June 22, 2011); *Exchange Act Exemptive Order;* and *SB Swaps Interim Final Rules.*

[1229] *See supra* part XI.A.1.

[1230] *See* section 15F of the Exchange Act, 15 U.S.C. 78o–10.

[1231] *See* section 3(a)(75) of the Exchange Act, 15 U.S.C. 78c(a)(75) (defining the term ''security-based swap data repository''); section 13(m) of the Exchange Act, 15 U.S.C. 78m(m) (regarding public availability of security-based swap data); section 13(n) of the Exchange Act, 15 U.S.C. 78m(n) (regarding requirements related to SB SDRs); and section 13A of the Exchange Act, 15 U.S.C. 78m–1 (regarding reporting and recordkeeping requirements for certain security-based swaps). *See also Security-Based Swap Data Repository Registration, Duties, and Core Principles,* Release No. 34–63347 (Nov. 19, 2010), 75 FR 77306 (Dec. 10, 2010); corrected at 75 FR 79320 (Dec. 20, 2010) and 76 FR 2287 (Jan. 13, 2011) (''SDR Proposing Release''); and *Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information,* Release No. 34–63346 (Nov. 19, 2010), 75 FR 75208 (Dec. 2, 2010) (''Regulation SBSR Proposing Release''). In each proposing release the SEC invited comment with respects to the costs and benefits of each of the proposed rules. The costs associated with these and other substantive rules, along with any comments received by the SEC addressing the costs of the proposed rules, are being addressed in more detail in connection with the applicable rulemakings.

[1232] *See* section 3C(a)(1) of the Exchange Act, 15 U.S.C. 78c–3(a)(1). *See also Process for Submissions for Review of Security-Based Swaps for Mandatory Clearing and Notice Filing Requirements for Clearing Agencies; Technical Amendments to Rule 19b–4 and Form 19b–4 Applicable to All Self-*

Continued

swap is subject to the clearing requirement, execution of the security-based swap transaction on an exchange, on a security-based swap execution facility (''SB SEF'') registered under the Exchange Act,[1233] or on an SB SEF that has been exempted from registration by the SEC under the Exchange Act,[1234] unless no SB SEF or exchange makes such security-based swap available for trading.[1235] In addition, Title VII amends the Securities Act and the Exchange Act to include security-based swaps in the definition of ''security'' for the purposes of those statutes.[1236] As a result, security-based swaps are subject to the full panoply of the Federal securities laws. Title VII also added specific provisions to the Securities Act and Exchange Act affecting how security-based swaps may be sold. For example, Title VII amended section 5 of the Securities Act to require that a registration statement meeting the requirements of the Securities Act be in effect before there can be an offer to sell, offer to buy, purchase or sale of a security-based swap from or to any person who is not an ECP.[1237] In addition, Title VII added section 6(l) to the Exchange Act to require that any security-based swap transaction with or for a person that is not an ECP must be effected on a national securities exchange.[1238]

The creation of regulatory regimes for agreements, contracts, or transactions that are defined as a swap or security-based swap will result in an array of programmatic benefits. However, if an agreement, contract or transaction falls within the swap or security-based swap definition, the parties to the agreement, contract, or transaction also may incur a number of upfront and ongoing costs associated with the regulation of Title VII instruments and transactions. These programmatic benefits and costs, discussed in more detail below, relate to Title VII registration; business conduct standards, compliance, operation and governance; clearing, trade execution, and reporting and processing; investor protection provisions of Title VII and the application of the Federal securities laws.[1239]

(a) Title VII Registration of Entities Involved in Security-Based Swaps

As a result of Title VII imposing a new regulatory regime on security-based swaps, in addition to making such security-based swaps securities under the Securities Act and the Exchange Act, Title VII will require the registration of entirely new types of registrants with the SEC, including SBS dealers and MSBSPs,[1240] SB SEFs,[1241] SB SDRs,[1242] and clearing agencies registered to clear security-based swaps.[1243] The SEC expects that registrants will incur costs in gathering information, accurately completing forms and filing these forms with the SEC.[1244] Registration will provide the SEC with information regarding registrants which will enable the SEC to oversee the SEC's security-based swap registrants.

(b) Business Conduct Standards, Compliance, Operation, and Governance

Title VII imposes requirements on registrants that did not exist prior to the adoption of Title VII, including core principles, duties and/or standards that are related to the type of registrant and its function.[1245] For example, Title VII includes core principles for SB SEFs, many of which require SB SEFs to establish and enforce rules specific to the trading of security-based swaps.[1246] Similarly, Title VII assigns duties (in addition to core principles) that are specific to the nature of SB SDRs, *e.g.* the acceptance and maintenance of data related to security-based swaps.[1247] The

Regulatory Organizations, 75 FR 82490 (Dec. 30, 2010) (''Clearing Procedures Proposing Release''). In the Clearing Procedures Proposing Release the SEC invited comment with respects to the costs and benefits of each of the proposed rules. The costs associated with these and other substantive rules, along with any comments received by the SEC addressing the costs of the proposed rules, are being addressed in more detail in connection with the applicable rulemakings.

[1233] *See* section 3D of the Exchange Act, 15 U.S.C. 78c–4.

[1234] *See* section 3D(e) of the Exchange Act, 15 U.S.C. 78c–4(e).

[1235] *See* sections 3C(g) and (h) of the Exchange Act, 15 U.S.C. 78c–3(g) and (h). *See also* section 3(a)(77) of the Exchange Act, 15 U.S.C. 78c(77) (defining the term ''security-based swap execution facility''). *See also Registration and Regulation of Security-Based Swap Execution Facilities,* Release No. 34–63825 (Feb. 2, 2011), 76 FR 10948 (Feb. 28, 2011) (''SB SEF Proposing Release''). In the SB SEF Proposing Release each proposing release the SEC invited comment with respects to the costs and benefits of each of the proposed rules. The costs associated with these and other substantive rules, along with any comments received by the SEC addressing the costs of the proposed rules, are being addressed in more detail in connection with the applicable rulemakings.

[1236] *See* sections 761(a)(2) and 768(a)(1) of the Dodd-Frank Act (amending sections 3(a)(10) of the Exchange Act, 15 U.S.C. 78c(a)(10), and 2(a)(1) of the Securities Act, 15 U.S.C. 77b(a)(1), respectively). The Dodd-Frank Act also amended the Securities Act to provide that any offer or sale of a security-based swap by or on behalf of the issuer of the securities upon which such security-based swap is based or is referenced, an affiliate of the issuer, or an underwriter, shall constitute a contract for sale of, sale of, offer for sale, or offer to sell such securities. *See* section 768(a) of the Dodd-Frank Act (amending section 2(a)(3) of the Securities Act, 15 U.S.C. 77b(a)(3)).

[1237] 15 U.S.C. 77e.

[1238] *See* section 6(l) of the Exchange Act, 15 U.S.C. 78f(l).

[1239] 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 Business Conduct Standards for Security-Based Swaps Dealer and Major Security-Based Swap Participants,* Release No. 34–64766 (June 29, 2011), 76 FR 42396, 42406, 42410 (July 18, 2011) (''Business Conduct Standards Proposing Release''). Also, for example, in connection with registration requirements the SEC expects 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 Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants,* Release No. 34–65543 (Oct. 12, 2011), 76 FR 65784, 65813–18 (Oct. 24, 2011) (''SB Swap Participant Registration Proposing Release''). In each proposing release the SEC invited comment with respects to the costs and benefits of each of the proposed rules. The costs associated with these and other substantive rules, along with any comments received by the SEC addressing the costs of the proposed rules, are being addressed in more detail in connection with the applicable rulemakings.

[1240] *See* section 15F(b)(5) of the Exchange Act, 15 U.S.C. 78o–10(b)(5).

[1241] *See* section 3D(a) of the Exchange Act, 15 U.S.C. 78c–4.

[1242] *See* section 13(n)(1) of the Exchange Act, 15 U.S.C. 78m(n)(1).

[1243] *See* section 17A(g) of the Exchange Act, 15 U.S.C. 78q–1(g).

[1244] The SEC has proposed rules related to the registration requirements for each of these new registrants. *See* SB Swap Participant Registration Proposing Release; SB SEF Proposing Release; SDR Proposing Release; and *Clearing Agency Standards for Operation and Governance,* Release No. 34–64017 (Mar. 3, 2011), 76 FR 14472 (Mar. 16, 2011) (''Clearing Agency Standards Proposing Release''). In each proposing release the SEC invited comment with respects to the costs and benefits of each of the proposed rules. The costs associated with these and other substantive rules, along with any comments received by the SEC addressing the costs of the proposed rules, are being addressed in more detail in connection with the applicable rulemakings.

[1245] *See* sections 3D(d), 13(n)(5) and (7), and 15F(h) and (j) of the Exchange Act, 15 U.S.C. 78c–4(d), 78m(n)(5) and (7), and 78o–10(h) and (j).

[1246] *See* sections 3D(d)(2), (3), (4), (6), and (8) of the Exchange Act, 15 U.S.C. 78c–4(d)(2), (3), (4), (6), and (8). *See also* SB SEF Proposing Release. In the SB SEF Proposing Release the SEC invited comment with respects to the costs and benefits of each of the proposed rules. The costs associated with these and other substantive rules, along with any comments received by the SEC addressing the costs of the proposed rules, are being addressed in more detail in connection with the applicable rulemakings.

[1247] *See* section 13(n)(5) of the Exchange Act, 15 U.S.C. 78m(n)(5). *See also* SDR Proposing Release. In the SDR Proposing Release the SEC invited comment with respects to the costs and benefits of each of the proposed rules. The costs associated with these and other substantive rules, along with any comments received by the SEC addressing the costs of the proposed rules, are being addressed in

provisions of Title VII related to SB SEFs and SB SDRs are designed to provide transparency in the security-based swap market.

Title VII also imposes a number of requirements on registered SBS dealers and MSBSPs, such as external business conduct requirements.[1248] Specifically, section 15F(h)(3)(B) of the Exchange Act establishes certain disclosure requirements for SBS dealers and MSBSPs,[1249] and section 15F(h)(3)(C) of the Act requires that communications by these entities meet certain standards of fairness and balance.[1250] The level of protection becomes higher for special entities [1251] to whom dealers offer security-based swaps.[1252] For example, an SBS dealer that acts as an advisor to a special entity has a duty to act in the best interest of the special entity and is required to make reasonable efforts to obtain such information as is necessary for the SBS dealer to make a reasonable determination that any security-based swap recommended by the SBS dealer is in the best interests of the special entity.[1253] In addition, section 15F(j)(5) of the Exchange Act imposes requirements intended to address potential conflicts of interest that may arise in transactions between a SBS dealer or MSBSP and its counterparty.[1254] Title VII also imposes upon SBS dealers and MSBSPs requirements to implement risk management policies and procedures that are designed to prevent them from taking on excessive risk and to enable them to better deal with market fluctuations that might otherwise endanger their financial health.[1255]

Section 15F(e) of the Exchange Act as added by section 764(a) of the Dodd Frank Act, imposes capital and margin requirements on dealers and major participants,[1256] which are designed to 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.[1257] With respect to a security-based swap submitted for clearing, counterparties will be required to post initial margin and maintenance margin to secure its obligations under the trade.

Section 3E of the Exchange Act, among other things, requires registered brokers, dealers and SBS dealers that collect initial and variation margin from counterparties to cleared security-based swap transactions to maintain that collateral in segregated accounts.[1258] With respect to uncleared swaps, section 3E gives a counterparty to a SBS dealer or MSBSP that collects collateral the right to request segregation of initial margins and maintenance of such initial margins in accordance with rules promulgated by the SEC.[1259] These protections provide market participants who enter into transactions with these entities confidence that their collateral accounts will remain separate from the SBS dealer or MSBSP's assets in the event of bankruptcy.[1260]

(c) Clearing, Trade Execution, Reporting and Processing

Section 763 of the Dodd-Frank Act adds section 3C to the Exchange Act, which deals with clearing for security-based swaps.[1261] Prior to the enactment of Title VII, swaps which traded on a bilateral basis were subject to counterparty credit risk, which may not have been fully mitigated by the posting of collateral.[1262] Section 3C of the Exchange Act requires that security-based swaps, with some exceptions, be cleared through a central counterparty (''CCP'') registered with the SEC.[1263] Clearing a security-based swap places a CCP between the parties to a trade and reduces the counterparty risk.

Title VII also requires the execution of clearable security-based swaps on exchanges or SB SEFs if such security-based swaps are available to trade and the reporting of trades to an SB SDR and dissemination of trading data to the public.[1264] Title VII also imposes requirements relating to the operations of the SB SEFs and SDRs.[1265] Section 15F(i) of the Exchange Act establishes regulatory standards for certain [registered security-based swap entities] related to the confirmation, processing, netting, documentation, and valuation of security-based swaps, which should enhance the efficiency of the trade execution and processing of security-based swaps.[1266]

Furthermore, sections 15F(f), (g), and (j)(3) of the Exchange Act impose certain reporting, recordkeeping, and regulatory disclosure requirements on SBS dealers

more detail in connection with the applicable rulemakings.

[1248] The SEC has proposed rules regarding business conduct standards for security-based swap dealers and major security-based swap participants. *See* Business Conduct Standards Proposing Release. In the Business Conduct Standards Proposing Release the SEC invited comment regarding the costs and benefits associated with the proposed rules. The costs associated with these and other substantive rules, along with any comments received by the SEC addressing the costs of the proposed rules, are being addressed in more detail in connection with the applicable rulemakings.

[1249] *See* section 15F(h)(3)(B) of the Exchange Act, 15 U.S.C. 78o–10(h)(3)(B).

[1250] *See* section 15F(h)(3)(C) of the Exchange Act, 15 U.S.C. 78o–10(h)(3)(C).

[1251] Title VII amends the Exchange Act to define a special entity as: (1) A Federal agency; (2) a State, State agency, city, county, municipality, or other political subdivision of a State; (3) any employee benefit planned, as defined in section 3 of the Employee Retirement Income Security Act of 1974; or (4) any governmental plan, as denied in section 3 of the Employee Retirement Income Security Act of 1974; or any endowment, including an endowment that is an organization in section 501(c)(3) of the Internal Revenue Code of 1986. *See* section 15F(h)(2)(C) of the Exchange Act, 15 U.S.C. 78o–10(h)(2)(C).

[1252] *See* sections 15F(h)(2), (h)(4), and (h)(5) of the Exchange Act, 15 U.S.C. 78o–10(h)(2), (h)(4), and (h)(5).

[1253] *See* section 15F(h)(4)(B) and (C) of the Exchange Act, 15 U.S.C. 78o–10(h)(4)(B) and (C).

[1254] *See* section 15F(j)(5) of the Exchange Act, 15 U.S.C. 78o–10(j)(5).

[1255] *See* section 15F(j)(2) of the Exchange Act, 15 U.S.C. 78o–10(j)(2).

[1256] *See* section 15F(e) of the Exchange Act, 15 U.S.C. 78o–10(e).

[1257] *See* Entity Definitions Release at 30723, *supra* note 12.

[1258] *See* 15 U.S.C. 78c–5.

[1259] *Id.*

[1260] *Id.*

[1261] *See* 15 U.S.C. 78c–3. *See also* Clearing Procedures Proposing Release; Clearing Agency Standards Proposing Release; *End-User Exception of Mandatory Clearing of Security-Based Swaps,* Release No. 34–63556 (Dec. 15, 2010), 75 FR 79992 (Dec. 21, 2010) (''End-User Exception Proposing Release''); and *Ownership Limitations and Governance Requirements for Security-Based Swap Clearing Agencies, Security-Based Swap Execution Facilities, and National Securities Exchanges with Respect to Security-Based Swaps under Regulation MC,* Release No. 34–63107, (Oct. 14, 2010), 75 FR 65882 (Oct. 26, 2010) (''Proposed Regulation MC''). In each proposing release the SEC invited comment with respects to the costs and benefits of each of the proposed rules. The SEC has received comments on the cost and benefits of these proposed rules. The costs associated with these and other substantive rules are being addressed in more detail in connection with the applicable rulemakings.

[1262] *See* U.S. Gov't Accountability Office, *Systemic Risk: Regulatory Oversight and Recent Initiatives to Address Risk Posed by Credit Default Swaps,* GAO–09–397T, at 13 (Mar. 5, 2009).

[1263] 15 U.S.C. 78c–3. Such clearing agencies also are required to register. *See* section 17A(g) of the Exchange Act, 15 U.S.C. 78q–1(g).

[1264] *See* sections 3C(h) and 13(m) of the Exchange Act, 15 U.S.C. and 13m(m). *See also* Regulation SBSR Proposing Release; and SDR Proposing Release.

[1265] *See* SDR Proposing Release; and SB SEF Proposing Release. In each proposing release the SEC invited comment with respects to the costs and benefits of each of the proposed rules. The costs associated with these and other substantive rules, along with any comments received by the SEC addressing the costs of the proposed rules, are being addressed in more detail in connection with the applicable rulemakings.

[1266] *See* section 15F(i) of the Exchange Act, 15 U.S.C. 78o–10(i). *See also Trade Acknowledgment and Verification on Security-Based Swap Transactions,* Release No. 34–63727 (Jan. 14, 2011), 76 FR 3859 (Jan. 21, 2011) (''Trade Documentation Proposing Release''). In the Trade Documentation Proposing Release the SEC invited comment with respects to the costs and benefits of each of the proposed rules. The costs associated with these and other substantive rules, along with any comments received by the SEC addressing the costs of the proposed rules, are being addressed in more detail in connection with the applicable rulemakings.

and MSBSPs.[1267] Specifically, Title VII imposes on parties to a security-based swap the responsibility to ''report security-based swap transaction information to the appropriate registered entity in a timely manner as may be prescribed by the [SEC].'' [1268] Title VII's reporting, recordkeeping, and disclosure requirements should enhance the volume and quality of information available in the market and facilitate effective oversight by the SEC.

(d) Investor Protection Provisions of Title VII and the Application of the Federal Securities Laws

Prior to the enactment of Title VII, the SEC had the ability to bring actions based on fraud, manipulation or insider trading relating to security-based swap agreements (as defined in section 206B of the GLBA [1269]) but did not have any other regulatory authority over swaps, security-based swaps or market participants involved in security-based swap transactions.[1270] Title VII provides the SEC with antifraud enforcement authority over SBSAs under Title VII and gives the SEC the authority to regulate security-based swap transactions and the security-based swaps market, including the authority to prevent or deter fraud, manipulation or deceptive conduct and take other actions.[1271]

By including security-based swaps in the definition of security under the Securities Act and the Exchange Act and repealing the restrictions on regulating security-based swap agreements as securities, Title VII extended the investor protections under the Federal securities laws to security-based swaps. In particular, Title VII amends the Exchange Act and the Securities Act to include security-based swaps within the definition of the term ''security.'' [1272] Accordingly, security-based swaps are securities and benefit from the investor protections provided by the Federal securities laws.[1273] In addition to the antifraud and anti-manipulation provisions, these protections include the registration, disclosure and civil liability provisions of the Securities Act and the disclosure provisions of the Exchange Act. Title VII specifically provides protections to non-ECPs by adding section 5(e) to the Securities Act, which requires that a registration statement must be in effect before a person can offer to sell, offer to purchase from, or otherwise enter into security-based swaps with non-ECPs.[1274] Any security-based swap with or for a person that is not an ECP must be effected on a national securities exchange.[1275] Furthermore, Title VII ensures that a security-based swap cannot be used to avoid registration or investor protection under the Securities Act by providing that if a security-based swap is entered into by an issuer's affiliate or underwriter, the offer and sale of the underlying security must comply with the Securities Act.[1276]

The programmatic benefits related to investor protection under the Federal securities laws have corresponding costs including costs associated with compliance with the registration and disclosure regime of the Securities Act if an exemption from such registration provisions is not available.[1277]

The above programmatic benefits and costs that will flow from regulation of the security-based swap market mandated by Title VII will be significant, although very difficult to quantify and measure.[1278] Moreover, the benefits can be expected to manifest themselves over the long run and be distributed over the market as a whole. The programmatic costs and benefits associated with substantive rules applicable to security-based swaps under Title VII are being addressed in more detail in connection with the applicable rulemakings implementing Title VII. There are programmatic costs that may arise from the application of other provisions of the Federal securities laws to security-based swaps, security-based swap transactions and market participants involved in such security-based swap transactions, including costs arising from potential overlapping regulatory requirements. The SEC already has taken interim actions to mitigate such overlapping and potentially conflicting regulatory requirements and will be carefully evaluating any future actions that may be necessary and appropriate to address such overlapping or conflicting requirements.

[1267] *See* section 15F(f) of the Exchange Act, 15 U.S.C. 78o–10(f) (reporting and recordkeeping requirements); section 15F(g) of the Exchange Act, 15 U.S.C. 78o–10(g) (daily trading records requirements); section 15F(j)(3) of the Exchange Act, 15 U.S.C. 78o–10(j)(3) (requirements related to the disclosure of information to regulators). *See also* Regulation SBSR Proposing Release. In the Regulation SBSR Proposing Release the SEC invited comment with respects to the costs and benefits of each of the rules proposed in the release. The costs associated with these and other substantive rules, along with any comments received by the SEC addressing the costs of the proposed rules, are being addressed in more detail in connection with the applicable rulemakings.

[1268] *See* section 13(m)(1)(F) of the Exchange Act, 15 U.S.C. 13m(m)(1)(F). *See also* Regulation SBSR Proposing Release. In the Regulation SBSR Proposing Release the SEC invited comment with respects to the costs and benefits of each of the proposed rules. The costs associated with these and other substantive rules, along with any comments received by the SEC addressing the costs of the proposed rules, are being addressed in more detail in connection with the applicable rulemakings.

[1269] 15 U.S.C. 78c note.

[1270] *See supra* part XI.A.1, notes 1225 and 1226.

[1271] *See supra* part XI.A.1, notes 1225 and 1226 and part I. *See also Prohibition Against Fraud, Manipulation, and Deception in Connection with Security-Based Swaps,* Release No. 34–63236 (Nov. 3, 2010), 75 FR 68560 (Nov. 8, 2010) (''SB Swap Antifraud Proposing Release''). In the SB Swap Antifraud Proposing Release the SEC invited comment with respects to the costs and benefits of each of the proposed rules. The costs associated with these and other substantive rules, along with any comments received by the SEC addressing the costs of the proposed rules, are being addressed in more detail in connection with the applicable rulemakings.

[1272] *See* section 2(a)(1) of the Securities Act and section 3(a)(10) of the Exchange Act, 15 U.S.C. 77b(a)(1) and 15 U.S.C. 78c(a)(10).

[1273] *See, e.g., 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,* 76 FR 39927 (July 7, 2011) (discussing the effect of the amendment to the definition of the term ''security'' to include security-based swaps under the Exchange Act and granting certain temporary relief and providing interpretive guidance).

[1274] *See* section 768(b) of the Dodd Frank Act (adding section 5(e) of the Securities Act, 15 U.S.C. 77e(d)).

[1275] *See* section 6(l) of the Exchange Act, 15 U.S.C. 78f(l).

[1276] *See* section 768(a) of the Dodd-Frank Act (amending section 2(a)(3) of the Securities Act, 15 U.S.C. 77b(a)(3)).

[1277] For offers and sales to non-ECPs, the statute requires registration of the security-based swap transaction.

[1278] One commenter suggested that the best measure of the benefits of the Dodd-Frank Act is the cost of the 2008 financial crisis. This commenter provided, as an example, an estimate from the Bank of England that the cost of the 2008 financial crisis in terms of lost output was between $60 trillion and $200 trillion. *See* Letter from Dennis Kelleher, Better Markets to the CFTC, June 3, 2011, regarding the reopening and extension of comment periods for rulemaking implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act. The SEC recognizes that this estimate addresses the aggregate cost of the financial crisis. It is also recognized that others have expressed concern regarding the potential cost of the requirements of Dodd-Frank. *See, e.g.,* letters from SIFMA, the American Bankers Association, the Financial Services Roundtable and the Clearing House Association, dated February 13, 2012 (commenting on *Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds,* 76 FR 68846 (Nov. 7, 2011)) and The Financial Services Roundtable, dated October 17, 2011 (commenting on *Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' ''Major Swap Participant,'' ''Major Security-Based Swap Participant''* and *''Eligible Contract Participant,''* 75 FR 80174 (Dec. 21, 2010)).

4. Costs and Benefits Associated With Specific Rules

(a) Insurance Safe Harbor and Grandfather for Insurance Products (Rules 3a69–1 Under the Exchange Act)

(i) Programmatic Benefits and Costs

The Commissions are adopting rules that establish an Insurance Safe Harbor and an Insurance Grandfather for certain agreements, contracts, and transactions that meet the conditions and tests set forth in rule 3a69–1 under the Exchange Act.[1279] The agreements, contracts, and transactions that satisfy the Insurance Safe Harbor or Insurance Grandfather under the Exchange Act will fall outside the statutory swap and security-based swap definitions.[1280] The SEC believes that the conditions and tests set forth in the Insurance Safe Harbor represent the characteristics of many types of traditional insurance products.[1281] As stated above, the Commissions are not aware of anything in the legislative history or Title VII itself to suggest that Congress intended for traditional insurance products to be regulated as swaps or security-based swaps.[1282]

Typically, insurance has not been regulated under the Federal securities laws; although variable life insurance and annuities are securities and are regulated under the Federal securities laws.[1283] Although a broad reading of the swap definition could encompass traditional insurance, the SEC does not believe that such a reading is consistent with Congressional intent.[1284] To include products that meet the Insurance Safe Harbor or Insurance Grandfather in the swap or security-based swap definition would subject traditional insurance products to the Title VII regime which the SEC does not believe is intended by Congress. Imposing programmatic costs on the insurance industry, such as those associated with compliance with the registration, compliance, and operation and governance requirements as described above, in addition to the Securities Act and Exchange Act requirements applicable to security-based swap transactions involving non-ECPs, would increase the business costs of insurance providers, which costs could be passed on to the consumers who need such insurance. In addition, because of the above costs as well as the Securities Act and Exchange Act restrictions applicable to offers and sales of security-based swaps to non-ECPs, including products that meet the Insurance Safe Harbor in the swap or security-based swap definition could potentially affect the ability of insurance providers to continue to offer insurance products and disrupt contracts that satisfy the Insurance Grandfather that are used every day in the American economy. For example, if Title VII applied to traditional insurance products, people who purchased insurance to protect their property or families against accidental hazards or risks would need to be qualified as ECPs[1285] or the offer and sale of the insurance products that were security-based swaps would need to be registered with the SEC[1286] and traded on an exchange;[1287] and for swaps that are under the CFTC jurisdiction would only be able to be sold on or subject to the rules of a board of trade. In addition, insurance providers that offer insurance products exceeding the de minimis threshold (as adopted in the Entities Release) applicable to swap dealers and security-based swap dealers would be required to register as swap dealers or SBS dealers[1288] and be subject to the substantive requirements that result from such registration.

The rules adopted in this release provide continuity in the regulatory treatment of agreements, contracts, and transactions that are insurance and fall outside the swap and security-based swap definitions. Market participants will be able to continue to rely on their existing understanding of insurance laws and regulations to engage in business activities relating to the insurance agreements, contracts, and transactions that satisfy the Insurance Safe Harbor or Insurance Grandfather.

(ii) Assessment Costs

Market participants will need to assess whether a particular agreement, contract, or transaction satisfies the Insurance Safe Harbor or Insurance Grandfather, prior to execution, but no later than when the parties offer to enter into the agreement, contract, or transaction. If such agreement, contract, or transaction satisfies rules 3a69–1 under the Exchange Act, it would fall outside the swap and security-based swap definitions. If such agreement, contract, or transaction does not satisfy the Insurance Safe Harbor or Insurance Grandfather, it would need to be analyzed based upon its own facts and circumstances in order to determine whether it falls within or outside the swap or security-based swap definition. For agreements, contracts, or transactions entered into subsequent to the effective date of such rule, this analysis will have to be performed prior to execution but no later than when the parties offer to enter into the agreement, contract, or transaction to customers to ensure compliance with Title VII. Incurring these assessment costs with respect to these agreements, contracts, or transactions would not have been required in most cases prior to Title VII for two primary reasons. First, as security-based swaps were not regulated prior to Title VII, there was no need to determine whether an agreement, contract or transaction fell within or outside the definition of security-based swap agreement in the CFMA. Second, the need for parties to assess individual types of insurance for purposes of determining whether the Federal securities laws apply would be limited because, as previously stated, typically,

[1279] *See supra* part II.B.1.

[1280] *Id.*

[1281] *Id.*

[1282] *Id.*

[1283] *See generally* section 3(a)(8) of the Securities Act, 15 U.S.C. 77c(a)(8), and section 12(g) of the Exchange Act, 15 U.S.C. 78l(g). The SEC has previously stated its view that Congress intended any insurance contract falling within section 3(a)(8) to be excluded from all provisions of the Securities Act notwithstanding the language of the Securities Act indicating that section 3(a)(8) is an exemption from the registration but not the antifraud provisions. *See Definition of ''Annuity Contract or Optional Annuity Contract'',* 49 FR 46750, 46753 (Nov. 28, 1984). *See also Tcherepnin* v. *Knight,* 389 U.S. 332, 342 n.30 (1967) (Congress specifically stated that ''insurance policies are not to be regarded as securities subject to the provisions of the [Securities] act,'' (quoting H.R. Rep. 85, 73rd Cong., 1st Sess. 15 (1933)). *See also supra* note 42.

[1284] Section 206A of the GLBA, 15 U.S.C. 78c note defined the term ''swap agreement'' and the CFMA had two requirements in addition to the definition of ''swap'' itself: (1) The transaction is between ECPs (as defined prior to enactment of the Dodd-Frank Act); and (2) the material terms of the swap agreement (other than price and quantity) are subject to individual negotiation. Section 762 of the Dodd-Frank Act removed these requirements from the definition of swap agreement. *See supra* part XI.A.1, notes 1225 and 1226. The definition of swap in Title VII of the Dodd-Frank Act is not conditioned on the existence of either of the two requirements, although swap or security-based swap transactions with non-ECPs are subject to additional restrictions under the Federal securities laws and the Commodity Exchange Act. *See* CEA section 1a(47), 7 U.S.C. 1a(47). Insurance policies are typically not subject to individual negotiation. Additionally, the average insurance purchaser may not qualify as an ECP. *See* CEA section 1a(18)(A)(xi), 7 U.S.C. 1a(18)(A)(xi).

[1285] An individual is considered an ECP if the 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 and who enters into the agreement, contract, or transaction in order to manage the risk associated with an asset owned or liability incurred, or reasonable likely to be owned or incurred, by the individual.'' CEA section 1a(18)(A)(xi), 7 U.S.C. 1a(18)(A)(xi).

[1286] *See* section 5(e) of the Securities Act, 15 U.S.C. 77e(d).

[1287] *See* CEA section 2(e), 7 U.S.C. 2(e), and section 6(l) of the Exchange Act, 15 U.S.C. 78f(l).

[1288] *See Registration of Swap Dealers and Major Swap Participants,* 77 FR 2613, corrected at 77 FR 3590 (regarding swap dealers and major swap participants); SB Swap Participant Proposing Release, *supra* note 1239, (regarding SBS dealers and MSBSPs).

insurance has not been regulated under the Federal securities laws, although variable life insurance and annuities are securities and are regulated under the Federal securities laws.[1289]

The SEC believes that rule 3a69–1 under the Exchange Act reduces the assessment costs that would otherwise exist without these rules. Without rule 3a69–1 under the Exchange Act, market participants would still need to assess whether or not the agreement, contract, or transaction they are offering falls within the swap or security-based swap definition. More time and effort would likely be spent on the assessment because of lack of any safe harbor or grandfather to rely on. Without rule 3a69–1 under the Exchange Act, market participants may feel the need to request joint interpretations from the Commissions before they invest resources in insurance business, even with respect to agreements, contracts, or transactions that would otherwise meet the Insurance Safe Harbor or Insurance Grandfather.

The SEC recognizes that the assessment costs associated with rule 3a69–1 under the Exchange Act may include costs related to obtaining legal advice on whether an agreement, contract, or transaction meets the requirements of the Insurance Safe Harbor or Insurance Grandfather. The SEC has sought to minimize the costs of this analysis by adopting an approach that incorporates the characteristics of traditional insurance into the straightforward Product Test and Provider Test, as described in the discussions of relevant rules above.

The SEC believes there will be minimal assessment costs for parties to determine whether an agreement, contract, or transaction is among those specifically enumerated in rule 3a69–1 under the Exchange Act [1290] or that falls within the Insurance Grandfather.[1291]

With respect to rule 3a69–1 under the Exchange Act, the SEC believes that at least some market participants are likely to seek legal counsel for interpretation of various aspects of the rule, particularly when structuring new or novel insurance products. The costs associated with obtaining such legal counsel would vary depending on the relevant facts and circumstances, including the complexity of the agreement, contract, or transaction and whether an interpretation from the Commissions is requested. The SEC believes that the range of costs to undertake the legal analysis required to determine whether the Insurance Safe Harbor or Insurance Grandfather applies to an agreement, contract, or transaction will range from $378 to $27,000, with $27,000 representing a reasonable estimate of the upper end of the range of the costs.[1292]

(iii) Alternatives

The SEC could have determined to not further define the terms ''swap'' and ''security-based swap'' to address the status of traditional insurance products. If the Commissions did not further define the terms ''swap'' and ''security-based swap'' to address the status of traditional insurance products by adopting the Insurance Safe Harbor or the Insurance Grandfather certain insurance providers would have treated their insurance products as swaps or security-based swap, thereby incurring programmatic costs that would otherwise be avoidable. Other insurance providers could misinterpret the application of the definition of swap to certain agreements, contracts, or transactions to determine that they fall outside such definition of swap or security-based swap, in which case the amount of Title VII programmatic benefits and costs with respect to such products may potentially decrease. As stated above, without rule 3a69–1 under the Exchange Act, there also would be higher assessment costs to determine whether an agreement, contract, or transaction falls within or outside the swap or security-based swap definition.[1293]

The Commissions received several comments in support of alternatives to rule 3a69–1 under the Exchange Act as proposed.[1294] The alternatives suggested by commenters include:

- A test based on whether the agreement, contract, or transaction is subject to regulation as insurance by the insurance commissioner of the applicable state(s).[1295]
- A test based on the application of section 3(a)(8) of the Securities Act [1296] to the agreement, contract, or transaction.[1297]
- Various alternative tests that add (or exclude) requirements to the Product Test and the Provider Test.[1298]

The Commissions have considered each of these alternatives proposed by commenters and are adopting the final rule as discussed above.[1299] The Commissions are not adopting the specific alternative tests as proposed by commenters. In considering each of these alternatives, the SEC has taken into account the costs and benefits associated with each alternative.

In the SEC's view, as discussed above,[1300] because these alternative tests do not adequately distinguish traditional insurance products from Title VII instruments, they could result in an over-inclusive Insurance Safe Harbor or Insurance Grandfather and fail to include in the Title VII regulatory regime agreements, contracts, and transactions that Congress intended to be regulated as swaps or security-based swaps.[1301] Therefore, the programmatic benefits of the Title VII regime would not be fully realized if any of the alternatives were adopted.

(b) Narrow-Based Security Index Rules (Rules 3a68–1a, 3a68–1b, and 3a68–3(a) Under the Exchange Act)

(i) Programmatic Costs and Benefits

As previously stated, Title VII created a jurisdictional division between the CFTC and the SEC. The CFTC has jurisdiction over swaps, whereas the SEC has jurisdiction over security-based

[1289] *See supra* note 1283.

[1290] *See supra* part II.B.1.

[1291] *See supra* part II.B.1.c).

[1292] The average cost incurred by market participants in connection with assessing whether an agreement, contract, or transaction is a swap or security-based swap is based on the estimated amount of time that staff believes will be required for both in-house counsel and outside counsel to apply rule 3a69–1. Staff estimates that some agreements, contracts, or transactions will clearly satisfy the Insurance Safe Harbor, Insurance Grandfather and an in-house attorney, without the assistance of outside counsel, will be able to make a determination in one hour. Based upon data 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), staff estimates that the average national hourly rate for an in-house counsel is $378. If an agreement, contract, or transaction is more complex, the SEC estimates the analysis will require approximately 30 hours of in-house counsel time and 40 hours of outside counsel time. The SEC estimates the costs for outside legal services to be $400 per hour. This is based on an estimated $400 per hour cost for outside legal services. This is the same estimate used by the SEC for these services in the release involving Exemptions for Security-Based Swaps Issued By Certain Clearing Agencies, Release No. 33–9308 (Mar. 30, 2012), 77 FR 20536 (Apr. 5, 2012). Accordingly, on the high end of the range the SEC estimates the cost to be $27,340 ($11,340 (based on 30 hours of in-house counsel time x $378) + $16,000 (based on 40 hours of outside counsel x $400). This estimate is rounded by two significant digits to avoid the impression of false precision of the estimate.

[1293] *See supra* part XI.A.4(a)(ii).

[1294] *See supra* part II.B.1.d), for a discussion of each of the proposed alternatives.

[1295] *See* ACLI Letter; AFGI Letter; AIA Letter; MetLife Letter and Travelers Letter.

[1296] 15 U.S.C. 77c(a)(8).

[1297] *See* ACLI Letter at 7; AFGI Letter at 3; CAI Letter at 21–25 and Nationwide Letter at 4.

[1298] *See* ACLI Letter; AIA Letter; Nationwide Letter and NAIC Letter.

[1299] *See supra* part II.B.1.

[1300] *See supra* part II.B.1.d).

[1301] For a more detailed discussion of the comments, including those that suggested alternatives, and the Commissions' response, *see supra* part II.B.1.d).

swaps. In most instances it is clear based on a plain reading of the statute whether a Title VII instrument is a swap or security-based swap (*e.g.,* a CDS referencing a single security or issuer is a security-based swap).[1302] In other instances, such as index CDS, whether a Title VII instrument is a swap or security-based swap depends on whether such instrument is based on a ''narrow-based security index'' or events relating to ''issuers of securities in a narrow-based security index''.[1303] The Commissions are adopting rules 3a68–1a and 3a68–1b under the Exchange Act to further define the terms ''issuers of securities in a narrow-based security index'' and ''narrow-based security index'' for purposes of analyzing CDS.[1304] Additionally, the Commissions are adopting rule 3a68–3(a) under the Exchange Act to define narrow-based security index, except as otherwise provided in rules 3a68–1a and 3a68–1b, consistent with the statutory definition set forth in section 3(a)(55) of the Exchange Act and the rules, regulations and orders of the SEC thereunder.

As discussed above, there are programmatic costs and benefits that flow from being a Title VII instrument.[1305] The overall programmatic costs and benefits flowing from an agreement, contract, or transaction being a swap or a security-based swap may be impacted by the similarities and differences in the Commissions' regulatory programs for swaps and security-based swaps. Generally, the Title VII regulatory regimes of the CFTC and SEC are expected to be broadly similar and complementary. Title VII requires the SEC and the CFTC to consult and coordinate for the purposes of assuring regulatory consistency and comparability with respect to rules adopted and orders issued pursuant to Title VII to the extent possible.[1306] Title VII provides that the Commissions should treat functionally or economically similar products or entities in a similar manner in such rules or orders, but does not require identical rules.[1307] The Commissions may, therefore, diverge substantively on certain rulemakings. In certain areas, the SEC believes it may be appropriate for Title VII's application to security-based swaps to be different from its application to the swaps that will be regulated by the CFTC, as the relevant products, entities and market themselves are different, or because the relevant statutory provisions are different. The SEC believes, however, that the programmatic costs and benefits (which will be discussed in subsequent releases adopting substantive rules) that will flow from the application of rules under either jurisdiction as a result of applying rules 3a68–1a, 3a68–1b, and 3a68–3(a) under the Exchange Act are expected to be broadly similar and complementary.

In addition, since Title VII specifically provides that security-based swaps are securities and grants the SEC the exclusive authority to regulate security-based swaps (other than as to mixed swaps for which the SEC shares jurisdiction with the CFTC), in adopting rules 3a68–1a, 3a68–1b, and 3a68–3(a) under the Exchange Act to further define the terms ''narrow-based security index,'' and ''issuers of securities in a narrow-based security index'', the SEC is mindful of the programmatic costs and benefits specifically associated with security-based swaps falling under the Federal securities laws regime and being regulated by the SEC. These programmatic benefits include, for example, the applicability of the Securities Act registration, disclosure, and civil liability scheme, as well as the SEC's authority to take action to protect investors and prevent fraud and market manipulation. These benefits could in some cases have corresponding costs associated with the application of the Securities Act related to registration, disclosure and civil liability scheme and the registration, disclosure and liability provisions of the Exchange Act. For example, if an issuer of an underlying security enters into a security-based swap it will have to comply with the Securities Act registration requirements both for the security-based swap and the underlying security unless an exemption from registration is available. As another example, if market participants wish to sell security-based swaps to non-ECPs they will have to comply with the registration requirements of the Securities Act. Any person that would be required to comply with the registration requirements of the Securities Act with respect to security-based swaps will incur the costs of such registration, including legal and accounting costs. Additionally, such person will become subject to the periodic reporting requirements of the Exchange Act, unless already subject to such requirements, and incur the costs associated with such Exchange Act periodic reporting.

(ii) Assessment Costs

Market participants will need to ascertain whether an agreement, contract or transaction based on an index is a swap or a security-based swap, prior to execution, but no later than when the parties offer to enter into it, according to the criteria set forth in the definitions of the terms ''narrow-based security index'' and ''issuers of securities in a narrow-based security index.'' The SEC expects that this assessment will be made each time an index is considered to be used or created for purposes of transactions based on such index, and each time the material terms of the index on which the agreement, contract, or transaction is based are amended or modified.[1308] These assessment costs with respect to agreements, contracts, or transactions based on indexes did not arise prior to the enactment of Title VII. The SEC believes that such assessment costs may vary depending on the composition of the index that may underlie agreement, contract, or transaction. For example, the number of components in an index may impact the assessment costs because of the need to determine whether the index's components satisfy the various tests within the rule. However, once such assessment is performed and the narrow-based or broad-based characteristics have been established with respect to an index, unless the characteristic of such index changes, any market participants engaging in agreements, contracts, or transactions referencing such index would not need to incur any material assessment costs, other than to confirm that the index has not changed in a way that would change its classification from narrow-based to broad-based or vice versa.

Although the assessment cost associated with rules 3a68–1a, 3a68–1b, and 3a68–3(a) under the Exchange Act may vary, the SEC estimates that costs associated with undertaking the determination of whether an agreement, contract or transaction based on an index is a swap or security-based swap will range from $378 to $20,000.[1309] The

[1302] *See* section 3(a)(68)(A)(II) of the Exchange Act, 15 U.S.C. 78c(a)(68)(A)(II).

[1303] *See* section 3(a)(68)(A)(I) and (III) of the Exchange Act, 15 U.S.C. 78c(a)(68)(A)(I) and (III).

[1304] *See supra* part III.G.3.b).

[1305] *See supra* part XI.A.3.

[1306] *See* section 712(a)(1) and (a)(2) of the Dodd-Frank Act.

[1307] *See* section 712(a)(7)(A) and (B) of the Dodd-Frank Act.

[1308] *See generally supra* part III.G.

[1309] The average cost incurred by market participants in connection with assessing whether an agreement, contract, or transaction is a swap or security-based swap is based on the estimated amount of time that staff believes will be required for both in-house counsel and outside counsel to apply the definition. Staff estimates that the average national hourly rate for an in-house counsel is $378 based on data from SIFMA's *Management &*

Continued

SEC believes that some agreements, contracts, or transactions based on an established index would not need the assistance of outside counsel, and a determination can be made in one hour. If an agreement, contract, or transaction is more complex, the SEC estimates the analysis will require approximately 20 hours of in-house counsel time and 30 hours of outside counsel time. Accordingly, if an agreement, contract or transaction is based on a newly structured customized index or basket to suit a particular investment or hedging need, the SEC estimates that the assessment may be at or close to the upper end of the estimated range, as part of the structuring of such customized index or basket.[1310]

(iii) Alternatives

The Commissions received many comments on proposed rules 3a68–1a and 3a68–1b and have incorporated many of the suggested alternatives into the final rules and rejected, after careful consideration, other suggested alternatives, as fully discussed in section III.G.3.b. The policy choices made with respect to accepting or rejecting the alternatives suggested by the commenters have been informed by the cost and benefit considerations. In particular, as stated above, the SEC is mindful of the programmatic costs and benefits specifically associated with security-based swaps falling under the Federal securities laws regime.[1311]

One alternative to rules 3a68–1a and 3a68–1b is for the Commissions to not further define the terms ''issuers of securities in a narrow-based security index'' or ''narrow-based security index.'' The SEC believes the assessment cost associated with determining whether an index CDS is a swap or security-based swap would be greater in the absence of rules 3a68–1a and 3a68–1b. Without these rules, market participants would still need to analyze index components and it would be difficult to apply the statutory language of ''issuer of securities in a narrow-based security index'' in section 3(a)(68)(A)(ii)(III) of the Exchange Act to index CDS, given that the existing statutory definition of ''narrow-based security index'' and the past guidance are focused on equity security indexes, volatility indexes and debt security indexes, none of which are specifically tailored for index CDS.[1312] Absent rules 3a68–1a and 3a68–1b, it is very likely that market participants would need to request interpretations from the Commissions. Rules 3a68–1a and 3a68–1b provide tailored and objective criteria, similar to the criteria used in the context of futures contracts on volatility indexes and debt security indexes, to assist market participants in determining whether an index CDS is based on issuers of securities in a narrow-based security index.[1313] These rules will allow market participants to make determinations without requesting interpretations from the Commissions and, therefore, should reduce the assessment costs.

Commenters expressed concern associated with the public information availability test and suggested that the public information availability test not be incorporated into the final rule for various reasons.[1314] As discussed above [1315], the Commissions are adopting the public information availability test with some modifications.

The SEC believes there are many programmatic benefits associated with the public information availability test. As noted above, the public information availability test is intended as the substitute test for the ADTV provision in the statutory narrow-based security index definition.[1316] The ADTV test is designed to take into account the trading of equity securities and, because the listing standards for equity securities require that the security be registered under the Exchange Act, the issuer of the equity security will be subject to the periodic reporting requirements of the Exchange Act. Due to the specific provisions of the statutory ADTV test, the Commissions have determined that the ADTV test is not a useful test for purposes of determining whether an index of reference entities or debt securities is a ''narrow-based security index'' because the components of the index are either reference entities, which do not ''trade,'' or debt instruments, which commonly are not listed, and, therefore, do not have a significant trading volume.[1317] Applying the ADTV test in the existing statutory narrow-based security index definition would not serve any purposes. However, the basis for such provision, that there is sufficient trading in the securities, public information about, and therefore market following of, the issuer of the securities, applies to index CDS. As a substitute for such ADTV test, the SEC believes that there should be public information available about a predominant percentage of the reference entities included in the index, or, in the case of an index CDS on an index of securities, about the issuers of the securities or the securities underlying the index. The SEC believes that this should reduce the likelihood that non-narrow-based indexes referenced in index CDS, or the component securities, or the named issuers of securities in that index would be used as a surrogate for the reference entities securities without complying with the Federal securities laws. In particular, the SEC believes that the public information availability test should reduce the likelihood that the index CDS could be used to circumvent the registration provisions of the Securities Act and provisions of the Exchange Act through the use of CDS based on such indexes, manipulate the reference entities securities or the securities in the index and reduce the potential for misuse of material non-public information through the use of CDS based on such indexes.[1318] If a CDS is based on an index that does not satisfy the public information availability test,[1319] such index CDS will be a security-based swap and thus

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). The SEC estimates the costs for outside legal services to be $400 per hour. This is the same estimate used by the SEC for these services in the release involving *Exemptions for Security-Based Swaps Issued By Certain Clearing Agencies,* Release No. 33–9308 (Mar. 30, 2012), 77 FR 20536 (Apr. 5, 2012). Accordingly, on the high end of the range the SEC estimates the cost to be $19,560 ($7,560 (based on 20 hours of in-house counsel time x $378) + $12,000 (based on 30 hours of outside counsel x $400). This estimate is rounded by two significant digits to avoid the impression of false precision of the estimate.

[1310] For example, the legal costs associated with the analysis of whether an index or basket CDS is a swap or security-based swap will include, among other things, analysis of the weighting of each index or basket component, the aggregate weighting of any five non-affiliated reference entities included in the index or basket, whether a predominant percentage (by weighting) of the issuers included in the index or basket satisfy the public information availability test and whether any issuer included in the index or basket with 5% or more weighting satisfies the public information availability test.

[1311] *See supra* part XI.4.(b)(i).

[1312] *See supra* part III.G.3.

[1313] *Id.*

[1314] *See* LSTA Letter (with respect to loans), Markit Letter, ISDA Letter and SIFMA Letter.

[1315] *See supra* part III.G.3.b(iii).

[1316] *Id.*

[1317] *Id.*

[1318] *Id.*

[1319] So long as the effective notional amounts allocated to reference entities or securities included in the index that satisfy the public information availability test comprise at least 80 percent of the index's weighting, failure by a reference entity or security included in the index to satisfy the public information availability test would be disregarded if the effective notional amounts allocated to that reference entity or security comprise less than 5 percent of the index's weighting. *See* paragraph (b) of rules 1.3(zzz) and 1.3(aaaa) under the CEA and rule 3a68–1a and 3a68–1b under the Exchange Act.

subject to the Federal securities laws and the SEC's oversight.[1320]

Some commenters indicated that the determinations of public availability of information would be costly but did not quantify such costs or explain the difficulty in making an assessment of whether information was publicly available.[1321] The SEC recognizes that there will be assessment costs associated with application of the public information availability test. The SEC notes that the public information availability test applies only for purposes of determining whether an index is a ''narrow-based security index.'' The SEC would expect that market participants would look to the index provider to make the assessment or, if the index or basket is customized by the market participant that the creator of the index would take into account the public information availability of the index components in creating the custom index or basket. As a result, while the SEC recognizes that there will be costs in evaluating whether the index components satisfy the tests, including the public information availability test, the SEC believes that the index provider (or the creator of the custom index or basket) would already be evaluating the index components to determine whether the provider's index criteria were satisfied and, as part of such evaluation, would be able to ascertain whether the public information availability test is satisfied.

One commenter raised a specific concern about the assessment cost relating to applying the public information availability test to indexes of loans or borrowers and stated that unlike index of securities, which are generally subject to national or exchange-based reporting and disclosure regimes, a higher proportion of the components of an index of loans or borrowers may not be registered securities or reporting companies under the Exchange Act and therefore, this commenter stated that it would be more difficult or costly to determine whether an index of loans or borrowers meets the public information availability test.[1322] The SEC has modified the public information availability test to expand the categories of instrument to be aggregated for purposes of the outstanding indebtedness criterion and to change the method of calculating affiliation for purposes of the public information availability test. The SEC believes that these modifications will mitigate the assessment costs that the commenter is concerned about.[1323]

The SEC believes that the overall assessment costs of including a public information availability test are justified in light of its benefits of preventing the index CDS from being used as a surrogate for the underlying securities or securities of the referenced issuer of securities. This should, in turn, prevent circumvention of the application of the Securities Act to index CDS transactions, and prevent fraud, manipulation and misuse of material non-public information.

One commenter suggested replacing the public information availability test with a volume trading test.[1324] The Commissions are not adopting a volume-trading test based on the CDS components of the index or on the index itself, either as a replacement for the public information availability test or as an alternative means of satisfying it. A volume trading test based on CDS is not practicable to use to determine the character of such index CDS because the character of the index CDS would have to be determined prior to any transaction in the Title VII Instrument. Given that there would be no trading volume at the time such determination is made, the index CDS would fail a volume-trading test in all cases [1325] and the assessment costs incurred in connection with such test would not serve any purpose. There also would be assessment costs in determining how many transactions in the CDS index or each CDS component of the index existed, and it is not apparent that any such trade information is either publicly available or verifiable at this time. In addition, the SEC also believes that a volume test based either on the CDS components of the index or the CDS index itself would not be an appropriate substitute for or an alternative to a public information availability test with respect to the referenced entity, issuer of securities, or underlying security because such a volume-based test would not provide transparency on such underlying entities, issuers of securities or securities.[1326] The volume of transactions in a particular CDS or the CDS index does not relate to whether there is public information about the reference entity or reference security underlying the CDS or CDS index. Therefore, a volume-trading test would not achieve the programmatic benefits described above with respect to the public information availability test.

Similarly, the Commissions also rejected commenters' suggestion that the presence of a third-party index provider would assure that sufficient information is available regarding the index CDS itself without the need for a public information availability test.[1327] As stated above, the public information availability test is intended to assure the availability of information about the components of the index, the underlying securities and issuers of the securities.[1328] The existence of a third-party index provider does not imply any greater likelihood that such public information is available.[1329] Although the existence of a third-party index provider as a substitute for the public information availability test would reduce assessment costs of the market participants using such an index (other than the index provider who must evaluate compliance with index criteria), the SEC does not believe that the existence of the third party index provider is a substitute for the public information availability test. The SEC believes that the information a third-party index provider makes available about the construction of an index, index rules, components, and predetermined adjustments provides information only about the index and is not a substitute for the public availability of information about the issuers of the securities or the securities in the index.[1330] In addition, the SEC does not believe that the existence of a third-party index provider indicates any likelihood that such public information is available about the components of the index, which the SEC believes is important to reduce the potential for manipulation of the component securities of an index, or the named issuers of securities in an index, the misuse of non-public information about such an index, the component securities or the reference entities and circumvention of other provisions of the Federal securities laws through the use of CDS based on such an index.[1331] Further, the SEC notes that a third-party index provider may create customized indexes at the behest of market participants, including as part of its regular business and be paid by such market participants for its index

[1320] *See id.*

[1321] *See* LSTA Letter (with respect to loans); and SIFMA Letter

[1322] *See* July LSTA Letter. *See also supra* part III.G.3(b)(iii).

[1323] *See supra* part III.G.3.b)iii).

[1324] *See* Markit Letter.

[1325] *See supra* part III.G.3.b)iii).

[1326] *Id.*

[1327] *See* ISDA Letter; and SIFMA Letter. Neither commenter provided any analysis to explain how or whether a third-party index provider would be able to provide information about the underlying securities or issuers of securities in the index.

[1328] *See supra* part III.G.3.b)iii).

[1329] *Id.*

[1330] *Id.*

[1331] *Id.*

customization and creation services.[1332] Accordingly, the SEC does not believe that a third party index test is an appropriate alternative for the public information availability test and the costs to market participants is justified by the programmatic benefits such test provides.[1333]

As more fully discussed above in section III.G.3.b.iii, in considering other alternatives, including whether to revise or maintain the public information availability test, the SEC has consistently considered the programmatic benefits described above and the importance of assuring that there is information available with respect to the issuers of securities constituting a predominant percentage of an index on which a CDS is based if such index is not going to be considered a ''narrow-based security index.''

(c) Swaps on Certain Futures Contracts on Foreign Sovereign Debt (Rule 3a68–5 Under the Exchange Act)

(i) Programmatic Benefits and Costs

Rule 3a68–5 provides that a Title VII instrument that is based on qualifying foreign futures contracts on debt securities of one of the 21 enumerated foreign governments is a swap and not a security-based swap if the Title VII instrument satisfies certain conditions.[1334] This rule is intended to prevent such Title VII instruments from being used to circumvent both the conditions of rule 3a12–8 and the Federal securities laws protections underlying such conditions.[1335] The conditions provided in rule 3a68–5 are intended to address these concerns. As discussed above, certain of the qualifying foreign futures contracts on the debt securities of one of the 21 enumerated foreign governments that satisfy the conditions of rule 3a12–8 trade with significant volume through foreign trading venues.[1336] Treating Title VII Instruments on such qualifying foreign futures contracts, subject to the conditions provided in rule 3a68–5, as swaps and not security-based swaps would not raise the concerns that such swaps could be used to circumvent rule 3a12–8, the Federal securities laws concerns that such conditions are intended to protect, or allow circumvention of the provisions of the Securities Act applicable to security-based swaps (including those applicable to security-based swaps entered into by issuer of securities underlie such security-based swaps, their affiliates, or underwriters of their securities).[1337] There are certain programmatic costs associated with the rule that market participants will need to be cognizant of. For example, although rule 3a12–8 allows qualifying foreign futures to be physically settled outside the United States, the conditions of rule 3a68–5 require that the swap be cash settled in order to be a swap and not a security-based swap. This has the potential cost of not permitting settlement on the same terms as the qualifying foreign future. However, the SEC believes that, as with other Title VII Instruments, if the Title VII Instrument can be physically settled with securities, it will be a security-based swap. The other condition in rule 3a68–5 that may impact the characterization of the Title VII Instrument is that the Title VII Instrument cannot be entered into by the foreign government, its affiliates, or an underwriter of its securities. This condition is intended to preserve the programmatic benefit of the application of the Securities Act to transactions in Title VII Instruments entered into by issuers of securities, their affiliates and underwriters. Moreover, the final rule provides consistent treatment of qualifying foreign futures contracts on the debt securities of the 21 enumerated foreign governments and Title VII instruments based on such futures contracts on the debt securities of the 21 enumerated foreign governments, which will allow instruments to trade through designated contract markets.

(ii) Assessment Costs

The SEC believes that the assessment cost associated with determining whether a swap on certain futures contracts on foreign government securities constitute a swap or security-based swap under rule 3a68–5 should be minimal. Currently, qualifying foreign futures contracts on debt securities of the 21 enumerated foreign governments are traded on exchanges or boards of trade. Market participants may look at the exchange or board of trade listing to determine what they are. Therefore, the assessment, in accordance with the rule, would primarily focus on whether such swap itself is traded on or through a board of trade; whether the swap is cash-settled; whether the futures is traded on a board of trade; whether any security used to determine the cash settlement amount are not registered under the Securities Act or the subject of any American depositary receipt registered under the Securities Act; and whether the swap is entered into by the foreign government issuing the debt securities upon which the qualifying futures contract is based or referenced, an affiliate of such foreign government or an underwriter of such foreign government securities. All of these determinations may be readily ascertained by the parties entering into the agreement, contract, or transaction. Therefore, the assessment costs associated with rule 3a68–5 under the Exchange Act should be nominal because parties should be able to make assessments under rule 3a68–5 in less than an hour.

(d) Tolerance and Grace Period for Swaps and Security-Based Swaps Traded on Regulated Trading Platforms (Rule 3a68–3 Under the Exchange Act)

(i) Programmatic Benefits and Costs

In addition to defining narrow-based security index consistent with the statutory definition set forth in section 3(a)(55) of the Exchange Act and the rules, regulations and orders of the SEC thereunder, Rule 3a68–3 under the Exchange Act establishes a tolerance and grace period for swaps and security-based swaps to address the treatment of indexes that migrate from broad-based to narrow-based or narrow-based to broad-based, so that market participants will know which regulatory jurisdiction will apply to such Title VII instruments.[1338]

There are programmatic costs and benefits associated with tolerance and grace periods. Because swaps may only trade on designated contract markets (''DCM''), swap execution facilities (''SEF''), and foreign boards of trade (''FBOT''), and security-based swaps may trade only on registered national securities exchanges (''NSE'') and SB SEFs, a tolerance and grace period creates the benefit of permitting the index provider to substitute certain index components in order to maintain the characteristic of such index being narrow-based or broad-based and allow market participants to continue to enter into the Title VII instrument on which such index is based.[1339] The associated programmatic costs are primarily related to the monitoring of index migrations performed by various trading platforms. Such monitoring costs would be part of the operation costs that a trading platform would incur in connection with implementing Title VII regardless of whether rule 3a68–3 under the Exchange Act is adopted. Absent rule 3a68–3 under the Exchange Act, trading platforms still need to have the

[1332] *Id. See also* Proposing Release at 29852.

[1333] *Id.*

[1334] *See supra* part III.E.

[1335] *See supra* note 717 and accompanying text.

[1336] *Id.*

[1337] *Id.*

[1338] *See supra* part III.G.5.

[1339] *Id.*

technology necessary to monitor and conduct surveillance for index migration, as well as create internal policies and procedures relating to such migration. On the other hand, without a tolerance and grace period, if a market participant wishes to offset a security-based swap to hedge its index CDS position on an SEC-regulated trading platform where the underlying security index has migrated from narrow-based to broad-based, the participant would be prohibited from doing so because a Title VII instrument based on the index would be a swap, and is ineligible for trading on an NSE or SB SEF.

(ii) Assessment Costs

Rule 3a68–3 under the Exchange Act provides a tolerance and grace period and does not require any determination to be made beyond the programmatic cost to monitor for migration as described above. The SEC believes that the assessment costs associated with rule 3a68–3 under the Exchange Act should be nominal on the parties entering into an agreement, contract, or transaction.

(iii) Alternatives

One commenter stated its view that extending the ''grace period'' from three months to six months would ease any disruption or dislocation associated with the delisting process with respect to an index that has migrated from broad-based to narrow-based, or narrow-based to broad-based, and such migration is not reversed during the tolerance period.[1340] The commenter did not provide any data, evidence, or other justification for its request. The Commissions are adopting the three-month grace period as proposed, which was the time frame used by Congress in the context of migration of indexes underlying security futures to address the same issue caused by index migration.[1341] The SEC believes that the three-month grace period gives parties to a swap or security-based swap on an index that has migrated sufficient time to execute offsetting positions and believes that it is appropriate to maintain the three-month period that is the applicable grace period for security futures.

(e) Request for Interpretation Process (Rule 3a68–2 Under the Exchange Act)

(i) Programmatic Benefits and Costs

Rule 3a68–2 under the Exchange Act allows persons to submit a request for a joint interpretation from the Commissions regarding whether an agreement, contract or transaction (or a class of agreements, contracts, or transactions) is a swap, security-based swap, or mixed swap. As stated above,[1342] if an agreement, contract, or transaction is a swap or a security-based swap the overall programmatic costs and benefits that may arise from the Commissions' regulatory programs are expected to be broadly similar and complementary.[1343] However, in implementing Title VII the Commissions may diverge on rules and requirements stemming from the Title VII regulatory regime. Accordingly, a party to an agreement, contract, or transaction will need to know the appropriate classification, *e.g.* whether it is a swap or security-based swap, in order to know which regulatory regime and corresponding requirements is applicable. The Dodd-Frank Act requires that, with respect to the definitions of swaps, security-based swaps, and mixed swaps, the Commissions must jointly interpret such definitions. This rule, by providing a mechanism for the Commissions to provide such joint interpretations, allows parties to understand the timing and process for seeing such joint interpretation. Regardless of this rule, the programmatic costs and benefits that flow from being a swap or security-based swap remain the same for parties requesting a joint interpretation. But, the rule allows for parties to the agreement, contract, or transaction to request through a joint interpretation from the Commissions, what regulatory regime would apply or whether the agreement, contract, or transaction is within the definition of swap or security-based swap.

(ii) Assessment Costs

The SEC estimates the costs of submitting a request for a joint interpretation pursuant to rule 3a68–2 under the Exchange Act would be approximately $20,000.[1344] The use of inside counsel in lieu of outside counsel would reduce this estimate. Once such a joint interpretation is made, however, other market participants that seek to transact in the same agreement, contract, or transaction (or class thereof) would be able to rely on such interpretation in determining whether their agreement, contract, or transaction is a swap, security-based swap, or mixed swap. Accordingly, assessment costs may be affected by the number of parties seeing an interpretation or whether prior interpretations with respect to the same or similar agreements, contracts, or transactions have been sought.

(f) Definition of Swap (Rule 3a69–2 Under the Exchange Act)

(i) Programmatic Benefits and Costs

Rule 3a69–2(a) under the Exchange Act states that the term swap has the meaning set forth in section 3(a)(69) of the Exchange Act.[1345] Rule 3a69–2(b) under the Exchange Act explicitly defines the term ''swap'' to include an agreement, contract, or transaction that is a cross-currency swap, currency option, foreign currency option, foreign exchange option, foreign exchange rate option, foreign exchange forward, foreign exchange swap, forward rate agreement, or non-deliverable forward involving foreign exchange, unless such agreement, contract, or transaction is otherwise excluded by section 1a(47)(B) of the CEA.[1346] Rule 3a69–2(c) under the Exchange Act provides that: (1) A foreign exchange forward or a foreign exchange swap shall not be considered a swap if the Secretary of the Treasury makes the determination described in section 1a(47)(E)(i) of the CEA; [1347] and (2) notwithstanding any such determination, certain provisions of the CEA will apply to such a foreign exchange forward or foreign exchange swap (specifically, the reporting requirements in section 4r of the CEA [1348] and regulations thereunder

[1340] *See* MarketAxess Letter. *See also supra* part III.G.5.b).

[1341] *See* section 3(a)(55)(C)(iii)(II) of the Exchange Act, 15 U.S.C. 77c(a)(55)(C)(iii)(II).

[1342] *See supra* part X.4(b)(i).

[1343] *Id.*

[1344] As stated in the Proposing Release at 29878, n. 354, this estimate is based on information indicating that the average costs associated with preparing and submitting a no action request to the SEC staff, which the SEC believes is a process similar to the process under rule 3a68–2 under the Exchange Act. The staff estimates that costs associated with a request pursuant to rule 3a68–2 will cost approximately $19,560. The SEC estimates the analysis will require approximately 20 hours of in-house counsel time and 30 hours of outside counsel time. Based upon data 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), staff estimates that the average national hourly rate for an in-house attorney is $378. The SEC estimates the costs for outside legal services to be $400 per hour. This is the same estimate used by the SEC for these services in the release involving *Exemptions for Security-Based Swaps Issued By Certain Clearing Agencies,* Release No. 33–9308 (Mar. 30, 2012), 77 FR 20536 (Apr. 5, 2012). Accordingly, the SEC estimates the cost to be $19,560 ($7,560 (based on 20 hours of in-house counsel time × $378) + $12,000 (based on 30 hours of outside counsel × $400)) to submit a joint request for interpretation. This estimate is rounded by two significant digits to avoid the impression of false precision of the estimate.

[1345] 15 U.S.C. 78c(a)(69).

[1346] 7 U.S.C. 1a(47)(B).

[1347] 7 U.S.C. 1a(47)(E)(i).

[1348] 7 U.S.C. 6r.

and, in the case of a swap dealer or major swap participant that is a party to a foreign exchange swap or foreign exchange forward, the business conduct standards in section 4s of the CEA [1349] and regulations thereunder). Rule 3a69–2(c) under the Exchange Act further clarifies that a currency swap, cross-currency swap, currency option, foreign currency option, foreign exchange option, foreign exchange rate option, or non-deliverable forward involving foreign exchange is not a foreign exchange forward or foreign exchange swap subject to a determination by the Secretary of the Treasury as described in the preamble.

Rule 3a69–2 is parallel to rule 1.3(xxx)(2) under the CEA. In order to determine whether an agreement, contract, or transaction is a ''swap'' or ''security-based swap'', it is necessary for the Commissions to adopt parallel rules that will apply to a Title VII instrument. Therefore, rule 3a69–2 is included under the Exchange Act. The definition of swap is the starting point for determining the status of a Title VII Instrument as a swap, security-based swap, or mixed swap. To the extent that the specific agreements, contracts, and transactions listed in section 1a(47)(B) of the CEA are swaps, the programmatic costs and benefits that flow from such agreements, contracts or transactions being a Title VII instrument under rule 3a69–2 will be determined by the substantive rules adopted by the CFTC mandated by Title VII. If any such agreements, contracts, or transactions are security-based swaps, the programmatic costs and benefits will be the same as with other security-based swaps.

(ii) Assessment Costs

Since this rule lists some of the types of agreements, contracts or transactions already listed in section 1a(47)(B) of the CEA [1350] and the determination made by the Secretary of the Treasury, the SEC does not believe there would be assessment costs in addition to those incurred by market participants in determining whether an agreement, contract or transaction falls within the definition of swap.

(g) Mixed Swaps (Rule 3a68–4 Under the Exchange Act)

(i) Programmatic Benefits and Costs

Rule 3a68–4(a) under the Exchange Act defines a ''mixed swap'' in the same manner as the term is defined in both the CEA and Exchange Act. Furthermore, rule 3a68–4(b) under the Exchange Act establishes the regulatory framework for mixed swaps with which parties to bilateral uncleared mixed swaps (*i.e.,* mixed swaps that are neither executed on or subject to the rules of a DCM, NSE, SEF, SB SEF, or FBOT nor cleared through a DCO or clearing agency), as to which at least one of the parties is dually registered with both the CFTC and the SEC, will need to comply. The SEC believes that paragraph (b) of rule 3a68–4 under the Exchange Act will augment the programmatic benefits of the Title VII regulatory regime. The rule addresses potentially duplicative regulatory requirements for dually-registered dealers and major participants that are subject to regulation by both the CFTC and the SEC, while requiring dual registrants to comply with the regulatory requirements the Commissions believe are necessary to provide sufficient regulatory oversight for mixed swaps transactions entered into by such dual registrants. It eliminates potentially duplicative regulation and reduces the programmatic costs associated with regulatory implementation and compliance in the context of mixed swaps by providing that a bilateral uncleared mixed swap would be subject to all applicable provisions of the Federal securities laws (and the SEC rules and regulations promulgated thereunder) but would be subject only to certain CEA provisions (and the CFTC rules and regulations promulgated thereunder).

Rule 3a68–4(c) under the Exchange Act establishes a process for persons to request that the Commissions issue a joint order, with respect to parallel provisions [1351] applicable to mixed swaps, to permit such persons (and any other person or persons that subsequently lists, trades, or clears that class of mixed swap) to comply with the parallel provisions of either the CEA or the Exchange Act and related rules and regulations (collectively ''specified parallel provisions''), instead of being required to comply with parallel provisions in both the CEA and the Exchange Act. This process applies except with respect to bilateral, uncleared mixed swaps where one of the parties to the mixed swap is dually registered with the CFTC as a swap dealer or major swap participant and with the SEC as a security-based swap dealer or major security-based swap participant, for which the regulatory framework is established under rule 3a68–4(c). The SEC has recognized the programmatic benefits associated with rule 3a68–4(c) and believes that in the mixed swap area, the process established by rule 3a68–4(c) would eliminate potentially duplicative regulatory requirements and reduce the compliance costs associated with mixed swaps.

(ii) Assessment Costs

With respect to rule 3a68–4(b) under the Exchange Act, one cost is that parties to a mixed swap would need to determine whether they satisfy the conditions set forth in such rule in order to ascertain the regulatory treatment of the mixed swap. Such assessment includes determining whether the mixed swap is neither executed on nor subject to the rules of a DCM, NSE, SEF, SB SEF, or FBOT, whether the mixed swap will not be submitted for clearing, and whether one party to the mixed swap is a dually registered dealer or major participant. The SEC believes that the above determinations would be based on readily ascertainable facts and the assessment costs associated with such determinations should be minimal.

With respect to rule 3a68–4(c) under the Exchange Act, parties to mixed swaps have the option to decide whether to submit a request for issuing a joint order, weighing the benefits realized from the joint order against the cost of submitting such request. If parties to mixed swaps decide to submit a request, the SEC estimates the total costs of preparing and submitting a party's request to the Commissions pursuant to rule 3a68–4(c) under the Exchange Act will be $31,000 per request for mixed swaps for which a request for a joint interpretation pursuant to rule 3a68–4(c) was not previously made.[1352] The use of inside

[1349] 7 U.S.C. 6s.

[1350] 7 U.S.C. 1a(47)(B).

[1351] For purposes of paragraph (c) of rule 3a68–4 under the Exchange Act, ''parallel provisions'' means comparable provisions of the CEA and the Exchange Act that were added or amended by Title VII with respect to security-based swaps and swaps, and the rules and regulations thereunder.

[1352] As discussed in the Proposing Release at 29878, note 356, this estimate is based on information indicating that the average costs associated with preparing and submitting a no-action request to the SEC staff, which the SEC believes is a process similar to the process under rule 3a68–4(c). The staff estimates that costs associated with such a request will cost approximately $31,340. The SEC estimates the analysis will require approximately 30 hours of in-house counsel time and 50 hours of outside counsel time. Based upon data 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), staff estimates that the average national hourly rate for an in-house attorney is $378. The SEC estimates the costs for outside legal services to be $400 per hour. This is the same estimate used by the SEC for these services in the release involving *Exemptions for Security-Based Swaps Issued By Certain Clearing Agencies,* Release No. 33–9308 (Mar. 30, 2012), 77 FR 20536 (Apr. 5,

counsel in lieu of outside counsel would reduce this estimate. Absent such a process, though, market participants that desire or intend to offer or enter into such a mixed swap (or class thereof) would not have the option to request for the Commissions' joint interpretation and absent a joint interpretation, they would be required pursuant to Title VII to comply with all regulatory requirements applicable to both swaps and security-based swaps.

(iii) Alternatives

One commenter recommended that the Commissions require that market participants disaggregate mixed swaps and enter into separate simultaneous transactions so that they cannot employ mixed swaps to obscure the underlying substance of transactions.[1353] This commenter stated that ''the regulatory complexity of dealing with a mixed swap far outweighs the legitimate benefits to counterparties from documenting the transactions as mixed swaps.'' [1354] This commenter asserted that some benefits of requiring disaggregation include more useful price reporting; increased transparency; regulatory reporting and monitoring that will align with the transaction database of the counterparties; and the thwarting of illegitimate motivations, such as obfuscation of prices and fees. Regardless of the benefits of disaggregation raised by the commenter, Title VII specifically contemplates that there would be mixed swaps comprised of both swaps and security-based swaps. The SEC believes that requiring parties to disaggregate mixed swaps into separate components is not consistent with congressional intent and may result in certain programmatic costs, such as limiting the types of derivatives products and transactions market participants may offer and enter into and increasing transaction costs (such as documentation costs) by disaggregating a mixed swap into multiple separate transactions.

(h) Books and Records Requirement for SBSAs (Rule 3a69–3 Under the Exchange Act)

(i) Programmatic Benefits and Costs

Rule 3a69–3 under the Exchange Act provides that there are no additional books and records, or data, requirements regarding SBSAs beyond those required for swaps. The SEC recognized the following programmatic benefits and costs in adopting this rule.

As discussed above, SBSAs are swaps over which the CFTC has primary regulatory authority, but for which the SEC has antifraud, anti-manipulation, and certain other authority.[1355] There will be programmatic benefits and costs as a result of the SDRs, swap dealers, and major swap participants implementing and complying with the books and records requirements provided in sections 21 and 4s of the CEA.[1356] The programmatic benefits and costs will flow from the substantive rules adopted by the CFTC regarding record keeping requirements for swaps. SBSAs are swaps and will be subject to these books and records requirements. The SEC believes that the rules proposed by the CFTC would provide sufficient books and records regarding SBSAs,[1357] and that additional books and records requirements for SBSAs may be duplicative and would not produce corresponding benefits warranting such additional costs. Rule 3a69–3 under the Exchange Act avoids any additional programmatic costs, especially the additional compliance and operation costs that would be incurred by SDRs, swap dealers, and major swap participants in the area of data maintenance and recordkeeping, beyond those which have already been prescribed by the CFTC's rules.

(ii) Assessment Costs

The SEC does not believe that any assessment costs associated with rule 3a69–3 under the Exchange Act would be material.

5. Effects on Competition, Efficiency, 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.[1358] In addition, section 23(a)(2) of the Exchange Act [1359] 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.

The Commissions are further defining ''swap'' and ''security-based swap'' pursuant to section 712(d)(1) of the Dodd-Frank Act.[1360] In the Proposing Release, the SEC stated that the SEC preliminarily believed that the proposed Exchange Act rules would not impose significant burden on competition, that they would create efficient processes, and that they would not have adverse effects on capital formation.[1361] In the Proposing Release, the SEC requested comment on each of these issues,[1362] and no commenters responded to specifically address these issues.

The SEC recognizes that the most significant impact of the swap and security-based swap definitions will derive from these definitions serving as the foundation for implementing the Title VII regulatory regime, particularly given the significant impacts that Title VII will have on the security-based swap market. In adopting these definitional rules, the SEC has sought to fairly reflect the statutory definitions and their underlying intent to implement the regulatory framework Congress intended to impose on the derivatives markets by enacting Title VII.

The scope of the definitions will affect the ultimate regulatory effects on competition, efficiency, and capital formation that will accompany the full implementation of Title VII. The SEC anticipates analyzing these effects in the adopting releases for the particular regulations. Below is a general discussion of the impacts on competition, efficiency, and capital formation as a result of the rules being adopted in this release.

The final rules being adopted relate primarily to further defining the terms ''swap,'' ''security-based swap,'' and ''mixed swap'' to determine (i) the instruments that will be subject to the Title VII regulatory regime and (ii) the jurisdictional line between Title VII

2012). Accordingly, the SEC estimates the cost to be $31,340 ($11,340 (based on 30 hours of in-house counsel time × $378) + $20,000 (based on 50 hours of outside counsel × $400)) to submit a joint request for interpretation. This estimate is rounded by two significant digits to avoid the impression of false precision of the estimate.

[1353] *See* Better Markets Letter.

[1354] *Id.*

[1355] *See supra* part V.

[1356] 7 U.S.C. 24a and 6s. Pursuant to sections 21(b)(2) and 4s(f)(1)(B)(ii) of the CEA, the CFTC has adopted rules with respect to data collection and maintenance by SDR and books and records requirements for swap dealers and major swap participants. *See* 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, 77 FR 20128 (April 3, 2012); and Swap Data Recordkeeping and Reporting Requirements, 77 FR 2136 (January 13, 2012).

[1357] *See* Proposing Release at 29863. *See also supra* part V.

[1358] 15 U.S.C. 78c(f).

[1359] 15 U.S.C. 78w(a)(2).

[1360] The SEC is also acting pursuant to its rulemaking authority provided by sections 3 and 23(a) of the Exchange Act.

[1361] *See* Proposing Release at 29885–87.

[1362] *Id.* at 29887.

instruments regulated by the SEC and those regulated by the CFTC. There also are procedural rules regarding interpretive requests and joint orders from the Commissions, and recordkeeping relating to SBSAs. The SEC believes that these procedural rules are related to the status of a product and the regulatory treatment of a mixed swaps, and therefore, the effects of these rules on competition, efficiency, and capital formation are subsumed in the overall impact of the rules defining the perimeter of the Title VII regulatory regime, and those of the rules relating to the jurisdictional line between the SEC and CFTC.

(a) The Status of Products

The status of products as inside the Title VII regulatory perimeter (i.e., swaps and security-based swaps) or outside the regulatory perimeter will have impacts on market participants. These rules will impact the status of certain market participants currently acting as intermediaries in the security-based swap market, subjecting them to regulatory oversight and registration. As the SEC has noted, the market among intermediaries for security-based swaps is highly concentrated. The 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 respect to having sufficient financial resources to provide potential counterparties with adequate assurances of financial performance.[1363] At the same time, as noted by commenters to the Entities Definition Release, some entities engage in smaller volumes of security-based swap dealing activity.[1364] Some small and mid-size banks, for example, routinely provide such services involving relatively small notional amounts to their customers.[1365] Although these relatively small 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 small need for security-based swaps) enter into security-based swaps, thus promoting the availability of these products.[1366] This availability may assist market participants (as end users), as discussed below, in engaging security-based swap activities that may be related to their businesses or financing needs.

As the SEC has noted before, persons who fall within the definitions of ''security-based swap dealer'' and ''major security-based swap participant'' will incur a range of programmatic costs by virtue of their status as a registered dealer or major participant and certain assessment costs regarding their security-based swap activities. To the extent the costs associated with these statutorily mandated requirements are relatively fixed or large enough, they may negatively affect competition within the security-based swap market.[1367] This may, for example, lead smaller dealers or entities for whom dealing is not a core business to keep their security-based swap dealing activity below the volume threshold required to be registered with the SEC or exit the market if the profit from the security-based swap dealing activity cannot justify the cost incurred to comply with the Title VII requirements; both scenarios could cause 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.[1368]

Certain aspects of the regulation of products defined as security-based swaps may enhance competition in the market for security-based swaps. For example, the proposed business conduct standards, if adopted as proposed, including those for disclosure of material risks and for fair and balanced communications, may reduce information asymmetries between security-based swap dealers, major security based swap participants, and their counterparties. The reduction of information asymmetries should promote price efficiency, promote more informed decision-making, and reduce the incidence of fraudulent or misleading representations.[1369]

In addition, as the SEC noted in the Entity Definitions Release, the current security-based swap market is subject to the potential for risk spillovers and systemic risk, which can occur when the financial sector as a whole (or certain key segments) is exposed to a significant amount of concentrated financial risk, either through direct counterparty relationships or the deterioration of asset values, and such exposure gives rise to the systemic chain effect of one firm's financial distress or losses leading to financial distress or losses of the entire financial sector as a whole.[1370] With respect to transactions involving security-based swaps, security-based swap dealers and major security-based swap participants will be regulated and, as noted in the Entity Definitions Release, such regulation and requirements are expected to increase market participants' confidence in the dealers' and major participants' ability to perform their obligations.[1371]

The effect of the definitions on efficiency and capital formation is linked to their effect on competition. 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, definitions 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 and capital formation within the market.[1372]

As discussed above, certain Title VII requirements and rules relating to intermediaries, such as internal and external business conduct standards, if adopted as proposed, are expected to reduce information asymmetries and promote price efficiency. These business conduct standards, if adopted as proposed, would also help regulators perform their functions in an effective manner. The resulting increase in market integrity could affect capital formation in U.S. capital markets positively.[1373]

Other entities also will be affected by the scope of the security-based swap definition, including clearing agencies that currently, and in the future will, clear security-based swaps, the security-based swap data repositories that collect security-based swap data, and the SB SEFs and exchanges that are transaction venues for security-based swaps, subjecting these entities to regulation and oversight by the SEC.[1374] For example, The SEC has noted that the intent of the proposed rules concerning standards for clearing agency operations and governance standards of clearing agencies is to promote the prompt and accurate clearance and settlement of securities transactions, including security-based swap transactions, by

[1363] *See* Entity Definitions Release, at 30740.

[1364] *Id.*

[1365] *Id.*

[1366] *Id.*

[1367] *Id.*

[1368] *Id.*

[1369] *See* Business Conduct Standards Proposing Release, 76 FR 42396–42459, at 42452. *See also supra* part XI.A.3.

[1370] *See* Entity Definitions Release, at 30740.

[1371] *Id.* at 30723–30724.

[1372] *See* Entity Definitions Release, at 30742.

[1373] *See* Business Conduct Standards Proposing Release, at 42452; SDR Proposing Release, at 77365.

[1374] *See supra* part XI.A.3.

requiring certain minimum standards at clearing agencies.[1375] The SEC stated that it preliminarily believes that these requirements would ensure resilient and cost-effective clearing agency operations as well as promote transparent and effective clearing agency governance that would consequently support confidence among market participants in clearing agencies' ability to serve as efficient mechanisms for clearance and settlement and to facilitate capital formation.[1376]

Similarly, the SEC has previously stated that the core principles, duties, and requirements imposed by Title VII and the proposed rules on SB SEFs will foster innovation in the security-based swap market by allowing entities that seek to become SB SEFs to structure diverse platforms for the trading of security-based swaps,[1377] increase pre-trade price transparency, and establish fair, objective, and not unreasonably discriminatory standards for granting impartial access to trading on the SB SEFs,[1378] thereby furthering higher efficiency, promoting competition, and encouraging capital formation.[1379] The SEC also noted that any resulting increase in market integrity proceeding from the rules intended to support the statutorily-mandated regulatory obligations of SB SEFs would likely increase market participants' confidence in the soundness and fairness of the security-based swap market.[1380] Such increased confidence likely would stimulate financial investment in SB swaps by corporate entities and others that may find that more transparent venues for the trading of SB swaps would allow them to purchase SB swaps to offset business risks and to meet hedging objectives.[1381] Further, to the extent that market participants utilize SB swaps to better manage portfolio risks with respect to positions in underlying securities, the extent that they are willing to participate in the SB swap market may impact their willingness to participate in the underlying asset's market.[1382] Therefore, the Commission stated its preliminary belief that the proposed rules would help encourage capital formation.[1383]

Furthermore, in the proposing release regarding SDRs, [1384] the SEC noted that, by allowing multiple SDRs to provide data collection, maintenance, and recordkeeping services, the rules are intended to promote competition among SDRs. The SEC also stated that the proposed rules promote data collection, maintenance, and recordkeeping according to existing best practices that are used in similar capital market institutions and are likely to positively affect transparency in credit markets and would help capital formation in the broader capital markets whose participants rely on security-based swap markets to meet their hedging objectives.[1385]

Other parties to security-based swap transactions may be affected by the definitions as well. Title VII amends the Exchange Act and the Securities Act to include security-based swap within the definition of the term ''security.'' [1386] End-users will have the benefit and protection of the existing Federal securities laws, including the Exchange Act and Securities Act provisions added by Title VII. As a result of the amendment to the Securities Act regarding security-based swap transactions entered into by issuers of the securities underlying the security-based swap, and their affiliates and underwriters,[1387] such issuers, affiliates, and underwriters cannot use security-based swaps without also complying with the Securities Act provisions with respect to the underlying securities. Furthermore, Title VII provides protections to non-ECPs by adding provisions to both the Securities Act and the Exchange Act that require security-based swap transactions with such non-ECPs to be covered by an effective registration statement under the Securities Act and traded on a national securities exchange, and for brokers and dealers engaging in transactions with non-ECPs to be registered as such under section 15 of the Exchange Act. To the extent counterparties, including issuers of the underlying securities, or their affiliates or underwriters, determine to engage in such transactions, other counterparties may have a greater willingness to engage in such transactions because of the protections afforded by the Securities Act registration, disclosure, and civil liability scheme. An increased interest by end-users may create effects on competition.

While other securities-related derivatives have the same limitations on issuers, affiliates, and underwriters using the derivative to avoid the Securities Act application to the underlying securities at the time the transaction is entered into, these other derivatives, such as security options and security futures, do not contain the same limitation on transactions with non-ECPs. Although security options and security futures must be traded on a national securities exchange as one condition to avail themselves of an exemption from registration under the Securities Act,[1388] other exemptions from registration under the Securities Act may be available for transactions in security options sold to non-ECPs that are not available to security-based swap transactions with non-ECPs.

There also may be effects on efficiency and capital formation by facilitating end-users' use of security-based swaps for investment or hedging of risks relating to investments or business operations, thereby affecting liquidity and costs in connection with the issuance of equity and debt securities. The further definitions may promote capital formation by facilitating these hedging and investment activities. For example, in the context of CDS, as credit risk is correlated, lenders who made loans and investors in debt securities may find it desirable to hedge credit risks on their loan or securities portfolios by purchasing protection through single-name or index CDS.[1389] Although basis risk may exist in this type of trade, it should be effective at reducing counterparty exposure.[1390]

(b) Jurisdictional Divide Impacts

There may be competitive impacts that arise due to the jurisdictional divide between the CFTC and the SEC that Congress imposed in Title VII. While the competitive impacts of the substantive rules will be addressed as part of each substantive rulemaking, the SEC acknowledges that such competitive effects may exist as a consequence of the statutory jurisdictional divide. These competitive impacts may arise due to capital and margin treatment, for example, which may affect demand for security-based swaps as compared to other types of security instruments. In addition, to the extent there are differences in regulatory treatment between security-based swaps

[1375] *See* Clearing Agency Standards Proposing Release, at 14535.

[1376] *Id.*

[1377] *See* SB SEF Proposing Release, at 11049.

[1378] *Id.*

[1379] *Id.* at 11049–50.

[1380] *Id.* at 11049.

[1381] *Id.*

[1382] *Id.* at 11050.

[1383] *Id.*

[1384] *See* SDR Proposing Release, at 77365.

[1385] *Id.*

[1386] *See* section 2(a)(1) of the Securities Act and section 3(a)(10) of the Exchange Act, 15 U.S.C. 77b(a)(1) and 15 U.S.C. 78c(a)(10).

[1387] *See supra* part XI.A.3.

[1388] *See* section 3(a)(14) of the Securities Act and Rule 238 under the Securities Act.

[1389] *See* Entity Definitions Release, at 30742.

[1390] *Id.*

and other securities-based or securities-related instruments, there will be competition across the markets affecting all market participants.

As one example of the possible competitive effects of the jurisdictional divide, section 3E(a) of the Exchange Act provides that only a registered broker, dealer, or security-based swap dealer may accept margin from customers to secure cleared security-based swap transactions,[1391] and that the broker, dealer, or security-based swap dealer shall treat and deal with all margin received from a customer as belonging to the customer.[1392] Similarly, section 4d(f) of the Commodity Exchange Act requires that only a registered futures commission merchant may accept margin from customers to secure cleared swap transactions [1393] and that the futures commissions merchant shall treat and deal with margin received from a customer as belonging to the customer.[1394] The SEC understands that many members of clearing agencies are dually-registered broker-dealers and futures commission merchants and that much of the clearing of security-based swaps may occur through such dually-registered entities.[1395] Because collateral for swaps and security-based swaps are required under applicable statutory requirements to be maintained in two separate accounts under the CEA and Exchange Act, respectively, the derivatives portfolio of a customer will be separated into a swap portfolio and a security-based swap portfolio, with two separate margin accounts and without the benefits of netting swaps against security-based swaps for purposes of calculating margin requirements. Absent the adoption of a margin and segregation approach that would permit a customer to hold both swaps and security-based swaps in a single customer account, a customer who clears swaps and security-based swaps through a clearing member who is dually-registered as a futures commission merchant with the CFTC and a broker-dealer with the SEC may have to deliver collateral to the clearing member with respect to the customer's cleared swap portfolio and also deliver collateral as margin to the clearing member with respect to its security-based swap portfolio even if the positions in the swap portfolio offset the risk arising from the positions in the security-based swap portfolio. This will impact customers' liquidity, as opposed to holding swap and security-based swap positions in one single account,[1396] and increase customers' transaction costs. Such an increase will affect customers' ability to use security-based swaps and may drive them to seek less expensive alternatives. Decrease in demand for security-based swaps may increase dealer competition in the security-based swap market for the remaining business, or result in dealers exiting the market.

In addition, there may be competitive impacts on security-based swap dealers, major security-based swap participants, clearing agencies, security-based swap data repositories and security-based swap execution facilities (or national securities exchanges) if they provide services for both security-based swaps and swaps, as their businesses will be divided based on the jurisdictional line between swaps and security-based swaps. For registered entities whose derivatives activities involve products that reference indexes or baskets, they will incur assessment costs [1397] and, to the extent that SEC and CFTC regulations diverge, they will incur additional regulatory compliance costs [1398] to implement two sets of regulations that would not otherwise be incurred if the jurisdictional divide did not exist. The SEC recognizes that these costs may affect existing market participants' considerations whether to continue to operate their business, and new entrants' desire to enter into new business, across two separate regulatory regimes and if they determine that the incremental costs of operating the derivatives business under two separate regulatory regimes would outweigh potential revenues, they may exit certain products to limit the application of regulatory requirements to solely those of the CFTC or the SEC. This could result in a redistribution of the swaps or security-based swaps dealing activity in the derivatives market and lead to further concentration of security-based swap dealing activity.

The SEC understands that Congress intended to create two parallel regulatory regimes for the derivatives market that complement each other. Each regulatory regime will have the benefit of the regulatory expertise of the respective agency. The rules further defining swap, security-based swap, and mixed swap do not by themselves create negative competitive impacts other than those which potentially could be imposed if the Commissions' substantive requirements differ substantially.

Finally, the rules being adopted may have effects on efficiency and capital formation. For example, the rules defining the terms ''issuers of securities in a narrow-based security index'' and ''narrow-based security index'' for purposes of the jurisdictional divide are intended to, among other things, minimize the likelihood that an index on which a CDS is based that is outside of the SEC's jurisdiction can be used as a surrogate or substitute for the underlying security, or with respect to securities of the referenced issuer, or to manipulate the market for such securities. Such provisions will provide greater protection to the reference issuers or the issuers of the securities in the index that the index CDS cannot be used in a manner that will adversely affect such issuers and their ability to raise capital.

In conclusion, the SEC believes the rules and interpretations adopted here would not have overall adverse effects on efficiency, competition, or capital formation.

B. Paperwork Reduction Act

1. Background

Rules 3a68–2 and 3a68–4(c) under the Exchange Act contain new ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995.[1399] The SEC has submitted them to the Office of Management and Budget (''OMB'') for review in accordance with the PRA.[1400] The titles

[1391] *See* section 3E(a) of the Exchange Act, 15 U.S.C. 78c–5(a).

[1392] *See* section 3E(b)(1) of the Exchange Act, 15 U.S.C. 78c–5(b)(1).

[1393] *See* section 4d(f)(1) of the CEA, 7 U.S.C. 6d(f)(1).

[1394] *See* section 4d(f)(2)(A) of the CEA, 7 U.S.C. 6d(f)(2)(A).

[1395] *See, e.g.,* letter to the SEC from ICE Clear Credit LLC, dated November 7, 2011 (''ICE Clear Credit Letter''), available at *http://www.sec.gov/rules/petitions/2011/petn4-641.pdf* (requesting exemptive relief from the application of section 15(c)(3) of the Exchange Act and Rule 15c3–3 thereunder to allow ICE Clear Credit, and its members that are dually-registered broker-dealers and futures commission merchants, to, among other things: (1) Hold customer assets used to margin, secure, or guarantee customer positions consisting of cleared credit default swaps that include swaps and security-based swaps in a commingled customer omnibus account subject to section 4d(f) of the CEA; and (2) calculate margin for this commingled customer account on a portfolio margin basis); *see also* section 4d(F)(1) of the CEA (making it unlawful for any person to, among other things, accept money and securities from a swaps customer for a cleared swap unless such person has registered with the CFTC as a futures commission merchant).

[1396] *See* ICE Clear Credit Letter at 6, 13–14. *See also Statement of General Policy on the Sequencing of the Compliance Dates for Final Rules Applicable to Security-Based Swaps Adopted Pursuant to the Securities Exchange Act of 1934 and the Dodd-Frank Wall Street Reform and Consumer Protection Act,* 77 FR 35625 n.138 (June 14, 2012).

[1397] *See* the discussion of assessment costs of various rules and interpretations, *supra* part XI.A.4.

[1398] *See supra* parts XI.A.3and XI.A.4.

[1399] 44 U.S.C. 3501 *et seq.*

[1400] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

for the collections of information are: (1) Interpretation of Swaps, Security-Based Swaps, and Mixed Swaps and (2) Regulation of Mixed Swaps: Process for determining regulatory treatment for mixed swaps (OMB Control No. 3235–0685). 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 rules containing these two collections of information are being adopted pursuant to the Exchange Act. The rules establish a process through which a person can submit a request to the Commissions that the Commissions provide a joint interpretation of whether an agreement, contract, or transaction (or class thereof) is a swap, security-based swap, or both (*i.e.,* a mixed swap). The rules also establish a process with respect to mixed swaps through which a person can submit a request to the Commissions that the Commissions issue a joint order permitting the requesting person (and any other person or persons that subsequently lists, trades, or clears that class of mixed swap) to comply, as to parallel provisions only, with specified parallel provisions, instead of being required to comply with parallel provisions of both the CEA and the Exchange Act. The hours and costs associated with preparing and sending these requests will constitute reporting and cost burdens imposed by each collection of information.

In the Proposing Release, the SEC requested comment on the collection of information requirements.[1401] As discussed in connection with rules 3a68–2 and 3a68–4(c) under the Exchange Act, under the Exchange Act the final rules require the same information to be collected as proposed.[1402] As noted above, the Commissions received approximately 86 comment letters on the Proposing Release.[1403] The SEC did not receive any comments that directly address its Paperwork Reduction Act analysis or its burden estimates. However, the SEC did receive comments regarding confidentiality of information submitted as a result of the collection of information requirements. These comments do not directly address the SEC's Paperwork Reduction Act analysis, but they do implicate those aspects of the analysis regarding confidentiality. These comments are discussed below.[1404]

2. Summary of Collection of Information Under Rules 3a68–2 and 3a68–4(c) Under the Exchange Act

First, the SEC is adopting new rule 3a68–2 under the Exchange Act, which will allow persons to submit a request for a joint interpretation from the Commissions regarding whether an agreement, contract, or transaction (or a class thereof) is a swap, security-based swap, or both (*i.e.,* a mixed swap). Under rule 3a68–2 under the Exchange Act, a person will provide to the Commissions all material information regarding the terms of, and a statement of the economic characteristics and purpose of, each relevant agreement, contract, or transaction (or class thereof), along with that person's determination as to whether each such agreement, contract, or transaction (or class thereof) should be characterized as a swap, security-based swap, or both (*i.e.,* a mixed swap), including the basis for such a determination. The Commissions also may request the submitting person to provide additional information.

The Commissions may issue in response a joint interpretation or joint notice of proposed rulemaking regarding the status of that agreement, contract, or transaction (or class thereof) as a swap, security-based swap, or both (*i.e.,* a mixed swap). Any joint interpretation, like any joint notice of proposed rulemaking, will be public and may discuss the material information regarding the terms of the relevant agreement, contract, or transaction (or class thereof), as well as any other information the Commissions deem material to the interpretation. Requesting persons also will be permitted to withdraw a request made pursuant to rule 3a68–2 under the Exchange Act at any time before the Commissions have issued a joint interpretation or joint notice of proposed rulemaking in response to the request.

Persons will submit requests pursuant to rule 3a68–2 under the Exchange Act on a voluntary basis. However, if a person submits a request, all of the information required under the rule, including any additional information requested by the Commissions, must be submitted to the Commissions, except to the extent a person withdraws the request pursuant to the rule.

Second, the SEC is adopting rule 3a68–4(c) under the Exchange Act, which will allow persons to submit requests to the Commissions for joint orders regarding the regulation of a particular mixed swap (or class thereof). Under rule 3a68–4(c) under the Exchange Act, a person will provide to the Commissions all material information regarding the terms of, and the economic characteristics and purpose of, the specified (or specified class of) mixed swap. In addition, a person will provide the specified parallel provisions, the reasons the person believes such specified parallel provisions are appropriate for the mixed swap (or class thereof), and an analysis of: (1) The nature and purposes of the parallel provisions that are the subject of the request; (2) the comparability of such parallel provisions; and (3) the extent of any conflicts or differences between such parallel provisions. The Commissions also may request the submitting person to provide additional information.

The Commissions may issue in response a joint order, after public notice and opportunity for comment, permitting the requesting person (and any other person or persons that subsequently lists, trades, or clears that class of mixed swap) to comply, as to parallel provisions only, with the specified parallel provisions (or another subset of the parallel provisions that are the subject of the request, as the Commissions determine is appropriate), instead of being required to comply with parallel provisions of both the CEA and the Exchange Act. Any joint order will be public and may discuss the material information regarding the terms of the relevant agreement, contract, or transaction (or class thereof), as well as any other information the Commissions deem material to the interpretation. Requesting persons also will be permitted to withdraw a request made pursuant to rule 3a68–4(c) under the Exchange Act at any time before the Commissions have issued a joint order in response to the request.

Persons will submit requests pursuant to rule 3a68–4(c) under the Exchange Act on a voluntary basis. However, if a person submits a request, all of the information required under the rule, including any additional information requested by the Commissions, must be submitted to the Commissions, except to the extent a person withdraws the request pursuant to the rule.

3. Reasons for and Use of Information

The SEC will use the information collected pursuant to rule 3a68–2 under the Exchange Act to evaluate agreements, contracts, or transactions (or classes thereof) in order to provide joint interpretations or joint notices of

[1401] *See* Proposing Release at 29877, 29879.

[1402] *See* discussion of rules 3a68–2 and 3a68–4(c) *supra* parts VI and IV.B.3.

[1403] *See supra* part I.

[1404] *See infra* part XI.B.3.

proposed rulemaking with the CFTC regarding whether these agreements, contracts, or transactions (or classes thereof) are swaps, security-based swaps, or both (*i.e.,* mixed swaps) as defined in the Dodd-Frank Act. The SEC will use the information collected pursuant to rule 3a68–4(c) under the Exchange Act to evaluate a specified, or a specified class of, mixed swap in order to provide joint orders or joint notices of proposed rulemaking with the CFTC regarding the regulation of that particular mixed swap or class of mixed swap. The information provided to the SEC pursuant to rules 3a68–2 and 3a68–4(c) under the Exchange Act also will allow the SEC to monitor the development of new OTC derivatives products in the marketplace and determine whether additional rulemaking or interpretive guidance is necessary or appropriate.

As discussed above, some commenters expressed concern about the public availability of information regarding the joint interpretive process and asked that the parties be able to seek confidential treatment of their submissions.[1405] As stated above, under existing rules of both Commissions, requesting parties may seek confidential treatment for joint interpretive requests from the SEC and the CFTC in accordance with the applicable existing rules relating to confidential treatment of information.[1406] Also as stated above, even if confidential treatment has been requested, all joint interpretive requests, as well all joint interpretations and any decisions not to issue a joint interpretation (along with the explanation of the grounds for such decision), will be made publicly available at the conclusion of the review period.[1407]

4. Respondents

As discussed in the Proposing Release, the SEC believes that the relevant categories of persons that will submit requests under rule 3a68–2 under the Exchange Act will be swap dealers, security-based swap dealers, major swap participants, and major security-based swap participants; SEFs, security-based SEFs and DCMs trading swaps; and SDRs, SBSDRs, DCOs clearing swaps, and clearing agencies clearing security-based swaps.[1408] The SEC estimates that the total number of such persons will be 475.[1409] Similarly, the SEC believes that the relevant categories of persons that will submit a request under rule 3a68–4(c) under the Exchange Act will be SEFs, security-based SEFs, and DCMs trading swaps and estimates that the total number of such persons will be 72.[1410]

However, based on the SEC's experience and information received from commenters to the ANPR[1411] and during meetings with the public to discuss the Product Definitions generally, and taking into consideration the certainty provided by the rules and interpretive guidance in this release, the SEC believes that the number of requests for a joint interpretation to the Commissions pursuant to rule 3a68–2 under the Exchange Act will be small.[1412] With respect to proposed rule 3a68–4(c) under the Exchange Act, the SEC also estimates the number of requests for joint orders will be small.[1413] Pursuant to the Commissions' rules and interpretive guidance, a number of persons that engage in agreements, contracts, or transactions that are swaps, security-based swaps, or both (*i.e.,* a mixed swap) will be certain that their agreements, contracts, or transactions are, indeed, swaps, security-based swaps, or both, (*i.e.,* mixed swaps) and will not request an interpretation pursuant to rule 3a68–2 under the Exchange Act. Also, as the Commissions provide joint interpretations regarding whether agreements, contracts, or transactions (or classes thereof) are or are not swaps, security-based swaps, or both (*i.e.,* mixed swaps), the SEC expects that the number of requests for interpretation will decrease over time. The SEC believes that the rules and interpretive guidance regarding swaps, security-based swaps, and mixed swaps the Commissions are adopting, as well as the additional guidance issued pursuant to joint interpretations and orders under rules 3a68–2 and 3a68–4(c) under the Exchange Act, will result in a narrow pool of potential respondents, approximately 50,[1414] to the collection of information requirements of proposed rule 3a68–2 under the Exchange Act. Although the SEC does not have precise figures for the number of requests that persons will submit after the first year, the SEC believes it is reasonable to estimate that there likely will be fewer than 10 requests on average in each ensuing year.

Similarly, because the SEC believes that both the category of mixed swap transactions and the number of market participants that engage in mixed swap transactions are small, the SEC believes that the pool of potential persons requesting a joint order regarding the regulation of a specified, or specified class of, mixed swap pursuant to proposed rule 3a68–4(c) under the Exchange Act will be small. In addition, depending on the characteristics of a mixed swap (or class thereof), a person may choose not to submit a request pursuant to rule 3a68–4(c) under the Exchange Act. The SEC also notes that any joint order issued by the Commissions will apply to any person that subsequently lists, trades, or clears that specified, or specified class of, mixed swap, so that requests for joint orders could diminish over time. Also, persons may submit requests for an interpretation under rule 3a68–4(c) under the Exchange Act that do not result in an interpretation that the agreement, contract, or transaction (or class thereof) is a mixed swap.[1415] Also, those requests submitted pursuant to rule 3a68–2 under the Exchange Act that result in an interpretation that the agreement, contract, or transaction (or class thereof) is not a mixed swap will reduce the pool of possible persons submitting a request regarding the regulation of particular mixed swaps (or class thereof) pursuant to rule 3a68–4(c) under the Exchange Act.

Furthermore, although certain requests made pursuant to rule 3a68–

[1405] *See supra* part VI.

[1406] *See* 17 CFR 200.81 and 17 CFR 140.98. *See also supra* part VI.

[1407] *See supra* part VI.

[1408] *See* Proposing Release at 29876.

[1409] This total number includes an estimated 250 swap dealers, 50 major swap participants, 50 security-based swap dealers, 10 major security-based swap participants, 35 SEFs, 20 security-based SEFs, 12 DCOs, 17 DCMs, 15 SDRs, 10 SBSDRs, and 6 clearing agencies, as set forth by the CFTC and SEC, respectively, in their other Dodd-Frank Act rulemaking proposals. *See* Entity Definitions Release, *supra* note 12 (regarding security-based swap dealers and major security-based swap participants); Registration of Swap Dealers and Major Swap Participants, *supra* note 1288 (regarding swap dealers and major security-based swap participants); SDR Proposing Release, *supra* note 1231 (regarding SBSDRs); Swap Data Repositories, *supra* note 6 (regarding SDRs); *Core Principles and Other Requirements for Swap Execution Facilities,* 76 FR 1214, Jan. 7, 2011 (regarding SEFs); *Registration and Regulation of Security-Based Swap Execution Facilities,* 76 FR 10948, Feb. 28, 2011 (regarding security-based SEFs); *Derivatives Clearing Organization General Provisions and Core Principles,* 76 FR 69334 (Nov. 8, 2011); *Core Principles and Other Requirements for Designated Contract Markets,* 75 FR 80572, Dec. 22, 2010 (regarding DCMs); *Clearing Agency Standards for Operation and Governance,* 76 FR 14472, Mar. 16, 2011 (regarding clearing agencies).

[1410] *Id.*

[1411] *See supra* note 12 and accompanying text.

[1412] *See infra* note 1414 and accompanying text.

[1413] *See infra* note 1415 and accompanying text.

[1414] The SEC believes that there will be approximately 50 requests in the first year. *See* discussion *infra* part XI.B.5. The SEC recognizes that one person might submit more than one request but for purposes of the PRA is considering the submitter of each such request as a separate person.

[1415] The SEC believes it is reasonable to estimate that it will receive 20 requests in the first year and, as with rule 3a68–2 under the Exchange Act, it will count the submitter of each request as a separate person. *See id.*

4(c) under the Exchange Act may be made without a previous request for a joint interpretation pursuant to rule 3a68–2 under the Exchange Act, the SEC believes that most requests under rule 3a68–2 under the Exchange Act that result in the interpretation that an agreement, contract, or transaction (or class thereof) is a mixed swap will result in a subsequent request for alternative regulatory treatment pursuant to rule 3a68–4(c) under the Exchange Act. The SEC believes that 90 percent, or 18 of the estimated 20 requests pursuant to rule 3a68–4(c) under the Exchange Act in the first year would be such ''follow-on'' requests.

In addition, not only the requesting party, but also any other person that subsequently lists, trades, or clears that mixed swap, will be subject to, and must comply with, the joint order regarding the regulation of the specified, or specified class of, mixed swap, as issued by the Commissions. Therefore, the SEC believes that the number of requests for a joint order regarding the regulation of mixed swaps, particularly involving specified classes of mixed swaps, will decrease over time. As discussed above, the SEC believes that as the Commissions provide joint orders regarding alternative regulatory treatment, the number of requests received will decrease over time. The SEC believes it is reasonable to estimate that there likely will be five requests on average in each ensuing year.

5. Paperwork Reduction Act Burden Estimates

Rules 3a68–2 and 3a68–4(c) under the Exchange Act require submission of certain information to the Commissions to the extent persons elect to request an interpretation and/or alternative regulatory treatment. Rules 3a68–2 and 3a68–4(c) under the Exchange Act each require certain information that a requesting party must include in its request to the Commissions in order to receive a joint interpretation or order, as applicable.

(a) Rule 3a68–2 Under the Exchange Act

Rule 3a68–2 will apply only to requests made by persons that desire an interpretation from the Commissions. For each agreement, contract, or transaction (or class thereof) for which a person requests the Commissions' joint interpretation under rule 3a68–2 under the Exchange Act, the requesting person will be required to provide certain information, as discussed above.[1416]

As discussed above, the SEC believes it is reasonable to estimate that 50 requests will be received in the first year. For purposes of the PRA, the SEC estimates the total paperwork burden associated with preparing and submitting a person's request to the Commissions pursuant to rule 3a68–2 under the Exchange Act will be 20 hours per request and associated costs of $12,000 for outside professionals, which the SEC believes will consist of services provided by attorneys.[1417] These total costs include all collection burdens associated with the rule, including burdens related to the initial determination requirements.

Assuming 50 requests in the first year, the SEC estimates that this will result in an aggregate burden for the first year of 1000 hours of company time (50 requests × 20 hours/request) and $600,000 for the services of outside professionals (*e.g.,* attorneys) (50 requests × 30 hours/request × $400). The estimated internal or company time burden for rule 3a68–2 under the Exchange Act has not changed from that included in the Proposing Release.[1418] However, the estimated burden of the cost for outside professionals for rule 3a68–2 under the Exchange Act has been revised from that included in the Proposing Release to reflect updated data regarding the hourly cost for an attorney.[1419]

As discussed above, the SEC believes that there will be 10 requests on average in each ensuing year, which results in an aggregate burden in each ensuing year of 200 hours of company time (10 requests × 20 hours/request) and $120,000 for the services of outside professionals (*e.g.,* attorneys) (10 requests × 30 hours/request × $400).[1420]

(b) Rule 3a68–4(c) Under the Exchange Act

Rule 3a68–4(c) under the Exchange Act will require any party requesting a joint order regarding the regulation of a specified, or specified class of, mixed swap under the rule to include certain information about the agreement, contract, or transaction (or class thereof) that is a mixed swap, including the specified parallel provisions that the person believes should apply to the mixed swap (or class thereof), the reasons the person believes the specified parallel provisions will be appropriate for the mixed swap.[1421]

As discussed above, the SEC believes the number of requests that persons will submit pursuant to rule 3a68–4(c) under the Exchange Act is quite small given the limited types of agreements, contracts, and transactions (or classes thereof) the Commissions believe will constitute mixed swaps and that it will receive 20 requests in the first year.[1422] For purposes of the PRA, the SEC estimates the total paperwork burden associated with preparing and submitting a party's request to the Commissions pursuant to rule 3a68–4(c) under the Exchange Act will be 30 hours and associated costs of $20,000 for the services of outside professionals, which the SEC believes will consist of services provided by attorneys,[1423] per request for mixed swaps for which a request for a joint interpretation pursuant to rule 3a68–4(c) under the Exchange Act was not previously made.[1424] These total costs include all collection burdens associated with the rule, including burdens related to the initial determination requirements.

[1416] *See* discussion *supra* part VI.

[1417] *See* discussion *supra* part XI.A.4.e(ii). This estimate is based on information indicating that the average burden associated with preparing and submitting a no-action request to the SEC staff in connection with the identification of whether certain products are securities, which the SEC believes is a process similar to the process under rule 3a68–2 under the Exchange Act, is approximately 20 hours and associated costs of $12,000. Assuming these costs correspond to legal fees, which the SEC estimates at an hourly cost of $400, the SEC estimates that this cost is equivalent to approximately 30 hours ($12,000/$400). The estimated internal or company time burden for rule 3a68–2 under the Exchange Act has not changed from that included in the Proposing Release, but the estimated burden of the cost for outside professionals for rule 3a68–2 under the Exchange Act has been revised from that included in the Proposing Release to reflect updated data regarding hourly costs for the services of outside professionals. The estimate of the dollar burden for rule 3a68–2 under the Exchange Act in the Proposing Release was based on data from SIFMA's ''Management & Professional Earnings in the Securities Industry 2009.'' *See* Proposing Release at 29876, note 345. The hourly rate used to estimate the PRA burdens is discussed above. *See supra* note 1344.

[1418] *See* Proposing Release at 29876, 29877–78.

[1419] *See id.*

[1420] *See* discussion *supra* part XI.B.4.

[1421] *See* discussion *supra* part IV.B.3.

[1422] *See supra* note 1415 and accompanying text.

[1423] *See supra* note 1352.

[1424] This estimate is based on information indicating that the average burden associated with preparing and submitting a no-action request to the SEC staff in connection with the regulatory treatment of certain securities products, which the SEC believes is a process similar to the process under rule 3a68–4(c) under the Exchange Act, is approximately 30 hours and associated costs of $20,000. Assuming these costs correspond to legal fees, which the SEC estimates at an hourly cost of $400 as discussed above, the SEC estimates that this cost is equivalent to approximately 50 hours ($20,000/$400). As with rule 3a68–2 under the Exchange Act, the estimated internal or company time burdens for rule 3a68–4(c) under the Exchange Act have not changed from those included in the Proposing Release, but the estimated burdens of the cost for outside professionals for rule 3a68–4(c) under the Exchange Act have been revised from those included in the Proposing Release to reflect updated data regarding hourly costs for the services of outside professionals.

Assuming 20 requests in the first year, the SEC estimates that this will result in an aggregate burden for the first year of 600 hours of company time (20 requests × 30 hours/request) and $400,000 for the services of outside professionals (20 requests × 50 hours/request × $400).[1425]

As discussed above, the SEC believes that most requests under rule 3a68–2 under the Exchange Act that result in the interpretation that an agreement, contract, or transaction (or class thereof) is a mixed swap will result in a subsequent request for alternative regulatory treatment pursuant to rule 3a68–4(c) under the Exchange Act.

Also as discussed above, the SEC believes that 90 percent, or 18 of the estimated 20 requests pursuant to rule 3a68–4(c) under the Exchange Act in the first year, as discussed above will be ''follow-on'' requests. For mixed swaps for which a request for a joint interpretation pursuant to rule 3a68–2 under the Exchange Act was previously made, the SEC estimates the total paperwork burden under the PRA associated with preparing and submitting a party's request to the Commissions pursuant to rule 3a68–4(c) under the Exchange Act will be 10 hours fewer and $6,000 less per request than for mixed swaps for which a request for a joint interpretation pursuant to rule 3a68–2 under the Exchange Act was not previously made because certain, although not all, of the information required to be submitted and necessary to prepare pursuant to rule 3a68–4(c) under the Exchange Act will have been required to be submitted and necessary to prepare pursuant to rule 3a68–2 under the Exchange Act.[1426] The SEC estimates that this will result in an aggregate burden for such ''follow-on'' requests in the first year of 360 hours of company time (18 requests × 20 hours/request) and $252,000 for the services of outside professionals (18 requests × 35 hours/request × $400) and an aggregate burden for all requests in the first year of 420 hours of company time (2 requests × 30 hours/request and 18 requests × 20 hours/request) and $292,000 for the services of outside professionals (2 requests × 50 hours/request × $400 and 18 requests × 35 hours/request × $400).

The estimated internal or company time burden for rule 3a68–4(c) under the Exchange Act has not changed from that included in the Proposing Release.[1427] However, the estimated burden of the cost for outside professionals for rule 3a68–4(c) has been revised from that included in the Proposing Release to reflect updated data regarding the hourly cost for an attorney.[1428]

As discussed above, the SEC believes that there will be five requests on average in each ensuing year. Assuming five requests in each ensuing year, the SEC estimates that this will result in an aggregate burden in each ensuing year of 150 hours of company time (5 requests × 30 hours/request) and $100,000 for the services of outside professionals (5 requests × 50 hours/request × $400). As discussed above, however, assuming that approximately 90 percent, or 4 of the estimated 5 requests pursuant to rule 3a68–4(c) under the Exchange Act in each ensuing year are ''follow-on'' requests to requests for joint interpretation from the Commissions under rule 3a68–4(c) under the Exchange Act, the SEC estimates that this will result in an aggregate burden for such ''follow-on'' requests in each ensuing year of 80 hours of company time (4 requests × 20 hours/request) and $56,000 for the services of outside professionals (4 requests × 35 hours/request × $400) and an aggregate burden for all requests in each ensuing year of 110 hours of company time (1 request × 30 hours/request and 4 requests × 20 hours/request) and $76,000 for the services of outside professionals (1 request × 50 hours/request × $40] and 4 requests × 35 hours/request × $400).

C. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act (''RFA'') [1429] requires Federal agencies, in promulgating rules, to consider the impact of those rules on small entities. Section 603(a) [1430] of the Administrative Procedure Act,[1431] 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.'' [1432] 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.[1433]

For purposes of SEC rulemaking in connection with the RFA, a small entity includes: (1) 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 [1434] and (2) 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,[1435] 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 entity.[1436] Under the standards adopted by the Small Business Administration, small entities in the finance and insurance industry include the following: (1) For entities engaged in credit intermediation and related activities, entities with $175 million or less in assets; [1437] (2) for entities engaged in non-depository credit intermediation and certain other activities, entities with $7 million or less in annual receipts; [1438] (3) for entities engaged in financial investments and related activities, entities with $7 million or less in annual receipts; [1439] (4) for insurance carriers and entities engaged in related activities, entities with $7 million or less in annual receipts; [1440] and (5) for funds, trusts, and other financial

[1425] *See supra* note 1415 and accompanying text.

[1426] This estimate takes into account that certain information regarding the mixed swap (or class thereof), namely the material terms and the economic purpose, will have already been gathered and prepared as part of the request submitted pursuant to proposed rule 3a68–2 under the Exchange Act. The SEC estimates that these items constitute approximately 10 hours fewer and a reduction in associated costs of $6,000. Assuming these costs correspond to legal fees, which the SEC estimates at an hourly cost of $400, the SEC estimates that this cost is equivalent to approximately 15 hours ($6,000/$400). As noted above, these amounts are revised from those included in the Proposing Release to reflect updated data regarding the hourly costs for the services of outside professionals.

[1427] *See* Proposing Release at 29876, 29878–79.

[1428] *See id.*

[1429] 5 U.S.C. 601 *et seq.*

[1430] 5 U.S.C. 603(a).

[1431] 5 U.S.C. 551 *et seq.*

[1432] 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 Statement of Management on Internal Accounting Control,* 47 FR 5215, Feb. 4, 1982.

[1433] *See* 5 U.S.C. 605(b).

[1434] *See* 17 CFR 240.0–10(a).

[1435] *See* 17 CFR 240.17a–5(d).

[1436] *See* 17 CFR 240.0–10(c).

[1437] *See* 13 CFR 121.201 (Subsector 522).

[1438] *See id.* at Subsector 522.

[1439] *See id.* at Subsector 523.

[1440] *See id.* at Subsector 524.

vehicles, entities with $7 million or less in annual receipts.[1441]

The Proposing Release stated that, based on the SEC's existing information about the swap markets, the SEC believed that the swap markets, while broad in scope, are largely dominated by entities such as those that would qualify as swap dealers, security-based swap dealers, major swap participants, and major security-based swap participants (collectively, ''swap market dealers and major participants'') and that the SEC believed that such entities exceed the thresholds defining ''small entities'' set out above.[1442]

The Proposing Release also stated that, although it is possible that other persons may engage in swap and security-based swap transactions, the SEC did not believe that any of these entities would be ''small entities'' as defined in rule 0–10 under the Exchange Act [1443] and that feedback from industry participants about the swap markets indicates that only persons or entities with assets significantly in excess of $5 million (or with annual receipts significantly in excess of $7 million) participate in the swap markets.[1444]

The Proposing Release further stated that, to the extent that a small number of transactions did have a counterparty that was defined as a ''small entity'' under SEC rule 0–10, the SEC believed it is unlikely that the proposed rules and interpretive guidance would have a significant economic impact on that entity because the proposed rules and interpretive guidance simply would address whether certain products fall within the swap definition, address whether certain products are swaps, security-based swaps, SBSAs, or mixed swaps, provide a process for requesting interpretations of whether agreements, contracts, and transactions are swaps, security-based swaps, and mixed swaps, provide a process for requesting alternative regulatory treatment for mixed swaps, and specify that the books and records for SBSAs are those that are applicable to all entities.[1445]

As a result, the SEC certified that the proposed rules and interpretive guidance 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.[1446]

In response to the Proposing Release, one commenter, representing a number of market participants, submitted a comment to the CFTC related to the RFA.[1447] The commenter did not address the letter to the SEC or provide comments regarding the SEC's RFA analysis.[1448]

The SEC continues to believe that the types of entities that would participate in the swap markets—which generally would be swap market dealers and major participants—would not be ''small entities'' for purposes of the RFA. The final rules and interpretive guidance do not themselves impose any compliance obligations. Instead they describe the categories of agreements, contracts, and transactions that are outside the scope of the Product Definitions and delineate the jurisdictional divide between the SEC's and the CFTC's regulatory regime. Accordingly, the SEC certifies that the final rules and interpretive guidance would not have a significant economic impact on a substantial number of small entities for purposes of the RFA.

XII. Statutory Basis and Rule Text

List of Subjects

17 CFR Part 1

Definitions, General swap provisions.

17 CFR Parts 230 and 240

Reporting and recordkeeping requirements, Securities.

17 CFR Part 241

Securities.

Commodity Futures Trading Commission

Pursuant to the Commodity Exchange Act, 7 U.S.C. 1 *et seq.,* as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010) (''Dodd-Frank Act''), and sections 712(a)(8), 712(d), 721(a), 721(b), 721(c), 722(d), and 725(g) of the Dodd-Frank Act, the CFTC is adopting rules 1.3(xxx) through 1.3(bbbb) and 1.6 through 1.9 under the Commodity Exchange Act.

Text of Final Rules

For the reasons stated in the preamble, the CFTC is amending Title 17, Chapter I, of the Code of Federal Regulations, as follows:

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, 6e, 6f, 6g, 6h, 6i, 6j, 6k, 6l, 6m, 6n, 6o, 6p, 6r, 7, 7a, 7b, 8, 9, 10, 12, 12a, 12c, 13a, 13a–1, 16, 16a, 21, 23, and 24.

■ 2. Amend § 1.3 by:
■ a. Adding and reserving paragraphs (nnn) through (www); and
■ b. Adding paragraphs (xxx), (yyy), (zzz), (aaaa) and (bbbb).

The additions read as follows:

§ 1.3 Definitions.

* * * * *

(nnn)–(www) [Reserved]

(xxx) *Swap.* (1) *In general.* The term swap has the meaning set forth in section 1a(47) of the Commodity Exchange Act.

(2) *Inclusion of particular products.* (i) The term swap includes, without limiting the meaning set forth in section 1a(47) of the Commodity Exchange Act, the following agreements, contracts, and transactions:

(A) A cross-currency swap;

(B) A currency option, foreign currency option, foreign exchange option and foreign exchange rate option;

(C) A foreign exchange forward;

(D) A foreign exchange swap;

(E) A forward rate agreement; and

(F) A non-deliverable forward involving foreign exchange.

(ii) The term swap does not include an agreement, contract, or transaction described in paragraph (xxx)(2)(i) of this section that is otherwise excluded by section 1a(47)(B) of the Commodity Exchange Act.

(3) *Foreign exchange forwards and foreign exchange swaps.* Notwithstanding paragraph (xxx)(2) of this section:

(i) A foreign exchange forward or a foreign exchange swap shall not be considered a swap if the Secretary of the Treasury makes a determination described in section 1a(47)(E)(i) of the Commodity Exchange Act.

(ii) Notwithstanding paragraph (xxx)(3)(i) of this section:

(A) The reporting requirements set forth in section 4r of the Commodity Exchange Act and regulations promulgated thereunder shall apply to a foreign exchange forward or foreign exchange swap; and

(B) The business conduct standards set forth in section 4s(h) of the Commodity Exchange Act and regulations promulgated thereunder shall apply to a swap dealer or major

[1441] *See id.* at Subsector 525.

[1442] *See* Proposing Release at 29887.

[1443] *See* 17 CFR 240.0–10(a).

[1444] *See* Proposing Release at 29887.

[1445] *See* Proposing Release at 29887–88.

[1446] *See* Proposing Release at 29888.

[1447] *See* Letter from the National Rural Electric Cooperative Association, the American Public Power Association, the Large Public Power Council, the Edison Electric Institute, and the Electric Power Supply Association (July 22, 2011).

[1448] *See id.*

swap participant that is a party to a foreign exchange forward or foreign exchange swap.

(iii) For purposes of section 1a(47)(E) of the Commodity Exchange Act and this paragraph (xxx), the term *foreign exchange forward* has the meaning set forth in section 1a(24) of the Commodity Exchange Act.

(iv) For purposes of section 1a(47)(E) of the Commodity Exchange Act and this paragraph (xxx), the term *foreign exchange swap* has the meaning set forth in section 1a(25) of the Commodity Exchange Act.

(v) For purposes of sections 1a(24) and 1a(25) of the Commodity Exchange Act and this paragraph (xxx), the following transactions are not foreign exchange forwards or foreign exchange swaps:

(A) A currency swap or a cross-currency swap;

(B) A currency option, foreign currency option, foreign exchange option, or foreign exchange rate option; and

(C) A non-deliverable forward involving foreign exchange.

(4) *Insurance.* (i) This paragraph is a non-exclusive safe harbor. The terms *swap* as used in section 1a(47) of the Commodity Exchange Act and *security-based swap* as used in section 1a(42) of the Commodity Exchange Act do not include an agreement, contract, or transaction that:

(A) By its terms or by law, as a condition of performance on the agreement, contract, or transaction:

(*1*) Requires the beneficiary of the agreement, contract, or transaction to have an insurable interest that is the subject of the agreement, contract, or transaction and thereby carry the risk of loss with respect to that interest continuously throughout the duration of the agreement, contract, or transaction;

(*2*) Requires that loss to occur and to be proved, and that any payment or indemnification therefor be limited to the value of the insurable interest;

(*3*) Is not traded, separately from the insured interest, on an organized market or over-the-counter; and

(*4*) With respect to financial guaranty insurance only, in the event of payment default or insolvency of the obligor, any acceleration of payments under the policy is at the sole discretion of the insurer; and

(B) Is provided:

(*1*)(*i*) By a person that is subject to supervision by the insurance commissioner (or similar official or agency) of any State or by the United States or an agency or instrumentality thereof; and

(*ii*) Such agreement, contract, or transaction is regulated as insurance under applicable State law or the laws of the United States;

(*2*)(*i*) Directly or indirectly by the United States, any State or any of their respective agencies or instrumentalities; or

(*ii*) Pursuant to a statutorily authorized program thereof; or

(*3*) In the case of reinsurance only, by a person to another person that satisfies the conditions set forth in paragraph (xxx)(4)(i)(B) of this section, provided that:

(*i*) Such person is not prohibited by applicable State law or the laws of the United States from offering such agreement, contract, or transaction to such person that satisfies the conditions set forth in paragraph (xxx)(4)(i)(B) of this section;

(*ii*) The agreement, contract, or transaction to be reinsured satisfies the conditions set forth in paragraph (xxx)(4)(i)(A) or paragraph (xxx)(4)(i)(C) of this section; and

(*iii*) Except as otherwise permitted under applicable State law, the total amount reimbursable by all reinsurers for such agreement, contract, or transaction may not exceed the claims or losses paid by the person writing the risk being ceded or transferred by such person; or

(*4*) In the case of non-admitted insurance, by a person who:

(*i*) Is located outside of the United States and listed on the Quarterly Listing of Alien Insurers as maintained by the International Insurers Department of the National Association of Insurance Commissioners; or

(*ii*) Meets the eligibility criteria for non-admitted insurers under applicable State law; or

(C) Is provided in accordance with the conditions set forth in paragraph (xxx)(4)(i)(B) of this section and is one of the following types of products:

(*1*) Surety bond;

(*2*) Fidelity bond;

(*3*) Life insurance;

(*4*) Health insurance;

(*5*) Long term care insurance;

(*6*) Title insurance;

(*7*) Property and casualty insurance;

(*8*) Annuity;

(*9*) Disability insurance;

(*10*) Insurance against default on individual residential mortgages; and

(*11*) Reinsurance of any of the foregoing products identified in paragraphs (xxx)(4)(i)(C)(*1*) through (*10*) of this section; or

(ii) The terms *swap* as used in section 1a(47) of the Commodity Exchange Act and *security-based swap* as used in section 1a(42) of the Commodity Exchange Act do not include an agreement, contract, or transaction that was entered into on or before the effective date of paragraph (xxx)(4) of this section, and that, at such time that it was entered into, was provided in accordance with the conditions set forth in paragraph (xxx)(4)(i)(B) of this section.

(5) *State.* For purposes of paragraph (xxx)(4) of this section, the term *State* means any state of the United States, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, or any other possession of the United States.

(6) *Anti-Evasion:*

(i) An agreement, contract, or transaction that is willfully structured to evade any provision of Subtitle A of the Wall Street Transparency and Accountability Act of 2010, including any amendments made to the Commodity Exchange Act thereby (*Subtitle A*), shall be deemed a swap for purposes of Subtitle A and the rules, regulations, and orders of the Commission promulgated thereunder.

(ii) An interest rate swap or currency swap, including but not limited to a transaction identified in paragraph (xxx)(3)(v) of this section, that is willfully structured as a foreign exchange forward or foreign exchange swap to evade any provision of Subtitle A shall be deemed a swap for purposes of Subtitle A and the rules, regulations, and orders of the Commission promulgated thereunder.

(iii) An agreement, contract, or transaction of a bank that is not under the regulatory jurisdiction of an appropriate Federal banking agency (as defined in section 1a(2) of the Commodity Exchange Act), where the agreement, contract, or transaction is willfully structured as an identified banking product (as defined in section 402 of the Legal Certainty for Bank Products Act of 2000) to evade the provisions of the Commodity Exchange Act, shall be deemed a swap for purposes of the Commodity Exchange Act and the rules, regulations, and orders of the Commission promulgated thereunder.

(iv) The form, label, and written documentation of an agreement, contract, or transaction shall not be dispositive in determining whether the agreement, contract, or transaction has been willfully structured to evade as provided in paragraphs (xxx)(6)(i) through (xxx)(6)(iii) of this section.

(v) An agreement, contract, or transaction that has been willfully structured to evade as provided in paragraphs (xxx)(6)(i) through (xxx)(6)(iii) of this section shall be considered in determining whether a

person that so willfully structured to evade is a swap dealer or major swap participant.

(vi) Notwithstanding the foregoing, no agreement, contract, or transaction structured as a security (including a security-based swap) under the securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47))) shall be deemed a swap pursuant to this paragraph (xxx)(6) or shall be considered for purposes of paragraph (xxx)(6)(v) of this section.

(yyy) *Narrow-based security index as used in the definition of ''security-based swap.''*

(1) *In general.* Except as otherwise provided in paragraphs (zzz) and (aaaa) of this section, for purposes of section 1a(42) of the Commodity Exchange Act, the term *narrow-based security index* has the meaning set forth in section 1a(35) of the Commodity Exchange Act, and the rules, regulations and orders of the Commission thereunder.

(2) *Tolerance period for swaps traded on designated contract markets, swap execution facilities, and foreign boards of trade.* Notwithstanding paragraph (yyy)(1) of this section, solely for purposes of swaps traded on or subject to the rules of a designated contract market, swap execution facility, or foreign board of trade, a security index underlying such swaps shall not be considered a narrow-based security index if:

(i)(A) A swap on the index is traded on or subject to the rules of a designated contract market, swap execution facility, or foreign board of trade for at least 30 days as a swap on an index that was not a narrow-based security index; or

(B) Such index was not a narrow-based security index during every trading day of the six full calendar months preceding a date no earlier than 30 days prior to the commencement of trading of a swap on such index on a market described in paragraph (yyy)(2)(i)(A) of this section; and

(ii) The index has been a narrow-based security index for no more than 45 business days over three consecutive calendar months.

(3) *Tolerance period for security-based swaps traded on national securities exchanges or security-based swap execution facilities.* Notwithstanding paragraph (yyy)(1) of this section, solely for purposes of security-based swaps traded on a national securities exchange or security-based swap execution facility, a security index underlying such security-based swaps shall be considered a narrow-based security index if:

(i)(A) A security-based swap on the index is traded on a national securities exchange or security-based swap execution facility for at least 30 days as a security-based swap on a narrow-based security index; or

(B) Such index was a narrow-based security index during every trading day of the six full calendar months preceding a date no earlier than 30 days prior to the commencement of trading of a security-based swap on such index on a market described in paragraph (yyy)(3)(i)(A) of this section; and

(ii) The index has been a security index that is not a narrow-based security index for no more than 45 business days over three consecutive calendar months.

(4) *Grace period.*

(i) Solely with respect to a swap that is traded on or subject to the rules of a designated contract market, swap execution facility, or foreign board of trade, an index that becomes a narrow-based security index under paragraph (yyy)(2) of this section solely because it was a narrow-based security index for more than 45 business days over three consecutive calendar months shall not be a narrow-based security index for the following three calendar months.

(ii) Solely with respect to a security-based swap that is traded on a national securities exchange or security-based swap execution facility, an index that becomes a security index that is not a narrow-based security index under paragraph (yyy)(3) of this section solely because it was not a narrow-based security index for more than 45 business days over three consecutive calendar months shall be a narrow-based security index for the following three calendar months.

(zzz) Meaning of ''issuers of securities in a narrow-based security index'' as used in the definition of ''security-based swap'' as applied to index credit default swaps.

(1) Notwithstanding paragraph (yyy)(1) of this section, and solely for purposes of determining whether a credit default swap is a security-based swap under the definition of ''security-based swap'' in section 3(a)(68)(A)(ii)(III) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(68)(A)(ii)(III), as incorporated in section 1a(42) of the Commodity Exchange Act, the term *issuers of securities in a narrow-based security index* means issuers of securities included in an index (including an index referencing loan borrowers or loans of such borrowers) in which:

(i)(A) There are nine or fewer non-affiliated issuers of securities that are reference entities included in the index, provided that an issuer of securities shall not be deemed a reference entity included in the index for purposes of this section unless:

(*1*) A credit event with respect to such reference entity would result in a payment by the credit protection seller to the credit protection buyer under the credit default swap based on the related notional amount allocated to such reference entity; or

(*2*) The fact of such credit event or the calculation in accordance with paragraph (zzz)(1)(i)(A)(*1*) of this section of the amount owed with respect to such credit event is taken into account in determining whether to make any future payments under the credit default swap with respect to any future credit events;

(B) The effective notional amount allocated to any reference entity included in the index comprises more than 30 percent of the index's weighting;

(C) The effective notional amount allocated to any five non-affiliated reference entities included in the index comprises more than 60 percent of the index's weighting; or

(D) Except as provided in paragraph (zzz)(2) of this section, for each reference entity included in the index, none of the criteria in paragraphs (zzz)(1)(i)(D)(*1*) through (*8*) of this section is satisfied:

(*1*) The reference entity included in the index is required to file reports pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d));

(*2*) The reference entity included in the index is eligible to rely on the exemption provided in rule 12g3–2(b) under the Securities Exchange Act of 1934 (17 CFR 240.12g3–2(b));

(*3*) The reference entity included in the index has a worldwide market value of its outstanding common equity held by non-affiliates of $700 million or more;

(*4*) The reference entity included in the index (other than a reference entity included in the index that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77)) has outstanding notes, bonds, debentures, loans, or evidences of indebtedness (other than revolving credit facilities) having a total remaining principal amount of at least $1 billion;

(*5*) The reference entity included in the index is the issuer of an exempted security as defined in section 3(a)(12) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(12)) (other than any municipal security as defined in section

3(a)(29) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(29)));

(*6*) The reference entity included in the index is a government of a foreign country or a political subdivision of a foreign country;

(*7*) If the reference entity included in the index is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77)), such asset-backed security was issued in a transaction registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) and has publicly available distribution reports; and

(*8*) For a credit default swap entered into solely between eligible contract participants as defined in section 1a(18) of the Commodity Exchange Act:

(*i*) The reference entity included in the index (other than a reference entity included in the index that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77))) makes available to the public or otherwise makes available to such eligible contract participant information about the reference entity included in the index pursuant to rule 144A(d)(4) under the Securities Act of 1933 (17 CFR 230.144A(d)(4));

(*ii*) Financial information about the reference entity included in the index (other than a reference entity included in the index that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77))) is otherwise publicly available; or

(*iii*) In the case of a reference entity included in the index that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77)), information of the type and level included in publicly available distribution reports for similar asset-backed securities is publicly available about both the reference entity included in the index and such asset-backed security; and

(ii)(A) The index is not composed solely of reference entities that are issuers of exempted securities as defined in section 3(a)(12) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(12)), as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in section 3(a)(29) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(29))), as in effect on the date of enactment of the Futures Trading Act of 1982; and

(B) Without taking into account any portion of the index composed of reference entities that are issuers of exempted securities as defined in section 3(a)(12) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(12)), as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in section 3(a)(29) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(29))), the remaining portion of the index would be within the term ''issuer of securities in a narrow-based security index'' under paragraph (zzz)(1)(i) of this section.

(2) Paragraph (zzz)(1)(i)(D) of this section will not apply with respect to a reference entity included in the index if:

(i) The effective notional amounts allocated to such reference entity comprise less than five percent of the index's weighting; and

(ii) The effective notional amounts allocated to reference entities included in the index that satisfy paragraph (zzz)(1)(i)(D) of this section comprise at least 80 percent of the index's weighting.

(3) For purposes of this paragraph (zzz):

(i) A reference entity included in the index is affiliated with another reference entity included in the index (for purposes of paragraph (zzz)(3)(iv) of this section) or another entity (for purposes of paragraph (zzz)(3)(v) of this section) if it controls, is controlled by, or is under common control with, that other reference entity included in the index or other entity, as applicable; provided that each reference entity included in the index that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77)) will not be considered affiliated with any other reference entity included in the index or any other entity that is an issuing entity of an asset-backed security.

(ii) Control for purposes of this section means ownership of more than 50 percent of the equity of a reference entity included in the index (for purposes of paragraph (zzz)(3)(iv) of this section) or another entity (for purposes of paragraph (zzz)(3)(v) of this section), or the ability to direct the voting of more than 50 percent of the voting equity of a reference entity included in the index (for purposes of paragraph (zzz)(3)(iv) of this section) or another entity (for purposes of paragraph (zzz)(3)(v) of this section).

(iii) In identifying a reference entity included in the index for purposes of this section, the term reference entity includes:

(A) An issuer of securities;

(B) An issuer of securities that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77)); and

(C) An issuer of securities that is a borrower with respect to any loan identified in an index of borrowers or loans.

(iv) For purposes of calculating the thresholds in paragraphs (zzz)(1)(i)(A) through (1)(i)(C) of this section, the term reference entity included in the index includes a single reference entity included in the index or a group of affiliated reference entities included in the index as determined in accordance with paragraph (zzz)(3)(i) of this section (with each reference entity included in the index that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77)) being considered a separate reference entity included in the index).

(v) For purposes of determining whether one of the criterion in either paragraphs (zzz)(1)(i)(D)(*1*) through (zzz)(1)(i)(D)(*4*) of this section or paragraphs (zzz)(1)(iv)(D)(*8*)(*i*) and (a)(1)(iv)(D)(*8*)(*ii*) of this section is met, the term reference entity included in the index includes a single reference entity included in the index or a group of affiliated entities as determined in accordance with paragraph (zzz)(3)(i) of this section (with each issuing entity of an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77)) being considered a separate entity).

(aaaa) Meaning of ''narrow-based security index'' as used in the definition of ''security-based swap'' as applied to index credit default swaps.

(1) Notwithstanding paragraph (yyy)(1) of this section, and solely for purposes of determining whether a credit default swap is a security-based swap under the definition of ''security-based swap'' in section 3(a)(68)(A)(ii)(I) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(68)(A)(ii)(I), as incorporated in section 1a(42) of the Commodity Exchange Act, the term narrow-based security index means an index in which:

(i)(A) The index is composed of nine or fewer securities or securities that are issued by nine or fewer non-affiliated issuers, provided that a security shall not be deemed a component of the index for purposes of this section unless:

(*1*) A credit event with respect to the issuer of such security or a credit event with respect to such security would result in a payment by the credit protection seller to the credit protection buyer under the credit default swap

based on the related notional amount allocated to such security; or

(*2*) The fact of such credit event or the calculation in accordance with paragraph (aaaa)(1)(i)(A)(*1*) of this section of the amount owed with respect to such credit event is taken into account in determining whether to make any future payments under the credit default swap with respect to any future credit events;

(B) The effective notional amount allocated to the securities of any issuer included in the index comprises more than 30 percent of the index's weighting;

(C) The effective notional amount allocated to the securities of any five non-affiliated issuers included in the index comprises more than 60 percent of the index's weighting; or

(D) Except as provided in paragraph (aaaa)(2) of this section, for each security included in the index, none of the criteria in paragraphs (aaaa)(1)(i)(D)(*1*) through (*8*) is satisfied:

(*1*) The issuer of the security included in the index is required to file reports pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d));

(*2*) The issuer of the security included in the index is eligible to rely on the exemption provided in rule 12g3–2(b) under the Securities Exchange Act of 1934 (17 CFR 240.12g3–2(b));

(*3*) The issuer of the security included in the index has a worldwide market value of its outstanding common equity held by non-affiliates of $700 million or more;

(*4*) The issuer of the security included in the index (other than an issuer of the security that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77))) has outstanding notes, bonds, debentures, loans or evidences of indebtedness (other than revolving credit facilities) having a total remaining principal amount of at least $1 billion;

(*5*) The security included in the index is an exempted security as defined in section 3(a)(12) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(12)) (other than any municipal security as defined in section 3(a)(29) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(29)));

(*6*) The issuer of the security included in the index is a government of a foreign country or a political subdivision of a foreign country;

(*7*) If the security included in the index is an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77)), the security was issued in a transaction registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) and has publicly available distribution reports; and

(*8*) For a credit default swap entered into solely between eligible contract participants as defined in section 1a(18) of the Commodity Exchange Act:

(*i*) The issuer of the security included in the index (other than an issuer of the security that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77))) makes available to the public or otherwise makes available to such eligible contract participant information about such issuer pursuant to rule 144A(d)(4) of the Securities Act of 1933 (17 CFR 230.144A(d)(4));

(*ii*) Financial information about the issuer of the security included in the index (other than an issuer of the security that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77))) is otherwise publicly available; or

(*iii*) In the case of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77)), information of the type and level included in public distribution reports for similar asset-backed securities is publicly available about both the issuing entity and such asset-backed security; and

(ii)(A) The index is not composed solely of exempted securities as defined in section 3(a)(12) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(12)), as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in section 3(a)(29) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(29))), as in effect on the date of enactment of the Futures Trading Act of 1982; and

(B) Without taking into account any portion of the index composed of exempted securities as defined in section 3(a)(12) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(12)), as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in section 3(a)(29) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(29))), the remaining portion of the index would be within the term ''narrow-based security index'' under paragraph (aaaa)(1)(i) of this section.

(2) Paragraph (aaaa)(1)(i)(D) of this section will not apply with respect to securities of an issuer included in the index if:

(i) The effective notional amounts allocated to all securities of such issuer included in the index comprise less than five percent of the index's weighting; and

(ii) The securities that satisfy paragraph (aaaa)(1)(i)(D) of this section comprise at least 80 percent of the index's weighting.

(3) For purposes of this paragraph (aaaa):

(i) An issuer of securities included in the index is affiliated with another issuer of securities included in the index (for purposes of paragraph (aaaa)(3)(iv) of this section) or another entity (for purposes of paragraph (aaaa)(3)(v) of this section) if it controls, is controlled by, or is under common control with, that other issuer or other entity, as applicable; provided that each issuer of securities included in the index that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77)) will not be considered affiliated with any other issuer of securities included in the index or any other entity that is an issuing entity of an asset-backed security.

(ii) Control for purposes of this section means ownership of more than 50 percent of the equity of an issuer of securities included in the index (for purposes of paragraph (aaaa)(3)(iv) of this section) or another entity (for purposes of paragraph (aaaa)(3)(v) of this section), or the ability to direct the voting of more than 50 percent of the voting equity an issuer of securities included in the index (for purposes of paragraph (aaaa)(3)(iv) of this section) or another entity (for purposes of paragraph (aaaa)(3)(v) of this section).

(iii) In identifying an issuer of securities included in the index for purposes of this section, the term issuer includes:

(A) An issuer of securities; and

(B) An issuer of securities that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77)).

(iv) For purposes of calculating the thresholds in paragraphs (zzz)(1)(i)(A) through (1)(i)(C) of this section, the term issuer of the security included in the index includes a single issuer of securities included in the index or a group of affiliated issuers of securities included in the index as determined in accordance with paragraph (aaaa)(3)(i) of this section (with each issuer of securities included in the index that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15

U.S.C. 78c(a)(77)) being considered a separate issuer of securities included in the index).

(v) For purposes of determining whether one of the criterion in either paragraphs (aaaa)(1)(i)(D)(1) through (aaaa)(1)(i)(D)(4) of this section or paragraphs (aaaa)(1)(iv)(D)(*8*)(*i*) and (aaaa)(1)(iv)(D)(*8*)(*ii*) of this section is met, the term issuer of the security included in the index includes a single issuer of securities included in the index or a group of affiliated entities as determined in accordance with paragraph (aaaa)(3)(i) of this section (with each issuing entity of an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77)) being considered a separate entity).

(bbbb) Futures contracts on certain foreign sovereign debt. The term *security-based swap* as used in section 3(a)(68) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(68)), as incorporated in section 1a(42) of the Commodity Exchange Act, does not include an agreement, contract, or transaction that is based on or references a qualifying foreign futures contract (as defined in rule 3a12–8 under the Securities Exchange Act of 1934 (17 CFR 240.3a12–8)) on the debt securities of any one or more of the foreign governments enumerated in rule 3a12–8 under the Securities Exchange Act of 1934 (17 CFR 240.3a12–8), provided that such agreement, contract, or transaction satisfies the following conditions:

(1) The futures contract that the agreement, contract, or transaction references or upon which the agreement, contract, or transaction is based is a qualifying foreign futures contract that satisfies the conditions of rule 3a12–8 under the Securities Exchange Act of 1934 (17 CFR 240.3a12–8) applicable to qualifying foreign futures contracts;

(2) The agreement, contract, or transaction is traded on or through a board of trade (as defined in the Commodity Exchange Act);

(3) The debt securities upon which the qualifying foreign futures contract is based or referenced and any security used to determine the cash settlement amount pursuant to paragraph (bbbb)(4) of this section were not registered under the Securities Act of 1933 (15 U.S.C. 77 *et seq.*) or the subject of any American depositary receipt registered under the Securities Act of 1933;

(4) The agreement, contract, or transaction may only be cash settled; and

(5) The agreement, contract or transaction is not entered into by the issuer of the debt securities upon which the qualifying foreign futures contract is based or referenced (including any security used to determine the cash payment due on settlement of such agreement, contract or transaction), an affiliate (as defined in the Securities Act of 1933 (15 U.S.C. 77 *et seq.*) and the rules and regulations thereunder) of the issuer, or an underwriter of such issuer's debt securities.

■ 3. Add §§ 1.6 through 1.9 to read as follows:

Sec.
1.6 Anti-evasion.
1.7 Books and records requirements for security-based swap agreements.
1.8 Requests for interpretation of swaps, security-based swaps, and mixed swaps.
1.9 Regulation of mixed swaps.

* * * * *

§ 1.6 Anti-evasion.

(a) It shall be unlawful to conduct activities outside the United States, including entering into agreements, contracts, and transactions and structuring entities, to willfully evade or attempt to evade any provision of the Commodity Exchange Act as enacted by Subtitle A of the Wall Street Transparency and Accountability Act of 2010 or the rules, regulations, and orders of the Commission promulgated thereunder (*Subtitle A*).

(b) The form, label, and written documentation of an agreement, contract, or transaction, or an entity, shall not be dispositive in determining whether the agreement, contract, or transaction, or entity, has been entered into or structured to willfully evade as provided in paragraph (a) of this section.

(c) An activity conducted outside the United States to evade as provided in paragraph (a) of this section shall be subject to the provisions of Subtitle A.

(d) Notwithstanding the foregoing, no agreement, contract, or transaction structured as a security (including a security-based swap) under the securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47))) shall be deemed a swap pursuant to this section.

§ 1.7 Books and records requirements for security-based swap agreements.

(a) A person registered as a swap data repository under section 21 of the Commodity Exchange Act and the rules and regulations thereunder:

(1) Shall not be required to keep and maintain additional books and records regarding security-based swap agreements other than the books and records regarding swaps required to be kept and maintained pursuant to section 21 of the Commodity Exchange Act and the rules and regulations thereunder; and

(2) Shall not be required to collect and maintain additional data regarding security-based swap agreements other than the data regarding swaps required to be collected and maintained by such persons pursuant to section 21 of the Commodity Exchange Act and the rules and regulations thereunder.

(b) A person shall not be required to keep and maintain additional books and records, including daily trading records, regarding security-based swap agreements other than the books and records regarding swaps required to be kept and maintained by such persons pursuant to section 4s of the Commodity Exchange Act and the rules and regulations thereunder if such person is registered as:

(1) A swap dealer under section 4s(a)(1) of the Commodity Exchange Act and the rules and regulations thereunder;

(2) A major swap participant under section 4s(a)(2) of the Commodity Exchange Act and the rules and regulations thereunder;

(3) A security-based swap dealer under section 15F(a)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78o-10(a)(1)) and the rules and regulations thereunder; or

(4) a major security-based swap participant under section 15F(a)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78o-10(a)(2)) and the rules and regulations thereunder.

(c) The term *security-based swap agreement* has the meaning set forth in section 1a(47)(A)(v) of the Commodity Exchange Act.

§ 1.8 Requests for interpretation of swaps, security-based swaps, and mixed swaps.

(a) *In general.* Any person may submit a request to the Commission and the Securities and Exchange Commission to provide a joint interpretation of whether a particular agreement, contract, or transaction (or class thereof) is:

(1) A swap, as that term is defined in section 1a(47) of the Commodity Exchange Act and the rules and regulations promulgated thereunder;

(2) A security-based swap, as that term is defined in section 1a(42) of the Commodity Exchange Act and the rules and regulations promulgated thereunder; or

(3) A mixed swap, as that term is defined in section 1a(47)(D) of the Commodity Exchange Act and the rules and regulations promulgated thereunder.

(b) *Request process.* In making a request pursuant to paragraph (a) of this section, the requesting person must

provide the Commission and the Securities and Exchange Commission with the following:

(1) All material information regarding the terms of the agreement, contract, or transaction (or class thereof);

(2) A statement of the economic characteristics and purpose of the agreement, contract, or transaction (or class thereof);

(3) The requesting person's determination as to whether the agreement, contract, or transaction (or class thereof) should be characterized as a swap, a security-based swap, or both, (*i.e.,* a mixed swap), including the basis for such determination; and

(4) Such other information as may be requested by the Commission or the Securities and Exchange Commission.

(c) *Request withdrawal.* A person may withdraw a request made pursuant to paragraph (a) of this section at any time prior to the issuance of a joint interpretation or joint proposed rule by the Commission and the Securities and Exchange Commission in response to the request; provided, however, that notwithstanding such withdrawal, the Commission and the Securities and Exchange Commission may provide a joint interpretation of whether the agreement, contract, or transaction (or class thereof) is a swap, a security-based swap, or both (*i.e.,* a mixed swap).

(d) *Request by the Commission or the Securities and Exchange Commission.* In the absence of a request for a joint interpretation under paragraph (a) of this section:

(1) If the Commission or the Securities and Exchange Commission receives a proposal to list, trade, or clear an agreement, contract, or transaction (or class thereof) that raises questions as to the appropriate characterization of such agreement, contract, or transaction (or class thereof) as a swap, a security-based swap, or both (*i.e.,* a mixed swap), the Commission or the Securities and Exchange Commission, as applicable, promptly shall notify the other of the agreement, contract, or transaction (or class thereof); and

(2) The Commission or the Securities and Exchange Commission, or their Chairmen jointly, may submit a request for a joint interpretation as described in paragraph (a) of this section; such submission shall be made pursuant to paragraph (b) of this section, and may be withdrawn pursuant to paragraph (c) of this section.

(e) *Timeframe for joint interpretation.* (1) If the Commission and the Securities and Exchange Commission determine to issue a joint interpretation as described in paragraph (a) of this section, such joint interpretation shall be issued within 120 days after receipt of a complete submission requesting a joint interpretation under paragraph (a) or (d) of this section.

(2) The Commission and the Securities and Exchange Commission shall consult with the Board of Governors of the Federal Reserve System prior to issuing any joint interpretation as described in paragraph (a) of this section.

(3) If the Commission and the Securities and Exchange Commission seek public comment with respect to a joint interpretation regarding an agreement, contract, or transaction (or class thereof), the 120-day period described in paragraph (e)(1) of this section shall be stayed during the pendency of the comment period, but shall recommence with the business day after the public comment period ends.

(4) Nothing in this section shall require the Commission and the Securities and Exchange Commission to issue any joint interpretation.

(5) If the Commission and the Securities and Exchange Commission do not issue a joint interpretation within the time period described in paragraph (e)(1) or (e)(3) of this section, each of the Commission and the Securities and Exchange Commission shall publicly provide the reasons for not issuing such a joint interpretation within the applicable timeframes.

(f) *Joint proposed rule.* (1) Rather than issue a joint interpretation pursuant to paragraph (a) of this section, the Commission and the Securities and Exchange Commission may issue a joint proposed rule, in consultation with the Board of Governors of the Federal Reserve System, to further define one or more of the terms swap, security-based swap, or mixed swap.

(2) A joint proposed rule described in paragraph (f)(1) of this section shall be issued within the timeframe for issuing a joint interpretation set forth in paragraph (e) of this section.

§ 1.9 Regulation of mixed swaps.

(a) *In general.* The term mixed swap has the meaning set forth in section 1a(47)(D) of the Commodity Exchange Act.

(b) *Regulation of bilateral uncleared mixed swaps entered into by dually-registered dealers or major participants.* A mixed swap that is neither executed on nor subject to the rules of a designated contract market, national securities exchange, swap execution facility, security-based swap execution facility, or foreign board of trade; that will not be submitted to a derivatives clearing organization or registered or exempt clearing agency to be cleared; and where at least one party is registered with the Commission as a swap dealer or major swap participant and also with the Securities and Exchange Commission as a security-based swap dealer or major security-based swap participant, shall be subject to:

(1) The following provisions of the Commodity Exchange Act, and the rules and regulations promulgated thereunder:

(i) Examinations and information sharing: sections 4s(f) and 8 of the Commodity Exchange Act;

(ii) Enforcement: sections 2(a)(1)(B), 4(b), 4b, 4c, 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6c, 6d, 9, 13(a), 13(b), and 23 of the Commodity Exchange Act;

(iii) Reporting to a swap data repository: section 4r of the Commodity Exchange Act;

(iv) Real-time reporting: section 2(a)(13) of the Commodity Exchange Act;

(v) Capital: section 4s(e) of the Commodity Exchange Act; and

(vi) Position Limits: section 4a of the Commodity Exchange Act; and

(2) The provisions of the Federal securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), and the rules and regulations promulgated thereunder.

(c) *Process for determining regulatory treatment for other mixed swaps*—(1) *In general.* Any person who desires or intends to list, trade, or clear a mixed swap (or class thereof) that is not subject to paragraph (b) of this section may request the Commission and the Securities and Exchange Commission to issue a joint order permitting the requesting person (and any other person or persons that subsequently lists, trades, or clears that mixed swap) to comply, as to parallel provisions only, with specified parallel provisions of either the Commodity Exchange Act or the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), and the rules and regulations thereunder (collectively, *specified parallel provisions*), instead of being required to comply with parallel provisions of both the Commodity Exchange Act and the Securities Exchange Act of 1934. For purposes of this paragraph (c), *parallel provisions* means comparable provisions of the Commodity Exchange Act and the Securities Exchange Act of 1934 that were added or amended by the Wall Street Transparency and Accountability Act of 2010 with respect to swaps and security-based swaps, and the rules and regulations thereunder.

(2) *Request Process.* A person submitting a request pursuant to

paragraph (c)(1) of this section must provide the Commission and the Securities and Exchange Commission with the following:

(i) All material information regarding the terms of the specified, or specified class of, mixed swap;

(ii) The economic characteristics and purpose of the specified, or specified class of, mixed swap;

(iii) The specified parallel provisions, and the reasons the person believes such specified parallel provisions would be appropriate for the mixed swap (or class thereof); and

(iv) An analysis of:

(A) The nature and purposes of the parallel provisions that are the subject of the request;

(B) The comparability of such parallel provisions;

(C) The extent of any conflicts or differences between such parallel provisions; and

(D) Such other information as may be requested by the Commission or the Securities and Exchange Commission.

(3) *Request withdrawal.* A person may withdraw a request made pursuant to paragraph (c)(1) of this section at any time prior to the issuance of a joint order under paragraph (c)(4) of this section by the Commission and the Securities and Exchange Commission in response to the request.

(4) *Issuance of orders.* In response to a request under paragraph (c)(1) of this section, the Commission and the Securities and Exchange Commission, as necessary to carry out the purposes of the Wall Street Transparency and Accountability Act of 2010, may issue a joint order, after notice and opportunity for comment, permitting the requesting person (and any other person or persons that subsequently lists, trades, or clears that mixed swap) to comply, as to parallel provisions only, with the specified parallel provisions (or another subset of the parallel provisions that are the subject of the request, as the Commissions determine is appropriate), instead of being required to comply with parallel provisions of both the Commodity Exchange Act and the Securities Exchange Act of 1934. In determining the contents of such joint order, the Commission and the Securities and Exchange Commission may consider, among other things:

(i) The nature and purposes of the parallel provisions that are the subject of the request;

(ii) The comparability of such parallel provisions; and

(iii) The extent of any conflicts or differences between such parallel provisions.

(5) *Timeframe.* (i) If the Commission and the Securities and Exchange Commission determine to issue a joint order as described in paragraph (c)(4) of this section, such joint order shall be issued within 120 days after receipt of a complete request for a joint order under paragraph (c)(1) of this section, which time period shall be stayed during the pendency of the public comment period provided for in paragraph (c)(4) of this section and shall recommence with the business day after the public comment period ends.

(ii) Nothing in this section shall require the Commission and the Securities and Exchange Commission to issue any joint order.

(iii) If the Commission and the Securities and Exchange Commission do not issue a joint order within the time period described in paragraph (c)(5)(i) of this section, each of the Commission and the Securities and Exchange Commission shall publicly provide the reasons for not issuing such a joint order within that timeframe.

Securities and Exchange Commission

Pursuant to the Securities Act, 15 U.S.C. 77a *et seq.,* and particularly, sections 19 and 28 thereof, and the Exchange Act, 15 U.S.C. 78a *et seq.,* and particularly, sections 3 and 23 thereof, and sections 712(a)(8), 712(d), 721(a), 761(a) of the Dodd-Frank Act, the SEC is adopting rule 194 under the Securities Act and rules 3a68–1a through 3a68–5 and 3a69–1 through 3a69–3 under the Exchange Act.

Text of Final Rules

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 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

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

Authority: 15 U.S.C. 77b, 77b note, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z–3, 77sss, 78c, 78d, 78j, 78*l,* 78m, 78n, 78o, 78o–7 note, 78t, 78w, 78ll(d), 78mm, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, 80a–37, and Pub. L. 111–203, § 712, 124 Stat. 1376 (2010) unless otherwise noted.

* * * * *

■ 2. Section 230.194 is added to read as follows:

§ 230.194 Definitions of the terms ''swap'' and ''security-based swap'' as used in the Act.

(a) The term *swap* as used in section 2(a)(17) of the Act (15 U.S.C. 77b(a)(17)) has the same meaning as provided in section 3(a)(69) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(69)) and 17 CFR 240.3a69–1 through 240.3a69–3.

(b) The term *security-based swap* as used in section 2(a)(17) of the Act (15 U.S.C. 77b(a)(17)) has the same meaning as provided in section 3(a)(68) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(68)) and 17 CFR 240.3a68–1a through 240.3a68–5.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 3. The general authority citation for Part 240 is revised to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77jjj, 77kkk, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l,* 78m, 78n, 78n–1, 78o, 78o–4, 78o–8, 78p, 78q, 78s, 78u–5, 78w, 78x, 78dd(b), 78dd(c), 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, 7201 *et seq.,* and 8302; 18 U.S.C. 1350; 12 U.S.C. 5221(e)(3), and Pub. L. 111–203, Sec. 712, 124 Stat. 1376 (2010), unless otherwise noted.

* * * * *

■ 4. Add an undesignated center heading and §§ 240.3a68–1a through 240.3a68–5 and §§ 240.3a69–1 through 240.3a69–3 to read as follows:

Further Definition of Swap, Security-Based Swap, and Security-Based Swap Agreement; Mixed Swaps; Security-Based Swap Agreement Recordkeeping

240.3a68–1a Meaning of ''issuers of securities in a narrow-based security index'' as used in section 3(a)(68)(A)(ii)(III) of the Act.
240.3a68–1b Meaning of ''narrow-based security index'' as used in section 3(a)(68)(A)(ii)(I) of the Act.
240.3a68–2 Requests for interpretation of swaps, security-based swaps, and mixed swaps.
240.3a68–3 Meaning of ''narrow-based security index'' as used in the definition of ''security-based swap.''
240.3a68–4 Regulation of mixed swaps.
240.3a68–5 Regulation of certain futures contracts on foreign sovereign debt.
240.3a69–1 Safe Harbor Definition of ''security-based swap'' and ''swap'' as used in sections 3(a)(68) and 3(a)(69) of the Act—insurance.
240.3a69–2 Definition of ''swap'' as used in section 3(a)(69) of the Act—additional products.
240.3a69–3 Books and records requirements for security-based swap agreements.

* * * * *

§ 240.3a68–1a Meaning of ''issuers of securities in a narrow-based security index'' as used in section 3(a)(68)(A)(ii)(III) of the Act.

(a) Notwithstanding § 240.3a68–3(a), and solely for purposes of determining

whether a credit default swap is a security-based swap under section 3(a)(68)(A)(ii)(III) of the Act (15 U.S.C. 78c(a)(68)(A)(ii)(III)), the term *issuers of securities in a narrow-based security index* as used in section 3(a)(68)(A)(ii)(III) of the Act means issuers of securities included in an index (including an index referencing loan borrowers or loans of such borrowers) in which:

(1)(i) There are nine or fewer non-affiliated issuers of securities that are reference entities included in the index, provided that an issuer of securities shall not be deemed a reference entity included in the index for purposes of this section unless:

(A) A credit event with respect to such reference entity would result in a payment by the credit protection seller to the credit protection buyer under the credit default swap based on the related notional amount allocated to such reference entity; or

(B) The fact of such credit event or the calculation in accordance with paragraph (a)(1)(i)(A) of this section of the amount owed with respect to such credit event is taken into account in determining whether to make any future payments under the credit default swap with respect to any future credit events;

(ii) The effective notional amount allocated to any reference entity included in the index comprises more than 30 percent of the index's weighting;

(iii) The effective notional amount allocated to any five non-affiliated reference entities included in the index comprises more than 60 percent of the index's weighting; or

(iv) Except as provided in paragraph (b) of this section, for each reference entity included in the index, none of the criteria in paragraphs (a)(1)(iv)(A) through (a)(1)(iv)(H) of this section is satisfied:

(A) The reference entity included in the index is required to file reports pursuant to section 13 or section 15(d) of the Act (15 U.S.C. 78m or 78o(d));

(B) The reference entity included in the index is eligible to rely on the exemption provided in § 240.12g3–2(b);

(C) The reference entity included in the index has a worldwide market value of its outstanding common equity held by non-affiliates of $700 million or more;

(D) The reference entity included in the index (other than a reference entity included in the index that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77))) has outstanding notes, bonds, debentures, loans, or evidences of indebtedness (other than revolving credit facilities) having a total remaining principal amount of at least $1 billion;

(E) The reference entity included in the index is the issuer of an exempted security as defined in section 3(a)(12) of the Act (15 U.S.C. 78c(a)(12)) (other than any municipal security as defined in section 3(a)(29) of the Act (15 U.S.C. 78c(a)(29)));

(F) The reference entity included in the index is a government of a foreign country or a political subdivision of a foreign country;

(G) If the reference entity included in the index is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77)), such asset-backed security was issued in a transaction registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) and has publicly available distribution reports; and

(H) For a credit default swap entered into solely between eligible contract participants as defined in section 3(a)(65) of the Act (15 U.S.C. 78c(a)(65)):

(*1*) The reference entity included in the index (other than a reference entity included in the index that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77))) makes available to the public or otherwise makes available to such eligible contract participant information about the reference entity included in the index pursuant to § 230.144A(d)(4)) of this chapter;

(*2*) Financial information about the reference entity included in the index (other than a reference entity included in the index that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77))) is otherwise publicly available; or

(*3*) In the case of a reference entity included in the index that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77)), information of the type and level included in publicly available distribution reports for similar asset-backed securities is publicly available about both the reference entity included in the index and such asset-backed security; and

(2)(i) The index is not composed solely of reference entities that are issuers of exempted securities as defined in section 3(a)(12) of the Act (15 U.S.C. 78c(a)(12)), as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in section 3(a)(29) of the Act (15 U.S.C. 78c(a)(29))), as in effect on the date of enactment of the Futures Trading Act of 1982); and

(ii) Without taking into account any portion of the index composed of reference entities that are issuers of exempted securities as defined in section 3(a)(12) of the Act (15 U.S.C. 78c(a)(12)), as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in section 3(a)(29) of the Act (15 U.S.C. 78c(a)(29))), the remaining portion of the index would be within the term ''issuer of securities in a narrow-based security index'' under paragraph (a)(1) of this section.

(b) Paragraph (a)(1)(iv) of this section will not apply with respect to a reference entity included in the index if:

(1) The effective notional amounts allocated to such reference entity comprise less than five percent of the index's weighting; and

(2) The effective notional amounts allocated to reference entities included in the index that satisfy paragraph (a)(1)(iv) of this section comprise at least 80 percent of the index's weighting.

(c) For purposes of this section:

(1) A reference entity included in the index is affiliated with another reference entity included in the index (for purposes of paragraph (c)(4) of this section) or another entity (for purposes of paragraph (c)(5) of this section) if it controls, is controlled by, or is under common control with, that other reference entity included in the index or other entity, as applicable; provided that each reference entity included in the index that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77)) will not be considered affiliated with any other reference entity included in the index or any other entity that is an issuing entity of an asset-backed security.

(2) Control for purposes of this section means ownership of more than 50 percent of the equity of a reference entity included in the index (for purposes of paragraph (c)(4) of this section) or another entity (for purposes of paragraph (c)(5) of this section), or the ability to direct the voting of more than 50 percent of the voting equity of a reference entity included in the index (for purposes of paragraph (c)(4) of this section) or another entity (for purposes of paragraph (c)(5) of this section).

(3) In identifying a reference entity included in the index for purposes of this section, the term *reference entity* includes:

(i) An issuer of securities;

(ii) An issuer of securities that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77)); and

(iii) An issuer of securities that is a borrower with respect to any loan identified in an index of borrowers or loans.

(4) For purposes of calculating the thresholds in paragraphs (a)(1)(i) through (a)(1)(iii) of this section, the term *reference entity included in the index* includes a single reference entity included in the index or a group of affiliated reference entities included in the index as determined in accordance with paragraph (c)(1) of this section (with each reference entity included in the index that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77)) being considered a separate reference entity included in the index).

(5) For purposes of determining whether one of the criterion in either paragraphs (a)(1)(iv)(A) through (a)(1)(iv)(D) of this section or paragraphs (a)(1)(iv)(H)(*1*) and (a)(1)(iv)(H)(*2*) of this section is met, the term *reference entity included in the index* includes a single reference entity included in the index or a group of affiliated entities as determined in accordance with paragraph (c)(1) of this section (with each issuing entity of an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77)) being considered a separate entity).

§ 240.3a68–1b Meaning of ''narrow-based security index'' as used in section 3(a)(68)(A)(ii)(I) of the Act.

(a) Notwithstanding § 240.3a68–3(a), and solely for purposes of determining whether a credit default swap is a security-based swap under section 3(a)(68)(A)(ii)(I) of the Act (15 U.S.C. 78c(a)(68)(A)(ii)(I)), the term *narrow-based security index* as used in section 3(a)(68)(A)(ii)(I) of the Act means an index in which:

(1)(i) The index is composed of nine or fewer securities or securities that are issued by nine or fewer non-affiliated issuers, provided that a security shall not be deemed a component of the index for purposes of this section unless:

(A) A credit event with respect to the issuer of such security or a credit event with respect to such security would result in a payment by the credit protection seller to the credit protection buyer under the credit default swap based on the related notional amount allocated to such security; or

(B) The fact of such credit event or the calculation in accordance with paragraph (a)(1)(i)(A) of this section of the amount owed with respect to such credit event is taken into account in determining whether to make any future payments under the credit default swap with respect to any future credit events;

(ii) The effective notional amount allocated to the securities of any issuer included in the index comprises more than 30 percent of the index's weighting;

(iii) The effective notional amount allocated to the securities of any five non-affiliated issuers included in the index comprises more than 60 percent of the index's weighting; or

(iv) Except as provided in paragraph (b) of this section, for each security included in the index none of the criteria in paragraphs (a)(1)(iv)(A) through (a)(1)(iv)(H) of this section is satisfied:

(A) The issuer of the security included in the index is required to file reports pursuant to section 13 or section 15(d) of the Act (15 U.S.C. 78m or 78o(d));

(B) The issuer of the security included in the index is eligible to rely on the exemption provided in § 240.12g3–2(b);

(C) The issuer of the security included in the index has a worldwide market value of its outstanding common equity held by non-affiliates of $700 million or more;

(D) The issuer of the security included in the index (other than an issuer of the security that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77))) has outstanding notes, bonds, debentures, loans, or evidences of indebtedness (other than revolving credit facilities) having a total remaining principal amount of at least $1 billion;

(E) The security included in the index is an exempted security as defined in section 3(a)(12) of the Act (15 U.S.C. 78c(a)(12)) (other than any municipal security as defined in section 3(a)(29) of the Act (15 U.S.C. 78c(a)(29)));

(F) The issuer of the security included in the index is a government of a foreign country or a political subdivision of a foreign country;

(G) If the security included in the index is an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77)), the security was issued in a transaction registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) and has publicly available distribution reports; and

(H) For a credit default swap entered into solely between eligible contract participants as defined in section 3(a)(65) of the Act (15 U.S.C. 78c(a)(65)):

(*1*) The issuer of the security included in the index (other than an issuer of the security that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77))) makes available to the public or otherwise makes available to such eligible contract participant information about such issuer pursuant to § 230.144A(d)(4)) of this chapter;

(*2*) Financial information about the issuer of the security included in the index (other than an issuer of the security that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77))) is otherwise publicly available; or

(*3*) In the case of an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77)), information of the type and level included in public distribution reports for similar asset-backed securities is publicly available about both the issuing entity and such asset-backed security; and

(2)(i) The index is not composed solely of exempted securities as defined in section 3(a)(12) of the Act (15 U.S.C. 78c(a)(12)), as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in section 3(a)(29) of the Act (15 U.S.C. 78c(a)(29))), as in effect on the date of enactment of the Futures Trading Act of 1982); and

(ii) Without taking into account any portion of the index composed of exempted securities as defined in section 3(a)(12) of the Act (15 U.S.C. 78c(a)(12)), as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in section 3(a)(29) of the Act (15 U.S.C. 78c(a)(29))), the remaining portion of the index would be within the term ''narrow-based security index'' under paragraph (a)(1) of this section.

(b) Paragraph (a)(1)(iv) of this section will not apply with respect to securities of an issuer included in the index if:

(1) The effective notional amounts allocated to all securities of such issuer included in the index comprise less than five percent of the index's weighting; and

(2) The securities that satisfy paragraph (a)(1)(iv) of this section comprise at least 80 percent of the index's weighting.

(c) For purposes of this section:

(1) An issuer of securities included in the index is affiliated with another issuer of securities included in the index (for purposes of paragraph (c)(4) of this section) or another entity (for purposes of paragraph (c)(5) of this section) if it controls, is controlled by, or is under common control with, that other issuer or other entity, as applicable; provided that each issuer of securities included in the index that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of

the Act (15 U.S.C. 78c(a)(77)) will not be considered affiliated with any other issuer of securities included in the index or any other entity that is an issuing entity of an asset-backed security.

(2) Control for purposes of this section means ownership of more than 50 percent of the equity of an issuer of securities included in the index (for purposes of paragraph (c)(4) of this section) or another entity (for purposes of paragraph (c)(5) of this section), or the ability to direct the voting of more than 50 percent of the voting equity an issuer of securities included in the index (for purposes of paragraph (c)(4) of this section) or another entity (for purposes of paragraph (c)(5) of this section).

(3) In identifying an issuer of securities included in the index for purposes of this section, the term *issuer* includes:

(i) An issuer of securities; and

(ii) An issuer of securities that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77)).

(4) For purposes of calculating the thresholds in paragraphs (a)(1)(i) through (a)(1)(iii) of this section, the term *issuer of the security included in the index* includes a single issuer of securities included in the index or a group of affiliated issuers of securities included in the index as determined in accordance with paragraph (c)(1) of this section (with each issuer of securities included in the index that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77)) being considered a separate issuer of securities included in the index).

(5) For purposes of determining whether one of the criterion in either paragraphs (a)(1)(iv)(A) through (a)(1))(iv)(D) of this section or paragraphs (a)(1)(iv)(H)(*1*) and (a)(1)(iv)(H)(*2*) of this section is met, the term *issuer of the security included in the index* includes a single issuer of securities included in the index or a group affiliated entities as determined in accordance with paragraph (c)(1) of this section (with each issuing entity of an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77)) being considered a separate entity).

§ 240.3a68–2 Requests for interpretation of swaps, security-based swaps, and mixed swaps.

(a) *In general.* Any person may submit a request to the Commission and the Commodity Futures Trading Commission to provide a joint interpretation of whether a particular agreement, contract, or transaction (or class thereof) is:

(1) A swap, as that term is defined in section 3(a)(69) of the Act (15 U.S.C. 78c(a)(69)) and the rules and regulations promulgated thereunder;

(2) A security-based swap, as that term is defined in section 3(a)(68) of the Act (15 U.S.C. 78c(a)(68)) and the rules and regulations promulgated thereunder; or

(3) A mixed swap, as that term is defined in section 3(a)(68)(D) of the Act and the rules and regulations promulgated thereunder.

(b) *Request process.* In making a request pursuant to paragraph (a) of this section, the requesting person must provide the Commission and the Commodity Futures Trading Commission with the following:

(1) All material information regarding the terms of the agreement, contract, or transaction (or class thereof);

(2) A statement of the economic characteristics and purpose of the agreement, contract, or transaction (or class thereof);

(3) The requesting person's determination as to whether the agreement, contract, or transaction (or class thereof) should be characterized as a swap, a security-based swap, or both (i.e., a mixed swap), including the basis for such determination; and

(4) Such other information as may be requested by the Commission or the Commodity Futures Trading Commission.

(c) *Request withdrawal.* A person may withdraw a request made pursuant to paragraph (a) of this section at any time prior to the issuance of a joint interpretation or joint proposed rule by the Commission and the Commodity Futures Trading Commission in response to the request; provided, however, that notwithstanding such withdrawal, the Commission and the Commodity Futures Trading Commission may provide a joint interpretation of whether the agreement, contract, or transaction (or class thereof) is a swap, a security-based swap, or both (i.e., a mixed swap).

(d) *Request by the Commission or the Commodity Futures Trading Commission.* In the absence of a request for a joint interpretation under paragraph (a) of this section:

(1) If the Commission or the Commodity Futures Trading Commission receives a proposal to list, trade, or clear an agreement, contract, or transaction (or class thereof) that raises questions as to the appropriate characterization of such agreement, contract, or transaction (or class thereof) as a swap, a security-based swap, or both (i.e., a mixed swap), the Commission or the Commodity Futures Trading Commission, as applicable, promptly shall notify the other of the agreement, contract, or transaction (or class thereof); and

(2) The Commission or the Commodity Futures Trading Commission, or their Chairmen jointly, may submit a request for a joint interpretation as described in paragraph (a) of this section; such submission shall be made pursuant to paragraph (b) of this section, and may be withdrawn pursuant to paragraph (c) of this section.

(e) *Timeframe for joint interpretation.* (1) If the Commission and the Commodity Futures Trading Commission determine to issue a joint interpretation as described in paragraph (a) of this section, such joint interpretation shall be issued within 120 days after receipt of a complete submission requesting a joint interpretation under paragraph (a) or (d) of this section.

(2) The Commission and the Commodity Futures Trading Commission shall consult with the Board of Governors of the Federal Reserve System prior to issuing any joint interpretation as described in paragraph (a) of this section.

(3) If the Commission and the Commodity Futures Trading Commission seek public comment with respect to a joint interpretation regarding an agreement, contract, or transaction (or class thereof), the 120-day period described in paragraph (e)(1) of this section shall be stayed during the pendency of the comment period, but shall recommence with the business day after the public comment period ends.

(4) Nothing in this section shall require the Commission and the Commodity Futures Trading Commission to issue any joint interpretation.

(5) If the Commission and the Commodity Futures Trading Commission do not issue a joint interpretation within the time period described in paragraph (e)(1) or (e)(3) of this section, each of the Commission and the Commodity Futures Trading Commission shall publicly provide the reasons for not issuing such a joint interpretation within the applicable timeframes.

(f) *Joint proposed rule.* (1) Rather than issue a joint interpretation pursuant to paragraph (a) of this section, the Commission and the Commodity Futures Trading Commission may issue a joint proposed rule, in consultation with the Board of Governors of the Federal Reserve System, to further

define one or more of the terms swap, security-based swap, or mixed swap.

(2) A joint proposed rule described in paragraph (f)(1) of this section shall be issued within the timeframe for issuing a joint interpretation set forth in paragraph (e) of this section.

§ 240.3a68–3 Meaning of ''narrow-based security index'' as used in the definition of ''security-based swap.''

(a) *In general.* Except as otherwise provided in § 240.3a68–1a and § 240.3a68–1b, for purposes of section 3(a)(68) of the Act (15 U.S.C. 78c(a)(68)), the term *narrow-based security index* has the meaning set forth in section 3(a)(55) of the Act (15 U.S.C. 78c(a)(55)), and the rules, regulations, and orders of the Commission thereunder.

(b) *Tolerance period for swaps traded on designated contract markets, swap execution facilities and foreign boards of trade.* Notwithstanding paragraph (a) of this section, solely for purposes of swaps traded on or subject to the rules of a designated contract market, swap execution facility, or foreign board of trade pursuant to the Commodity Exchange Act (7 U.S.C. 1 *et seq.*), a security index underlying such swaps shall not be considered a narrow-based security index if:

(1)(i) A swap on the index is traded on or subject to the rules of a designated contract market, swap execution facility, or foreign board of trade pursuant to the Commodity Exchange Act (7 U.S.C. 1 *et seq.*) for at least 30 days as a swap on an index that was not a narrow-based security index; or

(ii) Such index was not a narrow-based security index during every trading day of the six full calendar months preceding a date no earlier than 30 days prior to the commencement of trading of a swap on such index on a market described in paragraph (b)(1)(i) of this section; and

(2) The index has been a narrow-based security index for no more than 45 business days over three consecutive calendar months.

(c) *Tolerance period for security-based swaps traded on national securities exchanges or security-based swap execution facilities.* Notwithstanding paragraph (a) of this section, solely for purposes of security-based swaps traded on a national securities exchange or security-based swap execution facility, a security index underlying such security-based swaps shall be considered a narrow-based security index if:

(1)(i) A security-based swap on the index is traded on a national securities exchange or security-based swap execution facility for at least 30 days as a security-based swap on a narrow-based security index; or

(ii) Such index was a narrow-based security index during every trading day of the six full calendar months preceding a date no earlier than 30 days prior to the commencement of trading of a security-based swap on such index on a market described in paragraph (c)(1)(i) of this section; and

(2) The index has been a security index that is not a narrow-based security index for no more than 45 business days over three consecutive calendar months.

(d) *Grace period.* (1) Solely with respect to a swap that is traded on or subject to the rules of a designated contract market, swap execution facility or foreign board of trade pursuant to the Commodity Exchange Act (7 U.S.C. 1 *et seq.*), an index that becomes a narrow-based security index under paragraph (b) of this section solely because it was a narrow-based security index for more than 45 business days over three consecutive calendar months shall not be a narrow-based security index for the following three calendar months.

(2) Solely with respect to a security-based swap that is traded on a national securities exchange or security-based swap execution facility, an index that becomes a security index that is not a narrow-based security index under paragraph (c) of this section solely because it was not a narrow-based security index for more than 45 business days over three consecutive calendar months shall be a narrow-based security index for the following three calendar months.

§ 240.3a68–4 Regulation of mixed swaps.

(a) *In general.* The term mixed swap has the meaning set forth in section 3(a)(68)(D) of the Act (15 U.S.C. 78c(a)(68)(D)).

(b) *Regulation of bilateral uncleared mixed swaps entered into by dually-registered dealers or major participants.* A mixed swap:

(1) That is neither executed on nor subject to the rules of a designated contract market, national securities exchange, swap execution facility, security-based swap execution facility, or foreign board of trade;

(2) That will not be submitted to a derivatives clearing organization or registered or exempt clearing agency to be cleared; and

(3) Where at least one party is registered with the Commission as a security-based swap dealer or major security-based swap participant and also with the Commodity Futures Trading Commission as a swap dealer or major swap participant, shall be subject to:

(i) The following provisions of the Commodity Exchange Act (7 U.S.C. 1 *et seq.*), and the rules and regulations promulgated thereunder, set forth in the rules and regulations of the Commodity Futures Trading Commission:

(A) Examinations and information sharing: 7 U.S.C. 6s(f) and 12;

(B) Enforcement: 7 U.S.C. 2(a)(1)(B), 6(b), 6b, 6c, 6s(h)(1)(A), 6s(h)(4)(A), 9, 13b, 13a–1, 13a–2, 13, 13c(a), 13c(b), 15 and 26;

(C) Reporting to a swap data repository: 7 U.S.C. 6r;

(D) Real-time reporting: 7 U.S.C. 2(a)(13);

(E) Capital: 7 U.S.C. 6s(e); and

(F) Position Limits: 7 U.S.C. 6a; and

(ii) The provisions of the Federal securities laws, as defined in section 3(a)(47) of the Act (15 U.S.C. 78c(a)(47)), and the rules and regulations promulgated thereunder.

(c) *Process for determining regulatory treatment for other mixed swaps*—(1) *In general.* Any person who desires or intends to list, trade, or clear a mixed swap (or class thereof) that is not subject to paragraph (b) of this section may request the Commission and the Commodity Futures Trading Commission to issue a joint order permitting the requesting person (and any other person or persons that subsequently lists, trades, or clears that mixed swap) to comply, as to parallel provisions only, with specified parallel provisions of either the Act (15 U.S.C. 78a *et seq.*) or the Commodity Exchange Act (7 U.S.C. 1 *et seq.*), and the rules and regulations thereunder (collectively, *specified parallel provisions*), instead of being required to comply with parallel provisions of both the Act and the Commodity Exchange Act. For purposes of this paragraph (c), *parallel provisions* means comparable provisions of the Act and the Commodity Exchange Act that were added or amended by the Wall Street Transparency and Accountability Act of 2010 with respect to security-based swaps and swaps, and the rules and regulations thereunder.

(2) *Request process.* A person submitting a request pursuant to paragraph (c)(1) of this section must provide the Commission and the Commodity Futures Trading Commission with the following:

(i) All material information regarding the terms of the specified, or specified class of, mixed swap;

(ii) The economic characteristics and purpose of the specified, or specified class of, mixed swap;

(iii) The specified parallel provisions, and the reasons the person believes

such specified parallel provisions would be appropriate for the mixed swap (or class thereof); and

(iv) An analysis of:

(A) The nature and purposes of the parallel provisions that are the subject of the request;

(B) The comparability of such parallel provisions;

(C) The extent of any conflicts or differences between such parallel provisions; and

(D) Such other information as may be requested by the Commission or the Commodity Futures Trading Commission.

(3) *Request withdrawal.* A person may withdraw a request made pursuant to paragraph (c)(1) of this section at any time prior to the issuance of a joint order under paragraph (c)(4) of this section by the Commission and the Commodity Futures Trading Commission in response to the request.

(4) *Issuance of orders.* In response to a request under paragraph (c)(1) of this section, the Commission and the Commodity Futures Trading Commission, as necessary to carry out the purposes of the Wall Street Transparency and Accountability Act of 2010, may issue a joint order, after notice and opportunity for comment, permitting the requesting person (and any other person or persons that subsequently lists, trades, or clears that mixed swap) to comply, as to parallel provisions only, with the specified parallel provisions (or another subset of the parallel provisions that are the subject of the request, as the Commissions determine is appropriate), instead of being required to comply with parallel provisions of both the Act (15 U.S.C. 78a *et seq.*) and the Commodity Exchange Act (7 U.S.C. 1 *et seq.*). In determining the contents of such joint order, the Commission and the Commodity Futures Trading Commission may consider, among other things:

(i) The nature and purposes of the parallel provisions that are the subject of the request;

(ii) The comparability of such parallel provisions; and

(iii) The extent of any conflicts or differences between such parallel provisions.

(5) *Timeframe.* (i) If the Commission and the Commodity Futures Trading Commission determine to issue a joint order as described in paragraph (c)(4) of this section, such joint order shall be issued within 120 days after receipt of a complete request for a joint order under paragraph (c)(1) of this section, which time period shall be stayed during the pendency of the public comment period provided for in paragraph (c)(4) of this section and shall recommence with the business day after the public comment period ends.

(ii) Nothing in this section shall require the Commission and the Commodity Futures Trading Commission to issue any joint order.

(iii) If the Commission and the Commodity Futures Trading Commission do not issue a joint order within the time period described in paragraph (c)(5)(i) of this section, each of the Commission and the Commodity Futures Trading Commission shall publicly provide the reasons for not issuing such a joint order within that timeframe.

§ 240.3a68–5 Regulation of certain futures contracts on foreign sovereign debt.

The term *security-based swap* as used in section 3(a)(68) of the Act (15 U.S.C. 78c(a)(68)) does not include an agreement, contract, or transaction that is based on or references a qualifying foreign futures contract (as defined in § 240.3a12–8 on the debt securities of any one or more of the foreign governments enumerated in § 240.3a12–8, provided that such agreement, contract, or transaction satisfies the following conditions:

(a) The futures contract that the agreement, contract, or transaction references or upon which the agreement, contract, or transaction is based is a qualifying foreign futures contract that satisfies the conditions of § 240.3a12–8 applicable to qualifying foreign futures contracts;

(b) The agreement, contract, or transaction is traded on or through a board of trade (as defined in 7 U.S.C. 2);

(c) The debt securities upon which the qualifying foreign futures contract is based or referenced and any security used to determine the cash settlement amount pursuant to paragraph (d) of this section were not registered under the Securities Act of 1933 (15 U.S.C. 77 *et seq.*) or the subject of any American depositary receipt registered under the Securities Act of 1933;

(d) The agreement, contract, or transaction may only be cash settled; and

(e) The agreement, contract or transaction is not entered into by the issuer of the debt securities upon which the qualifying foreign futures contract is based or referenced (including any security used to determine the cash payment due on settlement of such agreement, contract or transaction), an affiliate (as defined in the Securities Act of 1933 (15 U.S.C. 77 *et seq.*) and the rules and regulations thereunder) of the issuer, or an underwriter of such issuer's debt securities.

§ 240.3a69–1 Safe Harbor Definition of ''security-based swap'' and ''swap'' as used in sections 3(a)(68) and 3(a)(69) of the Act—insurance.

(a) This paragraph is a non-exclusive safe harbor. The terms *security-based swap* as used in section 3(a)(68) of the Act (15 U.S.C. 78c(a)(68)) and *swap* as used in section 3(a)(69) of the Act (15 U.S.C. 78c(a)(69)) do not include an agreement, contract, or transaction that:

(1) By its terms or by law, as a condition of performance on the agreement, contract, or transaction:

(i) Requires the beneficiary of the agreement, contract, or transaction to have an insurable interest that is the subject of the agreement, contract, or transaction and thereby carry the risk of loss with respect to that interest continuously throughout the duration of the agreement, contract, or transaction;

(ii) Requires that loss to occur and to be proved, and that any payment or indemnification therefor be limited to the value of the insurable interest;

(iii) Is not traded, separately from the insured interest, on an organized market or over the counter; and

(iv) With respect to financial guaranty insurance only, in the event of payment default or insolvency of the obligor, any acceleration of payments under the policy is at the sole discretion of the insurer; and

(2) Is provided:

(i)(A) By a person that is subject to supervision by the insurance commissioner (or similar official or agency) of any State, as defined in section 3(a)(16) of the Act (15 U.S.C. 78c(a)(16)), or by the United States or an agency or instrumentality thereof; and

(B) Such agreement, contract, or transaction is regulated as insurance under applicable State law or the laws of the United States;

(ii)(A) Directly or indirectly by the United States, any State or any of their respective agencies or instrumentalities; or

(B) Pursuant to a statutorily authorized program thereof; or

(iii) In the case of reinsurance only by a person to another person that satisfies the conditions set forth in paragraph (a)(2) of this section, provided that:

(A) Such person is not prohibited by applicable State law or the laws of the United States from offering such agreement, contract, or transaction to such person that satisfies the conditions set forth in paragraph (a)(2) of this section;

(B) The agreement, contract, or transaction to be reinsured satisfies the

conditions set forth in paragraph (a)(1) or (3) of this section; and

(C) Except as otherwise permitted under applicable State law, the total amount reimbursable by all reinsurers for such agreement, contract, or transaction may not exceed the claims or losses paid by the person writing the risk being ceded or transferred by such person; or

(iv) In the case of non-admitted insurance by a person who:

(A) Is located outside of the United States and listed on the Quarterly Listing of Alien Insurers as maintained by the International Insurers Department of the National Association of Insurance Commissioners; or

(B) Meets the eligibility criteria for non-admitted insurers under applicable State law; or

(3) Is provided in accordance with the conditions set forth in paragraph (a)(2) of this section and is one of the following types of products:

(i) Surety bond;

(ii) Fidelity bond;

(iii) Life insurance;

(iv) Health insurance;

(v) Long term care insurance;

(vi) Title insurance;

(vii) Property and casualty insurance;

(viii) Annuity;

(ix) Disability insurance;

(x) Insurance against default on individual residential mortgages; and

(xi) Reinsurance of any of the foregoing products identified in paragraphs (i) through (x) of this section.

(b) The terms security-based swap as used in section 3(a)(68) of the Act (15 U.S.C. 78c(a)(68)) and swap as used in section 3(a)(69) of the Act (15 U.S.C. 78c(a)(69)) do not include an agreement, contract, or transaction that was entered into on or before the effective date of this section and that, at such time that it was entered into, was provided in accordance with the conditions set forth in paragraph (a)(2) of this section.

§ 240.3a69–2 Definition of ''swap'' as used in section 3(a)(69) of the Act—additional products.

(a) *In general.* The term *swap* has the meaning set forth in section 3(a)(69) of the Act (15 U.S.C. 78c(a)(69)).

(b) *Inclusion of particular products.* (1) The term *swap* includes, without limiting the meaning set forth in section 3(a)(69) of the Act (15 U.S.C. 78c(a)(69)), the following agreements, contracts, and transactions:

(i) A cross-currency swap;

(ii) A currency option, foreign currency option, foreign exchange option and foreign exchange rate option;

(iii) A foreign exchange forward;

(iv) A foreign exchange swap;

(v) A forward rate agreement; and

(vi) A non-deliverable forward involving foreign exchange.

(2) The term *swap* does not include an agreement, contract, or transaction described in paragraph (b)(1) of this section that is otherwise excluded by section 1a(47)(B) of the Commodity Exchange Act (7 U.S.C. 1a(47)(B)).

(c) *Foreign exchange forwards and foreign exchange swaps.* Notwithstanding paragraph (b)(2) of this section:

(1) A foreign exchange forward or a foreign exchange swap shall not be considered a swap if the Secretary of the Treasury makes a determination described in section 1a(47)(E)(i) of the Commodity Exchange Act (7 U.S.C. 1a(47)(E)(i)).

(2) Notwithstanding paragraph (c)(1) of this section:

(i) The reporting requirements set forth in section 4r of the Commodity Exchange Act (7 U.S.C. 6r) and regulations promulgated thereunder shall apply to a foreign exchange forward or foreign exchange swap; and

(ii) The business conduct standards set forth in section 4s(h) of the Commodity Exchange Act (7 U.S.C. 6s) and regulations promulgated thereunder shall apply to a swap dealer or major swap participant that is a party to a foreign exchange forward or foreign exchange swap.

(3) For purposes of section 1a(47)(E) of the Commodity Exchange Act (7 U.S.C. 1a(47)(E)) and this section, the term *foreign exchange forward* has the meaning set forth in section 1a(24) of the Commodity Exchange Act (7 U.S.C. 1a(24)).

(4) For purposes of section 1a(47)(E) of the Commodity Exchange Act (7 U.S.C. 1a(47)(E)) and this section, the term *foreign exchange swap* has the meaning set forth in section 1a(25) of the Commodity Exchange Act (7 U.S.C. 1a(25)).

(5) For purposes of sections 1a(24) and 1a(25) of the Commodity Exchange Act (7 U.S.C. 1a(24) and (25)) and this section, the following transactions are not foreign exchange forwards or foreign exchange swaps:

(i) A currency swap or a cross-currency swap;

(ii) A currency option, foreign currency option, foreign exchange option, or foreign exchange rate option; and

(iii) A non-deliverable forward involving foreign exchange.

§ 240.3a69–3 Books and records requirements for security-based swap agreements.

(a) A person registered as a swap data repository under section 21 of the Commodity Exchange Act (7 U.S.C. 24a) and the rules and regulations thereunder:

(1) Shall not be required to keep and maintain additional books and records regarding security-based swap agreements other than the books and records regarding swaps required to be kept and maintained pursuant to section 21 of the Commodity Exchange Act (7 U.S.C. 24a) and the rules and regulations thereunder; and

(2) Shall not be required to collect and maintain additional data regarding security-based swap agreements other than the data regarding swaps required to be collected and maintained by such persons pursuant to section 21 of the Commodity Exchange Act (7 U.S.C. 24a) and the rules and regulations thereunder.

(b) A person shall not be required to keep and maintain additional books and records, including daily trading records, regarding security-based swap agreements other than the books and records regarding swaps required to be kept and maintained by such persons pursuant to section 4s of the Commodity Exchange Act (7 U.S.C. 6s) and the rules and regulations thereunder if such person is registered as:

(1) A swap dealer under section 4s(a)(1) of the Commodity Exchange Act (7 U.S.C. 6s(a)(1)) and the rules and regulations thereunder;

(2) A major swap participant under section 4s(a)(2) of the Commodity Exchange Act (7 U.S.C. 6s(a)(2)) and the rules and regulations thereunder;

(3) A security-based swap dealer under section 15F(a)(1) of the Act (15 U.S.C. 78o–10(a)(1)) and the rules and regulations thereunder; or

(4) A major security-based swap participant under section 15F(a)(2) of the Act (15 U.S.C. 78o–10(a)(2)) and the rules and regulations thereunder.

(c) The term *security-based swap agreement* has the meaning set forth in section 3(a)(78) of the Act (15 U.S.C. 78c(a)(78)).

PART 241—INTERPRETATIVE RELEASES RELATING TO THE SECURITIES EXCHANGE ACT OF 1934 AND GENERAL RULES AND REGULATIONS THEREUNDER

■ 5. Part 241 is amended by adding Release No. 34–67453 and the release date of July 18, 2012, to the list of interpretative releases.

Dated: July 18, 2012.

By the Commodity Futures Trading Commission.

David A. Stawick,

Secretary.

By the Securities and Exchange Commission.

Dated: July 18, 2012.

Elizabeth M. Murphy,

Secretary.

Product Definitions Contained in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act—CFTC Voting Summary and Statements of CFTC Commissioners

Note: The following appendices will not appear in the Code of Federal Regulations.

CFTC Voting Summary

On this matter, Chairman Gensler and Commissioners Sommers, O'Malia and Wetjen voted in the affirmative; Commissioner Chilton voted in the negative.

Statement of CFTC Chairman Gary Gensler

I support the final rulemaking to implement the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) requirement to further define ''swap'' and other products that come under swaps market reform. The Commodity Futures Trading Commission (CFTC) worked closely with the Securities and Exchange Commission (SEC), in consultation with the Federal Reserve, on the final rules and interpretations to further define ''swaps,'' ''security-based swaps,'' ''mixed swaps'' and ''security-based swap agreements.''

The statutory definition as laid out by Congress of swap is very detailed. These final rules and interpretations are consistent with that detailed definition and Congressional intent. For example, interest rate swaps, currency swaps, commodity swaps, including energy, metals and agricultural swaps, and broad-based index swaps, such as index credit default swaps, are all swaps. Consistent with Congress's definition of swaps, the rule also defines options as swaps.

In preparing this final rulemaking, staff worked to address the more than 140 comments that were submitted by the public in response to the product further definition proposal. Many of the commenters asked the Commissions to specifically provide guidance on what is not a swap or security-based swap.

For example, under the Commodity Exchange Act, the CFTC does not regulate forward contracts. Over the decades, there have been a series of orders, interpretations and cases that market participants have come to rely upon regarding the exception from futures regulation for forwards and forwards with embedded options. Consistent with that history, the Dodd-Frank Act excluded from the definition of a swap ''any sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled.'' The Commission is interpreting that exclusion in a manner that is consistent with Commission precedent and, in response to commenters, is providing increased clarity on the forward exclusion from futures regulation. The final release provides guidance regarding forwards with embedded volumetric options, like those used within the electricity markets, and is requesting comment on this interpretation.

Further, consistent with the Dodd-Frank Act, insurance products will not be regulated as swaps. Similarly, this final rulemaking clarifies that certain consumer and commercial arrangements that historically have not been considered swaps, such as consumer mortgage rate locks, contracts to lock in the price of home heating oil and contracts relating to inventory or equipment, also will not be regulated as swaps.

The rule provides clarity on the dividing line between ''swaps'' and ''security-based swaps'' or both, i.e. mixed swaps. The rule also provides a process for requesting joint interpretations in circumstances where there are questions. These dividing lines and the process will benefit market participants, as they will provide greater clarity as to what regulatory requirements apply when they transact in the derivatives markets.

Lastly, the final release includes specific provisions that guard against transactions that are willfully structured to evade Dodd-Frank Act swaps market reforms.

I'd like to express my appreciation for their dedication to completing this rule to Chairman Mary Schapiro and her fellow Commissioners at the SEC, as well as the staff, including Robert Cook, Brian Bussey, Amy Starr, Donna Chambers, Christie March, Andy Schoeffler, Wenchi Hu, John Guidroz and Sarah Otte.

I'd also like to thank the CFTC's hardworking staff: Julian Hammar, Lee Ann Duffy, David Aron, Terry Arbit, Eric Juzenas and Stephen Kane.

Dissent of CFTC Commissioner Chilton on Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement;'' Mixed Swaps; Security-Based Swap Agreement Recordkeeping

I respectfully dissent from this joint final rule and interpretive guidance because I have reservations about certain aspects of the Commodity Futures Trading Commission's (''Commission'') interpretive guidance on forward contracts. Apart from this specific area, I agree with the joint release and would support its adoption.

I am dissenting from the interpretive guidance for two chief reasons. First, I believe that the Commission should make stronger efforts to ensure market participants claim the forward contract exclusion only under appropriate circumstances, consistent with its interpretive guidance. The Commission should apply a rebuttable presumption that contracts do not have as their predominant feature actual delivery in instances where market participants often do not follow the delivery settlement term in a contract. The Commission should set forth the conditions for a safe harbor, consistent with its interpretation of the forward contract exclusion, for market participants that often do not terminate ''forward'' contracts through physical delivery that includes some affirmative statement to the Commission explaining the circumstances leading to non-delivery. This safe harbor, in my view, would encourage market participants to submit information that would vastly improve the ability of the Commission to ensure that market participants claiming the forward contract exclusion are doing so appropriately, consistent with the law and Commission and staff interpretation of the law.

Second, the Commission has failed to provide adequate legal certainty to market participants engaging in contracts with embedded volumetric commodity options, particularly those that can terminate without physical delivery. Contracts with embedded commodity options that can negate the physical delivery term have optionality that targets the delivery term of the contract and therefore cannot be seen as having as a predominant feature actual delivery, a necessary element in any forward contract under applicable Commission precedent. The Commission has failed to perform an analysis of these types of contracts in an excess of caution that may invite confusion, at best, and evasion, at worst.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'') [1] imposes new safeguards on hitherto unregulated markets. These safeguards increase the integrity of the markets by, e.g., improving market transparency and thereby deterring abuses of the sorts seen in recent decades. These safeguards inevitably increase compliance costs, particularly in the initial phase of implementation. As I can predict with absolute certainty, bad actors (à la Amaranth) will be drawn to dark markets in search of spoils. Less ill-intentioned or ''grey'' actors may follow them in search of lower compliance costs. The Commission should not cede swaths of jurisdiction because such markets have not hitherto given rise to concerns.[2]

The Commission proposed [3] and is now adopting an approach to the forward contract exclusion that draws on ''the principles underlying'' the Brent Interpretation.[4] I agree

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[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* Financial Crisis Inquiry Commission, ''The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States,'' Jan. 2011, at 25, available at *http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf* (''concluding that ''enactment of * * * [the Commodity Futures Modernization Act of 2000 (''CFMA'')] to ban the regulation by both the Federal and State governments of over-the-counter (OTC) derivatives was a key turning point in the march toward the financial crisis.'').

[3] *See* Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 76 FR 29818, 29829, May 23, 2011.

[4] Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 FR ___, ___ (''Adopting Release''); Statutory Interpretation Concerning Forward Transactions, 55 FR 39188, Sept. 25, 1990

Continued

generally with this approach (I voted in the affirmative on releasing the proposal). In addition, the Commission recognizes that the underlying purpose of a transaction is a critical factor in determining whether a given transaction is more appropriately classified as a forward or swap (or commodity option).[5] I commend this clarification and hope it is applied or further clarified in a way that affirms the principles underlying the Brent Interpretation without endorsing the outcome of the Brent Interpretation.

1. Safe Harbor for ''Forwards'' That Often Do Not Terminate With Actual Delivery

I believe that the Commission should make stronger efforts to ensure market participants claim the forward contract exclusion only under appropriate circumstances. I am concerned that the forward contract exclusion may be abused if not intentionally evaded by the lack of safeguards to ensure its appropriate application.[6] This concern is exacerbated by the fact that actors claiming the forward contract exclusion are not subject to any reporting requirements, nor have we even provided for a safe harbor that encourages such reporting. In light of the transparency the CEA now provides for futures, options, and swaps markets, the regulatory differential between these regulated markets and unregulated markets, like forward markets, is going to encourage regulatory arbitrage. Despite substantial progress in improving the Commission's visibility into regulated markets, the Commission has failed to set forth interpretive guidance that ensures that, at the minimum, it can see and understand the transactions that market participants claim as being subject to the forward contract exclusion. I believe the Commission should be more active when it comes to ensuring that the forward contract exclusion is properly applied, particularly in instances where an ostensible ''forward'' closely resembles, in form, purpose, or economic substance regulated products.

The Commission has endorsed the purpose of a transaction as a factor in determining a contract's eligibility for the forward contract exclusion.[7] The Brent Interpretation or the Commission's re-interpretation of it notwithstanding, I believe that when few ''forward'' contracts for a given market participant result in delivery, then there is sufficient ground for the Commission to have doubt about the appropriateness of the forward contract exclusion claim. Moreover, under such circumstances the Commission should have doubt about the underlying purpose of the claimed ''forwards.'' Therefore, the Commission should apply a rebuttable presumption that the market participant may not be engaging in transactions that have as their predominant feature actual delivery.

At the same time, the Commission should specify the means by which this presumption may be rebutted. I believe that the Commission provide for a safe harbor for market participants that regularly engage in transactions they believe to qualify for the forward contract exclusion that, nonetheless, often do not terminate with delivery (e.g., in less than 20% of instances as measured by number of ''forward'' contracts or by potential total quantity under all ''forward'' contracts). This non-delivery could be of the result of, for example, exercised embedded volumetric optionality or through book-outs. Market participants claiming this safe harbor should include a brief, periodic statement that explains the reason why their forward transactions, in general terms or with more specificity as is necessary for the Commission to determine whether the presumption that the market participant is inappropriately claiming the forward contract exclusion is rebutted.

I request comment on my proposed safe harbor concept. I encourage the Commission to adopt some version of this safe harbor in order to allay the very real concerns I and, indeed, many market participants and many in the public have expressed to me that unregulated forwards markets could become a refuge for those that thrive in opacity. Our regulations implementing the Dodd-Frank Act will vastly improve transparency in regulated futures, options, and swaps markets. Unfortunately, our interpretive guidance today does little to ensure even any visibility for regulators in how players in the physical commodity markets, so critical to the Commission's mission, are claiming the forward contract exclusion: the unwatched back door out of the transparency-related requirements of the CEA.

2. Legal Certainty for Certain Commodity Options

Section 4c(b) of the CEA provides:

> No person shall offer to enter into, enter into or confirm the execution of, any transaction involving any commodity regulated under this chapter which is of the character of, or is commonly known to the trade as, an ''option'', ''privilege'', ''indemnity'', ''bid'', ''offer'', ''put'', ''call'', ''advance guaranty'', or ''decline guaranty'', contrary to any rule, regulation, or order of the Commission prohibiting any such transaction or allowing any such transaction under such terms and conditions as the Commission shall prescribe. Any such order, rule, or regulation may be made only after notice and opportunity for hearing, and the Commission may set different terms and conditions for different markets.[8]

Through this decades-old provision, Congress gave the Commission jurisdiction and plenary rulemaking authority over physical commodity option transactions.[9] The Dodd-Frank Act not only preserved this plenary authority over commodity options, but also reaffirmed the reach of the CEA over commodity options. Section 721 of the Dodd-Frank Act added section 1a(47) to the CEA, defining ''swap'' to include not only ''any agreement, contract, or transaction commonly known as,'' among other things, ''a commodity swap,'' [10] but also ''[an] option of any kind that is for the purchase or sale, or based on the value, of 1 or more * * * commodities * * *,''[11] *i.e.* commodity options.[12] While commodity options are subject to the Commission's plenary jurisdiction, the Commission has limited jurisdiction over forward contracts.[13]

(''Brent Interpretation''). I note that the Commission did not endorse the outcome of the Brent Interpretation.

[5] I recognize (and perhaps the Commission has quietly recognized as well) the merit in the dissent of former Commissioner Fowler West to the Brent Interpretation and am heartened to find elements of his analytical approach in this release. Commissioner West, among other things, emphasized the importance of the underlying purpose of a transaction in a forward contract analysis. Id., Dissent of Commissioner Fowler West, available at *http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/fwestdissent092090.pdf* (because, among other things, 15-day Brent contracts are entered into for the purpose of hedging or speculation rather than for the purpose of transferring ownership in crude oil they do not sufficiently resemble forward contracts to be excluded from the CEA) citing *CFTC* v. *Co. Petro Marketing Group, Inc.,* 680 F.2d 573, 580 (9th Cir. 1982). Commissioner West's dissent presaged the Brent market aberrations of the 1990s and early 2000s that some tied to squeezes of the Brent delivery complex through a hoarding of ''forwards'' that made leveraged cash-settled contract positions designed to benefit from such aberrations very profitable. While I endorse the Commission's approach to affirming the principles contained in the Brent Interpretation, I believe future interpretive guidance should apply the lessons of the past two-plus decades of market and regulatory history and apply the Brent Interpretation principles in that light. In this dissent, however, I do not need to go so far as to reinterpret the principles underlying the Brent Interpretation: even based on a conservative review of our precedent I feel we did not provide the market adequate clarity.

[6] *See* Adopting Release.

[7] *See* Adopting Release.

[8] CEA section 4c(b), 7 U.S.C. 6c(b).

[9] CEA section 4c(b) has been in the Act in substantially the same form since it was added by the Commodity Futures Trading Commission Act of 1974. See Public Law 93–463, October 23, 1974.

[10] *See* CEA section 1a(47)(A)(iii), 7 U.S.C. 1a(47)(A)(iii).

[11] *See* CEA section 1a(47)(A)(i), 7 U.S.C. 1a(47)(A)(i). Note that the swap definition excludes options on futures (which must be traded on a DCM pursuant to part 33 of the Commission's regulations) (*see* CEA section 1a(47)(B)(i), 7 U.S.C. 1a(47)(B)(i)), but it includes options on physical commodities (whether or not traded on a DCM) (*see* CEA section 1a(47)(A)(i), 7 U.S.C. 1a(47)(A)(i)).

[12] The Commission's regulations define a commodity option transaction or commodity option as ''any transaction or agreement in interstate commerce which is or is held out to be of the character of, or is commonly known to the trade as, an 'option,' 'privilege,' 'indemnity,' 'bid,' 'offer,' 'call,' 'put,' 'advance guaranty' or 'decline guaranty'.'' 17 CFR 1.3(hh).

[13] *See* CEA section 1a(47)(B)(ii), 7 U.S.C. 1a(47)(B)(ii) (excluding from the definition of ''swap'' contracts involving ''any sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled.''). *See also* CEA section 8(d), 7 U.S.C. 12(d), which directs the CFTC to investigate the marketing conditions of commodities and commodity products and byproducts, including supply and demand for these commodities, cost to the consumer, and handling and transportation charges; CEA sections 6(c), 6(d) and 9(a)(2), 7 U.S.C. 9, 13b, and 13(a)(2), which proscribe any manipulation or attempt to manipulate the price of any commodity in interstate commerce; and CEA section 6(c) as amended by section 753 of the Dodd-Frank Act, which contains prohibitions regarding manipulation and false reporting with respect to any commodity in

In the Brent Interpretation, the Commission found certain Brent oil contracts to be eligible for the forward contract exclusion, notwithstanding the fact that such transactions ''may ultimately result in performance through the payment of cash as an alternative to actual physical transfer or delivery of the commodity.'' The Commission found that when delivery obligations under a forward were terminated pursuant to a separate and individually negotiated ''book-out'' agreement, the parties escaped the physical delivery obligation traditionally required to claim the forward contract exclusion. The Commission also emphasized two features (among others) of the Brent oil contracts at issue: (1) The absence of a contractual right to offset (or to terminate without delivery) the transaction ''by the terms of the contracts as initially entered into'' and (2) the counterparties had to incur ''substantial economic risks of a commercial nature'' relating to actual delivery in order to claim the exclusion. Underlying the Brent Interpretation, other CFTC precedent, and the Commission's approach to the interpretive guidance on the forward contract exclusion is the essential feature of forward contracts: actual delivery (and not potential delivery).[14]

The Commission has failed to provide adequate legal certainty to market participants engaging in contracts with embedded volumetric commodity options, particularly those that can terminate without physical delivery. Contracts that are composed of a forward delivery obligation component combined with an embedded commodity option that can render delivery optional (''zero-delivery'' embedded volumetric options) are not forwards because the predominant feature of the contract cannot be actual delivery under these circumstances (more literally, the predominant feature is potential delivery which is an essential characteristic of commodity options). Such contracts include a contractual right to offset through the exercise of the volumetric option that can extinguish the delivery obligation. Because such contracts have a commodity option component that mitigates the risk incurred from an underlying forward delivery obligation, these contracts may fail to meet the incurring ''economic risks of a commercial nature'' element. Moreover, the purpose of the delivery optionality in these types of contracts shares a common purpose with commodity options: To provide market participants a means to hedge commodity quantity risk of a commercial nature. The Commission should therefore clarify, in any future interpretive guidance, that zero-delivery embedded volumetric options are generally commodity options because the delivery obligation is not obligatory.

The confluence of these features, as analyzed under a conservative reading of the Brent Interpretation, leads me to conclude that contracts with embedded zero-delivery option components cannot be said to have actual delivery as their essential feature. Other relevant Commission precedent is consistent with this analysis. Most recently, in *In re Wright,* a forward contract containing pricing optionality was found to be a forward contract because the optionality:

(i) May be used to adjust the forward contract price, but do not undermine the overall nature of the contract as a forward contract; (ii) *do not target the delivery term, so that the predominant feature of the contract is actual delivery; and* (iii) cannot be severed and marketed separately from the overall forward contract in which they are embedded.[15]

In re Wright is distinguishable because it involves pricing optionality, not volumetric optionality–the latter a feature the Commission has not hitherto opined on in the context of the forward contract exclusion. As the emphasized section of the block quote immediately above discusses, the interpretation there turned on the fact that the optionality in the *In re Wright* options did ''not target the delivery term.'' Optionality that can result in zero delivery ''targets the delivery term,'' in direct contrast to the *In re Wright* options. I commend the Commission for not overextending (to put it charitably) *In re Wright* to cover zero-delivery volumetric optionality, as argued by some commenters. Nonetheless, the Commission did not clarify that a contract that provides for optionality that can render delivery optional cannot therefore have as its predominant feature actual delivery because the optionality ''targets the delivery term.''[16]

Instead of, in my opinion, a proper application of the statute and precedent, the Commission has adopted a seven-element interpretation that applies to contracts with embedded volumetric optionality. This interpretative approach would potentially allow contracts with zero-delivery option components to nonetheless claim the forward contract exclusion when:

1. The embedded optionality does not undermine the overall nature of the agreement, contract, or transaction as a forward contract;

2. The predominant feature of the agreement, contract, or transaction is actual delivery;

3. The embedded optionality cannot be severed and marketed separately from the overall agreement, contract, or transaction in which it is embedded;

4. The seller of a nonfinancial commodity underlying the agreement, contract, or transaction with embedded volumetric optionality intends, at the time it enters into the agreement, contract, or transaction, to deliver the underlying nonfinancial commodity if the optionality is exercised;

5. The buyer of a nonfinancial commodity underlying the agreement, contract or transaction with embedded volumetric optionality intends, at the time it enters into the agreement, contract, or transaction, to take delivery of the underlying nonfinancial commodity if it exercises the embedded volumetric optionality;

6. Both parties are commercial parties; and

7. The exercise or non-exercise of the embedded volumetric optionality is based primarily on physical factors, or regulatory requirements, that are outside the control of the parties and are influencing demand for, or supply of, the nonfinancial commodity.

The first two elements, in particular, invoke the Brent Interpretation and related precedent.[17] The seventh and most problematic element seems to imply that supply and demand, *i.e.,* economic factors, could be a primary factor in the exercise or non-exercise of an embedded volumetric option. I fear how broadly this element could be interpreted by those predisposed to interpret the CEA in an opportunistic light. When can supply and demand factors not be correlated with physical factors? Does this mean that if delivery renders such a contract unprofitable for a party to such a contract that they can elect not to deliver? If that is the case, then the contract is a commodity option.[18]

I would amend the seventh element by making it clear the exercise or non-exercise for physical factors that influence demand and supply can negate the delivery obligation only in exceptional circumstances. If delivery renders a contract merely unprofitable and the contract permits a party to elect not to deliver, such a contract is not a forward and is a commodity option.

In addition, I would require, consistent with the third, ''severability,'' element, that in order to claim the forward contract exclusion where the contract at issue contains a zero-delivery embedded volumetric option, the parties must sever the forward contract component, which has as its purpose the delivery of commodities, from the remaining commodity option component, which has as its purpose the management of the commodity quantity risk associated with operating a commercial enterprise.[19] The

interstate commerce, including prohibiting any person to (i) ''use or employ, or attempt to use or employ * * * any manipulative or deceptive device or contrivance'' (section 6(c)(1)); (ii) ''to make any false or misleading statement of material fact'' to the CFTC or ''omit to state in any such statement any material fact that is necessary to make any statement of material fact made not misleading in any material respect'' (section 6(c)(2)); and (iii) ''manipulate or attempt to manipulate the price of any swap, or of any commodity in interstate commerce * * *'' (section 6(c)(3)). *See also* Rule 180.1(a) under the CEA, 17 CFR 180.1(a) (broadly prohibiting in connection with a commodity in interstate commerce manipulation, false or misleading statements or omissions of material fact to the Commission, fraud or deceptive practices or courses of business, and false reporting).

[14] *See* Adopting Release.

[15] *See In re Wright,* CFTC Docket No. 97–02, 2010 WL 4388247 (Oct. 25, 2010) (emphasis added). *See also* Characteristics Distinguishing Cash and Forward Contracts and ''Trade'' Options, 50 FR 39656 (Sept. 30, 1985) (finding that hedge-to-arrive contracts with pricing optionality could be categorized as forwards so long as it created a binding delivery obligation that could only be annulled in the event of a crop failure, in which case liquidated damages may apply).

[16] *In re Wright,* CFTC Docket No. 97–02, 2010 WL 4388247 (Oct. 25, 2010).

[17] *See* Adopting Release.

[18] *See, e.g.,* 50 FR 39656, 39660.

[19] These forward contract and commodity option hybrid contracts can, as I understand it, generally be severed into two separate forward and commodity option contracts. Some commenters suggested that many ''peaking'' contracts involve volumetric optionality that cannot be severed, but

Continued

commodity option component of these transactions could be eligible for a trade option exemption [20] that exempts (and importantly, does not exclude) them from many CEA requirements.[21]

Moreover, while the Adopting Release's guidance is the first of its kind and therefore an incremental step toward more legal certainty, it doesn't directly address embedded zero-delivery volumetric optionality specifically or any of the conceivable specific variations of such contracts. I believe this to be a flaw; a flaw that did not exist in a previous version of this document.

The Commission should affirm in any relevant future interpretive guidance the formal features in the Brent Interpretation's forward contract exclusion, *e.g.,* that the delivery obligation cannot be offset based on terms contained in the contract, that any delivery obligation be appropriately booked-out (in a separate transaction), or that the contract involve incurring ''substantial economic risks of a commercial nature.'' [22] In the absence of the Commission's courage to provide for more legal certainty on these kinds of transactions, I stress the application of the third, severability, element in the Commission's seven-element interpretation and note that as long as a market participant can decompose a pre-Dodd-Frank Act transaction into components, such action would not be in violation of the CEA if the resulting agreements, contracts, or transactions (1) neatly fall into forward, commodity option, or other swap contract buckets and (2) are dealt with as such.[23]

I look forward to receiving and reviewing comments on the Commission's interpretation, in particular those submitted in response to Question Seven.[24] I also welcome comments on this statement too, of course, particularly as it relates to zero-delivery embedded volumetric options. I am particularly interested in understanding under what circumstances such embedded option contracts and other contracts can be structured to evade Dodd-Frank Act requirements in a way that creates plausible deniability for one or both counterparties that they did not ''willfully'' intend to structure a transaction in a manner intended to evade. Should the Commission, instead of my proposed approach, follow a rebuttable presumption approach with respect to zero-delivery embedded option contracts whereby the presumption can be rebutted by a certification of facts that indicate a true commercial purpose for the transaction?

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I have yet to be convinced that the same party that is the ''seller'' under these contracts cannot simply become the appropriate counterparty when such contracts are severed into a forward contract component and a commodity option component that can offset or book-out the buyer's obligation to take delivery.

[20] Commodity Options, 77 FR 25320, Apr. 27, 2012, codified at 17 CFR 32.3.

[21] As of July 10, 2012, the Commission has received 12 comments on the interim final rule setting forth the trade option exemption.

[22] The Commission's inclusion of the underlying purpose of a transaction as a factor in determining its classification as a forward, commodity option, or other form of swap. The Commission will, under the interpretive guidance, consider the ''purpose of the claimed forward'' and whether its purpose is to sell physical commodities, hedge risk, or speculate. *See* Adopting Release.

[23] *See* Adopting Release, fn 337 (''When a forward contract includes an embedded option that is severable from the forward contract, the forward can remain subject to the forward contract exclusion, if the parties document the severance of the embedded option component and the resulting transactions, i.e. a forward and an option. Such an option would be subject to the CFTC's regulations applicable to commodity options.'').

[24] *Id.* (''Do the agreements, contracts, and transactions listed in question no. 6 above have embedded optionality in the first instance? Based on descriptions by commenters, it appears that they may have a binding obligation for delivery, but have no set amount specified for delivery. Instead, delivery (including the possibility of nominal or zero delivery) is determined by the terms and conditions contained within the agreement, contract, or transaction (including, for example, the satisfaction of a condition precedent to delivery, such as a commodity price or temperature reaching a level specified in the agreement, contract, or transaction). That is, the variation in delivery is not driven by the exercise of embedded optionality by the parties. Do the agreements, contracts, and transactions listed in question no. 6 exhibit these kinds of characteristics? If so, should the CFTC consider them in some manner other than its forward interpretation? Why or why not?'').

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Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for *Ipomopsis polyantha* (Pagosa skyrocket), *Penstemon debilis* (Parachute beardtongue), and *Phacelia submutica* (DeBeque phacelia); Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R6–ES–2011–0040: 4500030114]

RIN 1018–AX75

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for *Ipomopsis polyantha* (Pagosa skyrocket), *Penstemon debilis* (Parachute beardtongue), and *Phacelia submutica* (DeBeque phacelia)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, are designating critical habitat for the endangered *Ipomopsis polyantha* (Pagosa skyrocket) and the threatened *Penstemon debilis* (Parachute beardtongue) and *Phacelia submutica* (DeBeque phacelia) under the Endangered Species Act (Act). The purpose of this regulation is to conserve these three plant species and their habitats under the Act.

DATES: This rule becomes effective on September 12, 2012.

ADDRESSES: This final rule, and the associated final economic analysis and final environmental assessment, are available on the Internet at *http://www.regulations.gov.* The coordinates or plot points or both from which the maps are generated are included in the administrative record for this critical habitat designation and are available at *http://www.fws.gov/mountain-prairie/species/plants/3ColoradoPlants/index.html*, *http://www.regulations.gov* at Docket No. FWS–R6–ES–2011–0040, and at the Western Colorado Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**). Comments and materials received, as well as supporting documentation used in preparing this final rule, are available for public inspection, by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Western Colorado Ecological Services Office, 764 Horizon Drive, Suite B, Grand Junction, CO 81506–3946; telephone 970–243–2778; facsimile 970–245–6933.

FOR FURTHER INFORMATION CONTACT: Patty Gelatt, Field Supervisor, U.S. Fish and Wildlife Service, Western Colorado Ecological Services Office, 764 Horizon Drive, Suite B, Grand Junction, CO 81506–3946; telephone 970–243–2778; facsimile 970–245–6933. 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

Why we need to publish a rule and the basis for our action. Under the Act, any species that is determined to be threatened or endangered shall, to the maximum extent prudent and determinable, have habitat designated that is considered to be critical habitat. We listed these three plant species on July 27, 2011 (76 FR 45054). At the same time, we proposed to designate critical habitat (76 FR 45078). Section 4(b)(2) of the Act states that the Secretary shall designate critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The critical habitat areas we are designating in this rule constitute our current best assessment of the areas that meet the definition of critical habitat for *Ipomopsis polyantha, Penstemon debilis,* and *Phacelia submutica.* Here we are designating:

- Approximately 9,641 acres (ac) (3,902 hectares (ha)), in 4 units, are being designated as critical habitat for *Ipomopsis polyantha.*
- Approximately 15,510 ac (6,217 ha), in 4 units, are being designated as critical habitat for *Penstemon debilis.*
- Approximately 25,484 ac (10,313 ha), in 9 units, are being designated as critical habitat for *Phacelia submutica.*
- In total, approximately 50,635 ac (20,432 ha), in 17 units, are being designated as critical habitat for the three species.

We have prepared an economic analysis of the designation of critical habitat. In order to consider economic impacts, we have prepared an analysis of the economic impacts of the critical habitat designations and related factors. We announced the availability of the draft economic analysis (DEA) on March 27, 2012, allowing the public to provide comments on our analysis. We have incorporated the comments and are completed the final economic analysis (FEA) concurrently with this final determination.

We have prepared an environmental assessment of the designation of critical habitat. Based on a court ruling, we must undertake National Environmental Policy Act (NEPA) analysis in the Tenth Circuit when we designate critical habitat. We announced the availability of the draft environmental assessment on March 27, 2012, allowing the public to provide comments on our assessment. We have incorporated the comments and are completed the final environmental assessment concurrently with this final determination.

Peer reviewers support our methods. We obtained opinions from four knowledgeable individuals with scientific expertise to review our technical assumptions, analysis, adherence to regulations, and whether or not we had used the best available information. These peer reviewers generally concurred with our methods and conclusions and provided additional information, clarifications, and suggestions to improve this final rule.

Background

It is our intent to discuss in this final rule only those topics directly relevant to the development and designation of critical habitat for *Ipomopsis polyantha, Penstemon debilis,* and *Phacelia submutica* under the Act (16 U.S.C. 1531 *et seq.*). For more information on the biology and ecology of *I. polyantha, P. debilis,* and *P. submutica,* refer to the final listing rule published in the **Federal Register** on July 27, 2011 (76 FR 45054). For information on *I. polyantha, P. debilis,* and *P. submutica* critical habitat, refer to the proposed rule to designate critical habitat for *I. polyantha, P. debilis,* and *P. submutica* published in the **Federal Register** on July 27, 2011 (76 FR 45078). Information on the associated DEA and draft environmental assessment for the proposed rule was published in the **Federal Register** on March 27, 2012 (77 FR 18157).

Previous Federal Actions

The final rule listing *Ipomopsis polyantha* as an endangered species, and listing *Penstemon debilis* and *Phacelia submutica* as threatened species, was published on July 27, 2011 (76 FR 45054). Our proposal for designating critical habitat for *I. polyantha, P. debilis,* and *P. submutica* was published on the same date (76 FR 45078). Our notice of availability for the DEA and draft environmental assessment was published on March 27, 2012 (77 FR 18157). For other previous Federal actions, please see our final listing rule (76 FR 45054).

Summary of Comments and Recommendations

We requested written comments from the public on the proposed designation of critical habitat for *Ipomopsis polyantha, Penstemon debilis,* and *Phacelia submutica* during two comment periods. The first comment period associated with the publication of the proposed critical habitat rule (76

FR 45078) opened on July 27, 2011, and closed on September 26, 2011. We also requested comments on the proposed critical habitat designation and associated DEA during a comment period that opened March 27, 2012, and closed on April 26, 2012 (77 FR 18157). We did not receive any requests for a public hearing. We also contacted appropriate Federal, State, and local agencies; scientific organizations; and other interested parties and invited them to comment on the proposed rule and DEA during these comment periods.

During the first comment period, we received six comment letters directly addressing the proposed critical habitat designation. Four comment letters were received between the two comment periods. During the second comment period, we received nine comment letters addressing the proposed critical habitat designation, the DEA, or the draft environmental assessment. All substantive information provided during both comment periods has either been incorporated directly into this final determination or are addressed below. Comments received were grouped into 23 general categories specifically relating to the proposed critical habitat designation for *Ipomopsis polyantha, Penstemon debilis,* and *Phacelia submutica,* and are addressed in the following summary and incorporated into the final rule as appropriate. We received several comments on our final listing determination (76 FR 45054; July 27, 2011), but are not addressing those comments because they do not apply to this determination.

Peer Review

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited expert opinions from three knowledgeable individuals with scientific expertise that included familiarity with the species, the geographic region in which the species occurs, and the principles of conservation biology. We received responses from four peer reviewers because one of the reviewers requested the assistance of two other reviewers.

We reviewed all comments received from the peer reviewers regarding critical habitat for *Ipomopsis polyantha, Penstemon debilis,* and *Phacelia submutica.* The peer reviewers generally concurred with our methods and conclusions and provided minor additional information, clarifications, and suggestions to improve the final critical habitat rule. Peer reviewer comments are addressed in the following summary and are incorporated into the final rule as appropriate.

(1) Comments on the pollinators of *Ipomopsis polyantha:* One peer reviewer questioned some of the pollinator information presented for *I. polyantha.* This reviewer questioned whether the self-pollination we discussed was with or without the assistance of a pollinator. The reviewer also questioned if our pollinator information for *I. polyantha* was based on visitor information versus pollinator information, that is, if the insects listed were just visiting the plants, or if they were actually pollinating the flowers. In addition, the reviewer wondered if night-time pollinator experiments, collections, or observations were performed, since some other *Ipomopsis* species are primarily pollinated by night-flying hawkmoths.

Our Response: We based our conclusions on *Ipomopsis polyantha* pollination on a study done by Collins (1995). This breeding system study, looking at *Ipomopsis polyantha's* ability to set fruit with and without a pollinator, examined the ways in which pollination was most successful (Collins 1995, pp. 35–46). Given that open-pollinated and cross-pollinated individuals produced far more fruit than self-pollinated individuals without pollinators, we continue to conclude that pollinators are necessary for successful reproduction of *I. polyantha.* We have changed the text regarding the physical and biological features for the plant in an effort to better capture this information.

The *Ipomopsis polyantha* pollinator studies occurred only from dawn to dusk (Collins 1995, p. 30); therefore, we are unsure about night-time visitors. However, we have information about crepuscular (low-light) visitors, which includes hawkmoth species. Several butterfly, hawkmoth, fly, and other insect species were observed as visitors to *I. polyantha* plants, but not as the primary pollinators (Collins 1995, pp. 48–50). Only 9 of the more than 300 flower visits were from a hawkmoth (*Hyles lineata*) (Collins 1995, pp. 48–50). Further research would likely refine what we know about the primary pollinators and our information on night-time pollination; however, based on the best available information and the detailed information from the Collins (1995) study, we conclude that our information does distinguish between pollinators and visitors. If there are critical night-time pollinators, we have no information on them. As such, we did not adjust our criteria, physical and biological features, or primary constituent elements (PCEs) to address night-time pollination.

(2) Comments on the genetic diversity of *Penstemon debilis:* One peer reviewer provided information relating to genetic diversity, the potential clonal nature, and connectivity between sites for *P. debilis.* Given the underground stems of *P. debilis,* the reviewer concluded that the actual population size has been greatly overestimated. The reviewer provided information relating to quantitative, not neutral (genetic markers that are not directly linked to a species fitness), genetic diversity, with several citations in reference to the genetic work that has been done for *P. debilis.* Another commenter stated that the genetic diversity work was inadequate, not reproducible, and the conclusions about inbreeding depression were erroneous or in conflict with the reproductive biology study on the species.

Our Response: An individual stem or plant that is part of a clonal colony or genet (group of genetically identical individuals) is called a ramet. A common example of a ramet is the aspen tree (*Populus tremuloides*), which appears as an individual tree, but is genetically identical to its neighbor. Our population estimates for *Penstemon debilis* correspond to ramets, so are likely an overestimate of the number of unique individuals. Although we know *P. debilis'* neutral genetic diversity is low when compared to other species of plants with similar life-history traits (Wolfe 2010), we do not know how many of the ramets that have been counted as individuals are part of the same genet. Further research is needed to answer this question. Therefore, our estimate of the known individuals of *P. debilis* is likely an overestimate (as discussed under the physical and biological feature of ''disturbance'' for the species and under *Criteria Used To Identify Critical Habitat* below), and could be a large overestimate (Tepedino *in press* 2012, pp. 1–10). Please see comment 4 below for further information on the number and size of critical habitat units (CHUs) relating to this topic.

In response to the peer reviewers' comments on genetic variation, we recognize that the genetic information we have for *Penstemon debilis* (Wolfe 2010, pp. 1–7) is based on neutral genetic markers (genetic markers not specifically linked to a species' fitness) and does not specifically address the species' ability to persist into the future. However, the genetic data do show that the species suffers from some level of lowered genetic diversity and are the best available information we have at this time.

Our genetic information for *Penstemon debilis* comes from the work of Dr. Andrea Wolfe, one of the foremost experts on *Penstemon* genetics in the country (see *http://www.biosci.ohio-state.edu/~awolfe/* for background on the techniques she uses to assess genetic diversity). We recognize that we do not as yet have a peer-reviewed manuscript of her work. However, the Act requires that we use the best available information, and we find that Dr. Wolfe's summary of *P. debilis* genetics represents the best currently available information. We find her calculation of inbreeding coefficients are based on sound and reliable techniques. Furthermore, Dr. Wolfe is in the process of writing a more formal manuscript summarizing her data (Wolfe *et al.* 2012, pp. 1–31).

In general, fitness, the size of a population, and genetic diversity are positively correlated (reviewed in Leimu *et al.* 2006, pp. 942–952). More individuals usually equate to better fitness and higher genetic diversity, and fewer individuals are usually accompanied by less fitness and lower genetic diversity. Low genetic diversity can be a problem for species, especially those with limited population numbers or ranges, for several reasons: The effects from inbreeding can reduce fitness; the loss of genetic diversity (through genetic erosion or genetic drift that leads to the loss of genes or alleles) lessens the ability of populations to cope with environmental change; mutations can accumulate in small populations, (although there is less evidence this is a problem) (summarized in Frankham 2005, pp. 131–140); and outcrossing rates may be reduced (Aguilar *et al.* 2008, p. 5182). Inbreeding depression is defined as reduced fitness as a result of breeding related individuals. The more generations that have elapsed since a population has been fragmented or isolated, the less genetic diversity (Aguilar *et al.* 2008, p. 5183).

As pointed out by a commenter, the McMullen study did not find any inbreeding or outbreeding depression for the measure of fruit set for *Penstemon debilis* (McMullen 1998, p. 25). Fruit weight and seed set provided weak evidence that inbreeding depression may be occurring (McMullen 1998, pp. 25–26, 41). It is likely that the effects to fruit weight and seed set are what Dr. Wolfe was referencing when she referred to inbreeding depression. The Wolfe (2010, pp. 1–7) study demonstrates that genetic diversity is low for *P. debilis,* implying a lowered fitness. It also is reasonable to assume that inbreeding depression may be occurring based on small population sizes, the inbreeding depression (albeit weak) seen in the McMullen (1998) study, and the low genetic diversity and the inbreeding coefficients from the Wolfe study (Wolfe 2010, p. 3). The low population numbers and low genetic diversity of *P. debilis* are well substantiated by the best available information, and there are no data to suggest otherwise.

(3) Comment on *Penstemon debilis* site connectivity: One peer reviewer stated that the key to connectivity between *P. debilis* sites is other co-occurring *Penstemon* species, and specifically *P. caespitosa* (mat penstemon) that shares numerous pollinators with *P. debilis,* as discussed in the study done by McMullen (1998).

Our Response: Based on this comment on *Penstemon caespitosa,* that this species is especially important for the support of *P. debilis* pollinators, and correspondingly influencing the connectivity between sites of *P. debilis* (McMullen 1998, p. 27; Tepedino 2011, p. 3), we have added this species to our list of ''Plant Community'' features in our PCEs.

(4) Comments on unoccupied critical habitat units (CHUs) for *Penstemon debilis:* One peer reviewer commented that for *P. debilis,* based on its clonal nature and low population numbers, the ''redundancy'' criteria was only partially satisfied through the proposed designation of two unoccupied areas. The reviewer said that more distant populations are needed so the species is subject to more environmental exigencies (characters). A commenter supported the designation of unoccupied units for *P. debilis* for future recovery efforts, stating that transplanting or the creation of new populations is feasible and necessary for the species' recovery. A State commenter supported our designation of unoccupied CHUs, but suggested we consider existing leases on Federal parcels in our designation of unoccupied CHUs for *P. debilis,* to avoid conflicts with active or long-term mineral leases. This same State commenter reminded us that research in the future may lead to a better refinement of the areas we consider suitable for introduction efforts, and that we may want to consider revisions to these unoccupied CHUs in the future.

Our Response: Through this designation, we have tried to ensure there are sufficient areas for population expansion in the future. Because of the small number of individuals, clonal nature, and limited number of populations, recovery of *Penstemon debilis* will need to include the establishment of new populations of the plant, and this is why we are designating unoccupied units. We will better understand how many populations are needed (redundancy), and exactly where these new populations will need to be established, in the future, when we have completed the recovery planning process. Furthermore, we are not precluded from introducing *Penstemon debilis* into undesignated areas in the future.

When we overlaid our rough suitable habitat layer for *Penstemon debilis* with private and Federal lands, we mapped 16,862 ac (6,824 ha) of suitable habitat, 68 percent on private lands and 32 percent on Federal (Bureau of Land Management (BLM)) lands, with a spotty distribution measuring roughly 39 miles (mi) (63 kilometers (km)) from east to west and 17 mi (28 km) from north to south. Of the 5,323 ac (2,154 ha) on BLM lands, 1,515 ac (613 ha) fell within occupied units (Units 3 and 4), leaving 3,808 ac (1,541 ha) of suitable habitat (23 percent of the total suitable habitat). The remaining BLM ownership contains two large patches of suitable habitat, which we identify as the unoccupied units (Units 1 and 2). These unoccupied units contain 1,358 ac (550 ha) of suitable habitat, representing 40 percent of the remaining suitable habitat area on BLM lands. Additional suitable habitat on BLM lands was much more fragmented and spotty, not comprising the same large, contiguous blocks as the unoccupied units. The majority of the remaining habitat on BLM land has already been leased. Thus, the four CHUs represent a good portion of the range of the suitable habitat we mapped. We have added this language to *Criteria Used To Identify Critical Habitat,* below.

We make decisions on what areas to designate as critical habitat based on the best available information. We may refine our knowledge of *Penstemon debilis* and what constitutes suitable habitat in the future as new information becomes available. Additional information on the soil and habitat conditions needed to maximize the success of *P. debilis* introduction efforts in the future will aid in recovery. We agree there is a strong possibility, given careful research efforts, that we will be able to create new populations of *P. debilis* in the future.

(5) Comments on our criteria for designating our CHUs: All of our peer reviewers responded favorably to the criteria we developed for the identification of critical habitat of *Ipomopsis polyantha, Penstemon debilis,* and *Phacelia submutica.* Another reviewer responded that, given the low number of individuals for *P.*

debilis, it was appropriate that we include pollinator habitat (the 3,280-foot (ft) (1,000-meter (m) area). This same reviewer supported our 328-ft (100-m) area for *P. submutica* to help offset edge effects, climate change, the ephemeral nature of the species, and other impacts.

Another commenter stated that areas without suitable habitat should be excluded from the critical habitat designation for *Penstemon debilis,* particularly in Unit 3. This commenter stated that because we did not list the loss of pollinator habitat due to energy development as a threat in our final listing rule (based on the disturbance of vegetated areas being not nearly as extensive as the foraging distance of the pollinators), it was inappropriate to include pollinator areas. This same commenter discussed that *P. debilis* is a habitat specialist, making nonoccupied areas outside of suitable habitat unnecessary to the conservation of the species, because areas with denser vegetation were unsuitable for the plant growth. This commenter said we had provided no basis for including these areas. The commenter stated that unoccupied habitat must be ''essential for the conservation of the species,'' a higher standard than for occupied habitat. This same commenter stated that unoccupied areas with suitable habitat, unoccupied areas with unsuitable habitat, and areas beyond 328-ft (100-m) from identified occurrences should not be included. The commenter provided a paper (Elliot 2009) regarding bumblebees in Colorado supporting this 328-ft (100-m) area, and stated that this area applied on OXY USA WTP LP and Occidental Oil Shale, Inc. (collectively ''Oxy'') lands and had adequately protected *P. debilis* for 2 decades.

Another commenter stated that our DEA did not account for the effect of the additional 3,280-ft (1,000-m) buffer for *Penstemon debilis* when estimating the potential impacts of critical habitat designation, nor did it analyze the potential impact on unoccupied critical habitat areas with valid lease rights. This commenter also questioned the information in the draft environmental assessment relating to dust deposition and its effects to species, stating that our information was based on different species in different habitats and, therefore, was not applicable. This commenter stated that the draft environmental assessment relied on information contained in a study by Tepedino (2009), which was on a different species not closely related to *P. debilis,* and that the study by McMullen (1998) concluded that pollinators were not limiting seed set for *P. debilis,* and, therefore, should not be a primary concern to managers.

Another commenter discussed the recommended 656-ft (200-m) buffer avoidance distance being implemented by the BLM for surface disturbances near *Phacelia submutica.* This commenter stated we had failed to use any specific scientific studies that address impacts for oil and gas activities to *P. submutica,* and that we must conduct these studies.

Our Response: We consider all of Units 1 and 3 for *Ipomopsis polyantha,* all of Units 3 and 4 for *Penstemon debilis,* and all the *Phacelia submutica* units to represent the geographical area ''on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protections.'' Because all of these units contained plants at the time of listing, they are occupied. Physical and biological features are further defined in 50 CFR 424.12 as the features that may include but are not limited to: (1) Space for individuals and population growth, and for normal behavior; (2) Food, water, air, light, minerals, or other nutritional or physiological requirements; (3) Cover or shelter; (4) Sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and (5) Habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species. We consider the pollinator areas to be essential for reproduction, because both *P. debilis* and *I. polyantha* require pollinators for successful reproduction (Collins 1995, pp. 35–46; McMullen 1998, pp. 25–27). We consider the suitable habitat in the *P. debilis* CHUs to be essential sites for seed dispersal and population growth, with the added benefit of providing potential areas for future expansions or introduction efforts or to locate as of yet undiscovered populations. Therefore, these units contain areas occupied by the plants as well as areas with the physical or biological features essential to the conservation of the species (including areas for pollinators and seed dispersal) and that may require special management.

In this final rule, we have further explained our criteria, especially with respect to inclusion of pollinator areas, under *Criteria Used To Identify Critical Habitat,* below. We are also providing further explanation on these criteria in our final environmental assessment. We recognize that more species-specific research would strengthen our criteria; however, in the absence of this, we found the best available information was that on similar or related species, and used information in the general literature, including Elliot (2009, pp. 748–756), in order to define pollinator areas. Our criteria are scientifically based and provide a strong rationale for conserving these three plant species. Both *Ipomopsis polyantha* and *Penstemon debilis* require pollinators for successful reproduction and genetic exchange. Although pollinators were not found to be limiting seed set, McMullen (1998, p. 33) indicated that the entire suite of pollinators should be considered important to the long-term reproductive success of *P. debilis.* Thus, we delineated occupied areas, and evaluated the certainty that these areas would continue to have adequate pollinators, one of the essential physical and biological features for these species, in our process of critical habitat identification.

Pollinators are necessary for the reproduction of *Penstemon debilis* (McMullen 1998, pp. 25–27). Pollinators use a variety of habitats and floral resources and, therefore, are not confined to suitable habitat for *P. debilis.* Pollinators generally need: (1) A diversity of native plants whose blooming times overlap to provide flowers for foraging throughout the seasons; (2) nesting and egg-laying sites, with appropriate nesting materials; (3) sheltered, undisturbed places for hibernation and overwintering; and (4) a landscape free of poisonous chemicals (Shepherd *et al.* 2003, pp. 49–50). Encompassing a diversity of habitats and vegetation types will encourage a diversity of pollinators. Our pollinator areas were designed to consider and accommodate these requirements, and we have included additional language in our *Criteria Used To Identify Critical Habitat,* below.

Regarding the comment relating to our final listing rule and the threats to pollinators, threats and the physical and biological features essential to the conservation of a species are not the same. If the loss of pollinator habitat is not considered a threat, this does not mean that pollinator habitat is not essential for the conservation of a species. Additionally, in our final listing rule, we qualified the loss of pollinator habitat and the threat it poses, by stating that the degree of impact was unknown. Through this designation of critical habitat, lease rights will not be revoked or removed, nor is there any requirement for projects to completely avoid critical habitat. The 200-meter buffer mentioned by a reviewer is currently being utilized by the BLM, not the Service.

The FEA considers effects within CHUs incrementally, with the most stringent project modifications within 328-ft (100-m) of plants, more moderate measures from 328 to 984 ft (100 to 300 m), and measures to protect pollinators and habitat beyond 984 ft (300 m) (Industrial Economics, Inc. 2012, pp. ES–5, 2–9, 3–14, 4–2). These project modification distances are based on our draft projection of what section 7 consultations may consider for these three plants (Service 2012a, pp. 1–28). These distances are based on potential effects from disturbances including dust, pollutants, changes in erosion and sedimentation, habitat degradation, an increase in nonnative species, and increased fire risk, among others.

Given the lack of species-specific studies, and the relatively recent (in the last 10 to 15 years) disturbance caused by oil and gas development, we conducted an extensive literature review on effects from disturbances, as well as from habitat fragmentation. To date, we have reviewed 45 papers that evaluate the relationship between distance from a disturbance to the intensity of that disturbance, from a wide array of disturbances and in a wide array of ecosystems (Service 2012a, pp. B–3 to B–4). From this review, we have found effects extending from 33 ft (10 m) to over 6,562 ft (2,000 m), but with the majority of effects concentrated in the first several hundred meters (Service 2012a, pp. B–3 to B–4). From this, and in conjunction and coordination with others, we have developed the 328-ft (100-m) and 984-ft (300-m) draft guidelines for effect determinations in section 7 consultations related to all plant species in Colorado (Service 2012a, pp. 1–28), which were used in the DEA (Industrial Economics, Inc. 2012, pp. ES–5, 2–9, 3–14, 4–2). In combination, we also have reviewed 74 papers looking at the effects of habitat fragmentation on a wide array of plants and in a wide array of ecosystems (Service 2012a, pp. B–5 to B 11).

We recognize that the availability of more species-specific information evaluating the effects of disturbances, such as those from oil and gas development, may have helped us more accurately delineate critical habitat. There are ongoing studies on how disturbances are affecting six rare plants in Western Colorado and Eastern Utah, which are already listed under the Act (BIO–Logic 2010, pp. 1–9; Pitts *et al.* 2010, pp. 1–7; BIO–Logic 2011, pp. 1–10). However, much of the oil and gas development in the areas where these plants are found is recent and, given that the effects from habitat fragmentation and degradation can take many generations to be realized (Aguilar *et al.* 2008, p. 5183), initial studies may not show these effects. These studies may need to be done repeatedly in increments of 20 years or more. Compounding the problem, rare plants are inherently difficult to sample because of small populations and corresponding small sample sizes.

Comments From the State of Colorado

Comments received from the State (specifically the Colorado Natural Areas Program (CNAP)) regarding the proposal to designate critical habitat for *Ipomopsis polyantha, Penstemon debilis,* and *Phacelia submutica* are addressed below.

(6) Comments on *Ipomopsis polyantha* Unit 3, Pagosa Springs: The State commented that both a State Land Board (SLB) parcel and a State Wildlife Area fall within the boundaries of this unit. They informed us that the SLB has signed and is implementing a rare plant environmental review policy that will assure any ground-disturbing projects or major land use changes will not impact *I. polyantha.* Because this policy would provide more protection than the critical habitat designation (since plants are afforded few protections on State lands), the State requested that the SLB parcel be excluded from the critical habitat designation. The State did not request that the State Wildlife Area be excluded from critical habitat.

Our Response: We have reviewed the Colorado SLB Procedures for Rare Plant Environmental Review for Development Projects and Land Use Changes (State Board of Land Commissioners 2012, 3 pp.) that began being implemented on April 19, 2012. These procedures formalize SLB's practice of engaging the CNAP to ensure that projects on SLB lands move forward in a manner protective of rare plants. We commend the SLB and CNAP for their proactive efforts to conserve rare plants in the State of Colorado. This rare plant environmental review policy will provide protections for the plant on SLB lands for all projects, not just projects involving a Federal action (such as funding or permitting). However, we could find no tangible benefits to exclusion from critical habitat, as Federal activities on these lands that would invoke the protective standards for critical habitat are expected to be rare. The number of acres involved (110 ac (44 ha)) is relatively small and included within critical habitat for pollinator protection (the species is currently not present on the site). Thus, we do not believe that there are any benefits of exclusion that would outweigh the benefits of inclusion. We look forward to cooperating further with the State on *Ipomopsis polyantha* conservation and recovery at all these sites.

(7) Comments on exclusions and the management of *Penstemon debilis* on Oxy lands in Unit 3, Mount Callahan: Based on the success of ongoing conservation actions, the State commented that they support excluding all Oxy lands within this CHU (Unit 3, Mount Callahan). To support this exclusion, they are expanding the existing Colorado Natural Areas (CNA) agreement to include the Mount Logan Mine area, developing best management practices (BMPs) for habitat adjacent to the CNA to protect pollinators and habitat, and conducting further surveys for *P. debilis* in suitable habitat and the protection of new populations, should they be located on Oxy lands. The State commended Oxy for their long-term voluntary efforts to protect *P. debilis* and discussed the BMPs in place for protection of *P. debilis.* The State emphasized it is important to recognize these voluntary efforts, encouraging private land efforts such as these now and into the future. The State also commented that these voluntary protections would lead to more conservation than the protections afforded by critical habitat.

An additional commenter on behalf of Oxy also supported excluding all Oxy lands within the *Penstemon debilis* Unit 3, Mount Callahan. To support this exclusion, Oxy has agreed to expand the CNA agreement to include the Mount Logan Mine area (totaling roughly 762 ac (308 ha)), develop BMPs to provide protection for habitats and pollinators in areas adjacent to the natural areas, conduct further surveys in suitable habitat and include newly discovered *P. debilis* populations with over 75 individuals in a Natural Area, and extend the termination clause on the CNA agreement from 90 days to 2 years. This commenter expressed concern that designating critical habitat on Oxy lands would unreasonably delay and complicate domestic energy production on Oxy lands and unnecessarily burden Oxy. The commenter stated that voluntary conservation efforts would provide better protections for *P. debilis* than the species would receive through the critical habitat designation because the Act only protects plants on private lands when there is a Federal action (such as Federal funding or a necessary Federal permit). The commenter also suggested that the proposed critical habitat designation did not appropriately recognize the efforts undertaken by Oxy, which may be

interpreted as a disincentive for voluntary protections.

Another commenter supported the exclusion of Oxy lands, provided our overall criteria for designating critical habitat for *Penstemon debilis* were not changed. This support was based on the additional protections Oxy has agreed to, as described in the previous paragraph. This commenter stated that a permanent conservation easement for the CNA would provide additional protections. One peer reviewer expressed concern over the CNA exclusion, because the site is relatively undisturbed, making it a high-quality (intact) area.

Our Response: Oxy has the majority of three of the four viable populations of *Penstemon debilis* on their private lands, making their cooperation in the conservation of the species essential. We recognize that the voluntary conservation actions that Oxy has undertaken to protect *P. debilis* on their lands have been vital to the conservation of the species. In our proposed critical habitat rule, we announced we were considering the exclusion of Oxy lands based on the efforts of the landowner.

Oxy has been working to protect *Penstemon debilis* since 1987, when they first entered into a CNA Agreement. These protection efforts include regular monitoring of *P. debilis,* population avoidance, and the development and implementation of BMPs to protect and conserve the species. In 2008, Oxy expanded the CNA to include a second population of *P. debilis.* Because of Oxy's long-standing efforts to conserve *Penstemon debilis* and Oxy's efforts to work towards further protections for the plant, we are excluding all Oxy lands within Unit 3, Mount Callahan. We are excluding these lands based on the approved agreements Oxy has made to date and their efforts to move toward finalizing the additional agreement to conserve this species, as evidenced by the ongoing conservation partnership, as described above and under Exclusions below. We recognize that the Mount Callahan area represents a high-quality setting. Before we may make an exclusion from areas that meet the definition of critical habitat, we must weigh the benefits of inclusion versus the benefits of exclusion. Because plants receive very few protections on private lands under the Act (which primarily occur only in the event of a Federal action, such as Federal permitting or Federal funding), and because of the protections and greater conservation benefits provided by Oxy, we determine that the benefits of excluding Oxy lands outweigh the benefits of including these areas. This is further discussed under Exclusions below.

We agree with a commenter that a permanent conservation easement would be preferable to voluntary protections, but we also recognize that effective conservation can occur in other ways. In addition, Oxy's long-term commitment to protect the species, since 1987, (CNAP 1987, entire) provides us assurance that these voluntary protections will continue into the future.

(8) Comments on requests for extensions: The State commented that there was not adequate time to get the new CNA agreement with Oxy signed before the final critical habitat rule is due for publication. Oxy echoed the same concerns, and requested an extension of the final rule until July 27, 2013, citing language in the regulations as well as the Act allowing a 2-year extension on critical habitat determinations. We received an additional comment supporting an extension to accommodate the signing of Oxy's CNA agreement for *Penstemon debilis.*

Two counties, two oil and gas companies, and two groups associated with the oil and gas industry requested an extension on the final designation of 120 days, until August 24, 2012, to comment on the DEA.

Our Response: In an effort to improve implementation of the Act, we reached a multi-district litigation settlement with WildEarth Guardians in May 2011 (*WildEarth Guardians* v. *Salazar* MDL Docket No. 2165 (2011)) and with the Center for Biological Diversity in July 2011 (*Center for Biological Diversity* v. *Salazar* MDL Docket No. 2165 (2011)) outlining a multi-year listing work plan to systematically review and address species, especially those listed as candidates under the Act. The agreement includes species across the country, and sets specific timelines for actions to be completed. The work plans for these agreements identify that we will complete the final critical habitat rule for *Ipomopsis polyantha, Penstemon debilis,* and *Phacelia submutica* before the end of the 2012 Fiscal Year (the end of September 2012) (*WildEarth Guardians* v. *Salazar* MDL Docket No. 2165 (2011). This timing does not allow us to extend the comment period.

Moreover, we believe adequate time has been provided for the public to provide comment on the proposed critical habitat rule and the associated economic analysis. We have requested comments on critical habitat in our notice of availability of the DEA and draft environmental assessment from March 27 to April 26, 2012 (77 FR 18157). We requested information on the proposed critical habitat designation, including a request for information on economic impacts, from July 27 to September 26, 2011. Furthermore, we requested information on potential critical habitat areas in our proposed listing rule from June 23 to August 23, 2010 (75 FR 35721).

We worked closely with Oxy and the CNAP on their expansion of the CNA agreement and to address exclusion of all Oxy lands within the *Penstemon debilis* Unit 3, Mount Callahan (see Exclusions, below, for a more thorough discussion).

(9) Comments on unoccupied CHUs for *Ipomopsis polyantha:* We received comments from the U.S. Forest Service (USFS) relating to the boundaries of our two unoccupied CHUs for *I. polyantha:* Unit 2, the O'Neal Hill Special Botanical Area and Unit 4, Eight Mile Mesa. The comments discussed how the bottomland areas of Unit 2 do not provide suitable habitat for *I. polyantha* because of the dense ground cover with little exposed shale. The USFS also discussed several small areas in Unit 4 that were separated from the large parcel of contiguous habitat by roads, making management complicated and not providing good areas for future introductions. Another commenter supported these refinements of these critical habitat units as identified in the notice of availability (77 FR 18157).

Our Response: We confirmed these comments during site visits in the summer of 2011 and have accordingly adjusted the boundaries of both units by removing unsuitable habitat. The area of Unit 2 decreased from 784 to 564 ac (317 to 228 ha), and the area of Unit 4 decreased from 1,180 to 1,146 ac (478 to 464 ha).

(10) Comment on the quality of information used: One commenter questioned the validity of our information, although no specifics were provided, stating that our finding is based on weak and unreliable scientific information. The commenter stated that by using unpublished reports we were not relying on the best data available. The commenter stated that we should use peer-reviewed science. Another commenter stated that the designation is based on incomplete and outdated science and that the data we relied on were either incomplete, not fully considered, or were improperly relied on and that our proposed critical habitat designation was therefore flawed. This same commenter requested that we conduct another peer review because of our data quality issues. Another

commenter stated that our DEA and draft environmental assessment did not contain sufficient scientific analysis to justify the breadth of the critical habitat designation, although the commenter was not specific on what additional information was needed. This same commenter stated that the draft environmental assessment did not meet our information quality guidelines, stating that element occurrence data and genetic data are not publicly available.

Our Response: Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards under the Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat. Primary or original sources are those that are closest to the subject being studied, as opposed to those that cite, comment on, or build upon primary sources.

The Act and our regulations do not require us to use only peer-reviewed literature, but instead they require us to use the ''best scientific and commercial data available'' in a critical habitat designation We use information from many different sources, including survey reports completed by qualified individuals, Master's thesis research that has been reviewed but not published in a journal, status reports, peer-reviewed literature, other unpublished governmental and nongovernmental reports, reports prepared by industry, personal communication about management or other relevant topics, and other sources. Also, in accordance with our peer review policy, published on July 1, 1994 (59 FR 34270), we solicited expert opinions from knowledgeable individuals with scientific expertise that included familiarity with the species, the geographic region in which the species occurs, and conservation biology principles. Additionally, we requested comments or information from other concerned governmental agencies, the scientific community, industry, and any other interested parties concerning the proposed rule. Comments and information we received helped inform this final rule.

In conclusion, we believe we have used the best available scientific information for the designation of critical habitat for these three plants. We did conduct a peer review of our proposed critical habitat designation and incorporated changes into this final rule.

(11) Comment on the taxonomic validity of *Phacelia submutica:* One commenter questioned the validity of *P. submutica* as a stand-alone species, citing that NatureServe recognizes the plant as a variety instead of a species.

Our Response: Phacelia submutica also has been known by the name of *P. scopulina* var. *submutica.* In 1944, Howell described *P. submutica* as a distinct species, citing 13 different characteristics that distinguished the 2 taxa (Howell 1944, pp. 371–372). In 1981, Halse changed the species to a variety, stating the taxon was not well enough differentiated to deserve species recognition, but did merit varietal status. His determination was based on limited material (Halse 1981, p. 130; O'Kane 1987, p. 2). The Colorado Natural Heritage Program (CNHP), which is part of the NatureServe network, recognizes the taxon as a species (CNHP 2012b, pp. 19–110), which should eventually translate to a change at the National level. The Biota of North America Program (BONAP) now recognizes the taxon as a species (Kartesz 2009, p. 1), which similarly should eventually make its way to the USDA Natural Resources Conservation Service's Plants Database site, as well as the Integrated Taxonomic Information System. We determine, based on BONAP and other findings, this to be the best available information on the taxonomy of the species.

(12) Other comments on exclusions: One commenter suggested that any entities that invoke voluntary conservation efforts that have proven to be effective on private lands or leased public lands should be granted appropriate exclusions to continue economic activities in those areas. This same commenter urged us to consider exclusions for all three species on both private and public lands. One commenter stated that critical habitat should not be designated on any private lands. Several commenters suggested exclusions based on economic impacts to the oil and gas industry.

Our Response: Aside from the Oxy CNA agreement and the Colorado SLB rare plant environmental review policy, we are unaware of any other effective voluntary conservation efforts for these three plant species, nor did the commenter provide examples of such efforts. Without knowledge of these agreements, we are unable to assess the benefits of inclusion versus the benefits of exclusion. Although plants receive few protections on private lands, the Act does not allow us to exclude habitat areas for plants based on this reasoning. Instead, as the Act states, we must designate the geographic areas ''on which are found those physical or biological features (I) essential to the conservation of the species.'' We are not making any exclusions based on the economic analysis, as we concluded that this rule would not result in significant economic impacts (please see Exclusions Based on Economic Impacts, below). We are excluding lands covered by the voluntary agreements between Oxy and CNAP from this final designation (see Exclusions Based on Other Relevant Impacts, below).

(13) Comments on designating unoccupied units for *Phacelia submutica:* One commenter suggested we consider designating other similar slopes and soils with the PCEs for *P. submutica* based on the potential habitat model done by Decker *et al.* (2005).

Our Response: The Decker *et al.* (2005) habitat model is not refined enough to allow us to find the small barren patches, within the larger plant communities, where *Phacelia submutica* is found. In addition, we believe that the CHUs we have identified contain the PCEs and are adequate in number, size, and distribution to provide adequate redundancy, resiliency, and representation for the species.

(14) Comments on plant locations: One commenter asked why we did not include *Phacelia submutica* locations east of Parachute, Colorado.

Our Response: The three *Phacelia submutica* points identified by the commenter have not been verified. The botanist at the Colorado River Valley Field Office of the BLM has revisited these sites and did not find any suitable habitat or plants. She believes the contractor that located the plants may have been mistaken in their identification (DeYoung 2010b, p. 1). Based on this information, we conclude that the site does not meet the definition of critical habitat.

(15) Comments on designating critical habitat: One commenter stated that we had not established that designating critical habitat is necessary for these species.

Our Response: The Act specifically states in section 4(a)(3)(A) that critical habitat will be concurrently designated

with a listing determination for threatened or endangered species. Critical habitat is defined in section 3 of the Act as: (1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (a) essential to the conservation of the species, and (b) which may require special management considerations or protection; and (2) specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination by the Secretary that such areas are essential for the conservation of the species. Section 4 of the Act requires that, to the maximum extent prudent and determinable, critical habitat will be designated for threatened and endangered species. In our final listing rule for the three species (76 FR 45054), we found that designating critical habitat was both prudent and determinable.

(16) Comments on disturbance and *Penstemon debilis:* One commenter stated that we did not evaluate the positive effects of oil and gas development to *P. debilis* since the species prefers disturbed soils and has expanded populations in areas that have been previously disturbed.

Our Response: We recognize that *Penstemon debilis* prefers some levels of natural disturbance, and indicate this in both our description of physical and biological features and our list of PCEs. However, we have no information to suggest that *P. debilis* benefits from artificial disturbances associated with oil and gas activities. We know that *P. debilis* is found in artificially disturbed areas at Mount Logan Mine. However, we have no information on where the plant was distributed prior to that disturbance. For example, we do not know if the plant was once found across the entire area and is now distributed in small patches, or if the plant was introduced to the site with seeds. We also have no information on which type of artificial disturbances, and at what levels, may or may not benefit the plant. Therefore, we have not evaluated these effects.

(17) Comments related to baseline conservation already required for oil and gas development relating to the DEA: One commenter noted that the DEA did not consider the impacts to oil and gas development caused by the restrictions set forth in the Roan Plateau Resource Management Plan (RMP) Amendment. The commenter stated that the restrictions set forth in this RMP combined with the designation of critical habitat for the *Penstemon debilis* are likely to create a situation where it will be extremely difficult, if not impossible, to locate well pads and associated infrastructure.

Our Response: The DEA considers the restrictions placed on oil and gas development on lands managed by the BLM Colorado River Valley Field Office, which administers the Roan Plateau RMP. First, lands managed by BLM that are covered by a no surface occupancy (NSO) stipulation (where future oil and gas development will not likely pose a threat to the plant) are not included for consideration in the incremental effects analysis of the DEA. Next, the analysis considers the other restrictions placed on oil and gas development by the Roan Plateau RMP and the conservation measures likely requested by the Service during section 7 consultation and concludes that these restrictions do not appear to preclude drilling activities. More specifically, as described in Section 3.4.1 of the DEA, during section 7 consultation the Service may request changes to the design of a well pad and supporting infrastructure within 300 meters of *Penstemon debilis* occurrences to avoid jeopardy to the species. While this baseline conservation effort may affect the location of some well pads, it is unlikely to affect the siting of most wells within the critical habitat area. A discussion of this concern has been added to Section 3.3.1 of the FEA. A more specific discussion of the Roan Plateau RMP Amendment has been added to Section 3.3.2 of the FEA.

The RMP has two lease stipulations that directly address endangered, threatened, and candidate plants. A no surface occupancy lease stipulation (NSO–12) protects occupied habitat and adjacent potential habitat from ground disturbing activities, with narrow exceptions. A controlled surface use stipulation (CSU–12) protects special status plant species and plant communities by authorizing BLM to impose special design, operation, mitigation, and reclamation measures, including relocation of ground disturbing activities by more than 200 meters, with some exceptions. Special management considerations and protections are thus contemplated.

(18) Comments related to oil and gas development and the DEA: Multiple commenters asserted that the DEA underestimates impacts to the oil and gas industry. The commenters stated that oil and gas development on Federal lands is currently subject to overlapping regulations, seasonal restrictions, and legal challenges. Commenters indicated that these restrictions complicate access to Federal resources and often lead to delays in resource extraction. The commenters asserted that the proposed critical habitat will create further delays and, when combined with the current restrictions, may potentially prohibit oil and gas development within certain portions of the proposed critical habitat areas that overlap existing oil and gas fields or areas prospective for natural gas. Commenters indicated that the economic impact to oil and gas companies and Federal, State, and local governments associated with the lost potential to develop oil and gas resources would exceed the costs associated with section 7 consultation currently quantified in the DEA.

Our Response: The Service is committed to working with project proponents to implement a series of conservation efforts to protect the plants and their habitat, while allowing oil and gas development projects to move forward. The DEA recognizes that oil and gas resources on Federal lands are managed through a myriad of regulations. Section 3.3.2 of the DEA describes some of these regulations and how they affect the level of future oil and gas development within the proposed critical habitat. During section 7 consultation, the Service is likely to recommend a series of conservation efforts within critical habitat to avoid impacts to the plants and their habitat. The Service does not expect to recommend the prohibition of oil and gas activities from critical habitat areas and does not believe that the recommended conservation efforts will lead to a decrease in oil and gas development. Therefore, the DEA quantifies the reasonably foreseeable costs associated with these conservation efforts and does not quantify impacts associated with a decrease in resource extraction.

In addition, paragraph 96 of the DEA discusses the potential for time delays associated with consultation. This paragraph qualitatively discusses the potential for this impact, but notes that the extent of possible delay is not known and therefore the impact of time delay is not quantified in this analysis. The Service does not expect to recommend timing or seasonal restrictions for the plants that could potentially overlap with those currently in place on Federal lands for other species. A more detailed section on the concerns raised by these commenters has been added to Section 3.3.1 of the FEA.

(19) Comments related to the uncertainty associated with future oil and gas development and the DEA: Multiple commenters asserted that the methods used in the DEA to forecast the level of future oil and gas development

are flawed and the resulting estimates of the number of wells drilled is too low. Commenters stated that the fluctuating price of natural gas, technological advances, and discoveries of new producing formations throughout the Piceance Basin have contributed to changes in the level of current and future oil and gas development. Further commenters believe that it is not reasonable to assume that the number of future wells will be evenly distributed within each county based on the historic distribution of wells.

Our Response: The DEA acknowledges that the most significant source of uncertainty in the analysis is the level and distribution of future oil and gas development. The economic analysis employs multiple scenarios of future oil and gas activity to account for this uncertainty. The DEA uses the best publicly available information on current and future oil and gas development, while recognizing that the number of actual wells drilled could vary greatly due to changing economic conditions and technological innovations.

Stakeholders in the region indicated that future drilling activity within Mesa and Garfield Counties would be limited to areas within the Piceance and Paradox Basins and, therefore, the DEA restricts its projections to these areas. No better information is publicly available on the future distribution of wells within each county. Section 3.3.1 of the FEA describes the oil and gas industry's concern that the number of gas wells may be underestimated in the DEA.

(20) Comments on economic impacts to Federal, State, and local governments: Multiple commenters stated that the DEA should consider the impact to Federal, State, and local governments of the proposed critical habitat designation. In particular, these commenters asserted that the designation of critical habitat will lead to lost oil and gas development opportunities, which will in turn result in lost royalty and tax revenues to the Federal, State, and local governments.

Our Response: In paragraph 97, the DEA states that ''if resource production is curtailed due to conservation efforts, then mineral owners could receive fewer royalties.'' However, the DEA goes on to explain that the Service is unlikely to recommend the prohibition of oil and gas activities from within critical habitat areas. Therefore, no loss in revenues to Federal, State, or local governments is anticipated.

(21) Comments relating to oil and gas lease rights on Federal lands: Two commenters express concern that the proposed critical habitat designation may undermine or preempt existing oil and gas lease rights on Federal lands. The commenters state that BLM and the Service should not infringe on lease rights by overly restricting oil and gas activities.

Our Response: The conservation efforts described in the DEA that are likely to be recommended by the Service during section 7 consultation include efforts such as surveying, monitoring, temporary fencing, and weed control. Section 3.4.1 of the DEA describes the likely modifications related to oil and gas development in detail. These conservation efforts will allow for oil and gas development on Federal lands and therefore are not viewed as undermining oil and gas lease rights.

(22) Comments on privately owned surface and mineral rights: One commenter stated that it is inappropriate for the DEA to ignore potential economic impacts associated with the proposed critical habitat designation in areas where both the surface and mineral rights are privately owned.

Our Response: The DEA assumes that a Federal action will not exist for oil and gas development in areas where both the surface and mineral rights are privately owned. Therefore, project proponents are not required to consult with the Service in these areas. Section 3.5 of the DEA acknowledges that projects on privately-owned lands may have a Federal action if they require a permit from the U.S. Army Corps of Engineers under section 402 of the Clean Water Act.

(23) Comments on oil and gas development in *Penstemon debilis* Unit 3: One commenter indicated that the DEA underestimated the number of future well pads to be constructed within proposed Unit 3 for *Penstemon debilis.* The commenter states that the DEA accounts for three future multi-well pads, but in total 15 multi-well pads are estimated.

Our Response: As described in paragraph 105, the DEA assumes that three multi-well pads will be drilled within the currently existing Mount Callahan and Mount Callahan Saddle Colorado Natural Areas within Unit 3 for *Penstemon debilis.* The remaining 12 well pads are located on privately owned property outside of the Natural Areas. The DEA assumes that there will be no Federal nexus for oil and gas development on privately owned land and thus no need for consultation with the Service. Therefore, there will be no impacts associated with the development of the additional 12 well pads outside of the Natural Areas. Paragraph 109 of the FEA explains the assumptions behind which well pads are included in the economic analysis in more detail.

Summary of Changes From Proposed Rule

Modifications to Critical Habitat Unit Boundaries

- Based on additional information which identified unsuitable and discontinuous habitat (Holtrop 2011, pp. 1–2), we refined our designation within *Ipomopsis polyantha* Unit 2 and reduced it from 784 to 564 ac (317 to 228 ha), and reduced Unit 4 from 1,180 to 1,146 ac (478 to 464 ha). These changes were made based on comments from the USFS (Holtrop 2011), as well as site visits made by the Service during the summer of 2011. We notified the public of these changes in our notice of availability for the DEA and draft environmental assessment (77 FR 18157; March 27, 2012).
- We have modified the boundaries of *Penstemon debilis* Unit 3, Mount Callahan. We have modified these boundaries based on the ongoing partnership and conservation efforts between Oxy and CNAP, an existing agreement between Oxy and CNAP to conserve *P. debilis,* and well-formulated plans to increase the scope of this agreement. We are excluding all Oxy lands in this unit. This is further discussed in our Exclusions section and in the Unit description. The Unit was reduced in size from 8,013 to 4,369 ac (3,243 to 1,769 ha). We announced that we were considering these areas for exclusion in the notice of availability for the DEA and draft environmental assessment (77 FR 18157)
- Based on site surveys in 2011 that located more areas with *Phacelia submutica* plants, we have modified the boundaries of *P. submutica* Unit 6, Ashmead Draw; Unit 7, Baugh Reservoir; and Unit 9, Anderson Gulch (Langton 2010a, spatial data; CNHP 2012b). Unit 6 increased from 1,220 to 1,276 ac (494 to 516 ha); Unit 7 increased from 28 to 430 ac (12 to 174 ha); Unit 9 increased from 310 to 341 ac (122 to 138 ha). We notified the public of these increases in our Notice of Availability for the DEA and draft environmental assessment (77 FR 18157; March 27, 2012).

Modification to Primary Constituent Elements

- We revised the PCE for *Penstemon debilis* regarding habitat for pollinators to accommodate the mud-nesting habits of the wasp, *Pseudomasarid vespoides,*

based on information provided by a peer reviewer (Tepedino 2011, p. 1).

• We added to the PCE for *Penstemon debilis* in order to further describe an additional necessary *Penstemon* species (*P. caespitosa*) for support of pollinators and connectivity between sites, based on information provided by a peer reviewer (Tepedino 2011, p. 2).

Clarifications in Our Criteria Used To Identify Critical Habitat

• We have added language to clarify our reasoning for designation of pollinator areas.

• We have added language to clarify our designation of unoccupied units for *Penstemon debilis.*

Critical Habitat

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination by the Secretary that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means to use all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated loss.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) of the Act would apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and the landowner is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical and biological features within an area, we focus on the principal biological or physical constituent elements (PCEs such as roost sites, nesting grounds, seasonal wetlands, water quality, tide, soil type) that are essential to the conservation of the species. PCEs are those specific elements of physical or biological features that provide for a species' life-history processes and are essential to the conservation of the species.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. For example, an area currently occupied by the species but that was not occupied at the time of listing may be essential to the conservation of the species and may be included in the critical habitat designation. We designate critical habitat in areas outside the geographical area occupied by a species only when a designation limited to its range would be inadequate to ensure the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards under the Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, other unpublished materials, or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to:

(1) Conservation actions implemented under section 7(a)(1) of the Act,

(2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species, and (3) the prohibitions of section 9 of the Act if actions occurring in these areas may affect the species. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of

these species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Physical or Biological Features

In accordance with section 3(5)(A)(i) and 4(b)(1)(A) of the Act and regulations at 50 CFR 424.12, in determining which areas within the geographical area occupied by the species at the time of listing to designate as critical habitat, we consider the physical or biological features essential to the conservation of the species and which may require special management considerations or protection. These include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distributions of a species.

We derive the specific physical or biological features essential for *Ipomopsis polyantha, Penstemon debilis,* and *Phacelia submutica* from studies of the species' habitat, ecology, and life-history as described in the Critical Habitat section of the proposed rule to designate critical habitat published in the **Federal Register** on July 27, 2011 (76 FR 45078), and in the information presented below. Additional information can be found in the final listing rule published in the **Federal Register** on July 27, 2011 (76 FR 45054).

Ipomopsis polyantha

We have determined that *Ipomopsis polyantha* requires the following physical and biological features:

Space for Individual and Population Growth

Plant Community and Competitive Ability—Ipomopsis polyantha is found on barren shales, or in the open montane grassland (primarily *Festuca arizonica* (Arizona fescue)) understory at the edges of open *Pinus ponderosa* (Ponderosa pine), Ponderosa pine and *Juniperus scopulorum* (Rocky Mountain juniper), or *J. osteosperma* (Utah juniper) and *Quercus gambellii* (Gambel oak) plant communities (Anderson 2004, p. 20). Within these plant communities, the plant is found in open or more sparsely vegetated areas where plant cover is less than 5 or 10 percent, although these interspaces can be small within the greater plant community (less than 100 ft^2 (10 m^2)). Because the plant is found in these open areas it is thought to be a poor competitor. Dense stands of nonnative invasive grasses such as *Bromus inermis* (smooth brome) appear to almost totally exclude the species (Anderson 2004, p. 36).

Complexity in *Ipomopsis polyantha* plant communities is important because pollinator diversity at *I. polyantha* sites is higher at more vegetatively diverse sites (Collins 1995, p. 107). The importance of pollinators for *I. polyantha* is further discussed under ''Reproduction'' below. Therefore, based on the information above, we identify sparsely vegetated, barren shales, Ponderosa pine margins, Ponderosa pine and juniper, or juniper and oak plant communities to be a physical or biological feature for this plant. Given that much of the area where *I. polyantha* currently exists has already been altered to some degree, these plant communities may be historical. For example, the adjacent forest that would have naturally occurred in *I. polyantha* habitat may have been thinned or removed. In another example, forage species may have been planted in habitat that was once more suitable for *I. polyantha.*

Elevation—Known populations of *Ipomopsis polyantha* are found from 6,750 to 7,775 ft (2,050 to 2,370 m) (Service 2011a, p. 1) on Mancos shale soils (as descibed below). Because plants have not been identified outside of this elevation band and because growing conditions frequently change across elevation gradients, we have identified elevations from 6,400 to 8,100 ft (1,950 to 2,475 m) to be a physical or biological feature for this plant. We have extended the elevation range 328 ft (100 m) upward and downward in an attempt to provide areas where the plant could migrate, given shifting climates (Callaghan *et al.* 2004, entire; Crimmins *et al.* 2011, entire). We consider this 328 ft (100 m) to be a conservative allowance since studies elsewhere on climate change elevational shifts have found more dramatic changes even in the last century: 95 ft (29 m) upward per decade (Lenoir *et al.* 2008, entire), or an average of 279 ft (85 m) downward since the 1930s (Crimmins *et al.* 2011, entire). We do not have information specific to *I. polyantha* elevational shifts. The above studies were done in different areas, Western Europe and California, and looking at different species. Mancos shale habitats extend into these higher and lower elevations.

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

Soils—Ipomopsis polyantha is found on Mancos shale soils from the Upper Cretaceous period within the elevation range described above. These shales comprise a heavy gray clay loam alluvium (loose) soil derived from shale, sandstone, clay, and residuum that is unconsolidated, weathered mineral material that has accumulated as consolidated rock and disintegrated in place (Collins 1995, pp. 2–4). Although Mancos shale soils do not retain soil moisture well, *I. polyantha* seeds grow best when germinated in these soils (Collins 1995, p. 87). We conclude that the soils where *I. polyantha* are found are among the harshest local sites for plant growth because of the lack of vegetation at occupied sites, and because the soils are heavy, droughty, and deficient in nutrients. Species that occupy such sites have been called ''stress-tolerators'' (Grime 1977, p. 1196). Because *I. polyantha* plants are found only on Mancos shale soils, and because greenhouse trials have found that seedlings grow best in Mancos shale soils, we have identified these Mancos shale soils as a physical or biological feature for this plant.

Climate—Average annual rainfall in Pagosa Springs is 20 inches (in) (51 centimeters (cm)) (Anderson 2004, p. 21). Winters are cold with snow cover commonly present throughout the winter months. Winter snow is important for preventing severe frost damage to some plants during the winter months (Bannister *et al.* 2005, pp. 250–251) and may be important for *Ipomopsis polyantha.* Freezing temperatures can occur into June and even July, indicating that *I. polyantha* can tolerate frost because it grows and blooms during this time (Anderson 2004, p. 21). May and June, when *I. polyantha* blooms, are, on average, the driest months of the year (Anderson 2004, p. 21; Service 2011b, p. 52). Because *I. polyantha* has evolved in these climatic conditions, we have identified suitable precipitation; cold, dry springs; and winter snow as physical or biological features for this plant. These climatic conditions are influenced, in part, by elevation.

Cover or Shelter

While *Ipomopsis polyantha* seeds and seedlings certainly require ''safe sites'' for their germination and establishment, these microclimates are too small to be considered or managed here as a physical or biological feature for this plant. We do not understand exactly what physical characteristics constitute a safe site other than that they are locations where the appropriate conditions for seedling germination and growth exist. We believe these features are encompassed in the ''Plant Community and Competitive Ability'' and ''Soils'' sections discussed above.

Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring

Reproduction—Ipomopsis polyantha sets far less fruit when self-pollinated (2 to 8 percent versus 47 percent fruit set when crossed with pollen from another plant) (Collins 1995, p. 36). Open pollinated (unbagged and not experimentally manipulated) plants set even more fruit (77 percent) (Collins 1995, p. 36). Also, male and female reproductive parts are separated both spatially and temporally (Collins 1995, pp. 34–35). Therefore, we conclude that pollinators are necessary for the long-term successful reproduction and conservation of the plant. Over 30 different insects have been collected visiting *I. polyantha* flowers (Collins 1995, pp. 47–74). The primary pollinators are all bee species; these include the nonnative honeybee *Apis mellifera* (honeybees) and native bees that nest in the ground or twigs including species of *Augochlorella* (a type of Halictid or sweat bee), *Anthophora* (digger bees), *Bombus* (bumblebee), *Dialictus* (another type of Halictid or sweat bee), *Megachile* (leafcutter bees), and *Lasioglossum* (another type of Halictid or sweat bee) (Collins 1995, p. 71). Most of these pollinators are solitary and do not live communally, with the exception of honeybees, which live socially, and bumblebees, which are partially social with seasonal summer colonies. Pollinator diversity was higher at *I. polyantha* sites with more complex plant communities (Collins 1995, p. 107). Because pollinators are necessary for successful reproduction of *I. polyantha,* we have identified pollinators and their associated habitats as an essential biological feature for this plant.

Habitats Protected From Disturbance or Representative of the Historic Geographical and Ecological Distribution of the Species

Disturbance Regime—The native habitat of *Ipomopsis polyantha* has been extensively modified (Anderson 2004, p. 28). The species is considered a ruderal species, which means it is one of the first plant species to colonize disturbed lands. Seeds are not thought to disperse far. Plants are able to colonize nearby disturbed areas quickly. The species is found in light to moderately disturbed areas, such as rills (small, narrow, shallow incisions in topsoil layers caused by erosion by overland flow or surface runoffs), areas that are only occasionally disturbed, or areas with previous disturbances that have been colonized and not subsequently disturbed (i.e., previously cleared areas that have had some time to recover) (Anderson 2004, p. 23; 75 FR 35724–35726). Some of these disturbances are now maintained or created by human activities (such as light grazing or the recolonization of Mancos shale substrate roads that are no longer used) that mimic the constant erosion that occurs on the highly erosive Mancos shale soils and seem to maintain *I. polyantha* at a site. *Ipomopsis polyantha s*ites with constant or repetitive disturbance, especially sites with constant heavy grazing or repeated mowing, have been lost (Mayo 2008, pp. 1–2). Fire also may have played a role in maintaining open habitats and disturbances for *I. polyantha* in the past (Anderson 2004, p. 22), as it historically did in all Ponderosa pine forests across the West (Brown and Smith 2000, p. 97).

Interestingly, *Ipomopsis polyantha* individuals at newly disturbed sites were slightly more likely to self-pollinate than were plants in later successional areas (Collins 1995, p. 99), demonstrating that disturbance is important enough to *I. polyantha* that it may influence reproductive success (self-pollinated individuals are less reproductively successful) and possibly genetic diversity (self-pollination leads to lowered genetic diversity). Managing for an appropriate disturbance type and level can be difficult since we lack research to better quantify these measures. Because *I. polyantha* is found only within areas with light to moderate or discontinuous disturbances, we have identified the disturbance regime to be a physical or biological feature for this plant.

Penstemon debilis

We have determined that *Penstemon debilis* requires the following physical and biological features:

Space for Individual and Population Growth

Plant Community and Competitive Ability—Penstemon debilis is found on steep, constantly shifting shale cliffs with little vegetation. The decline or loss of several populations has been attributed to encroaching vegetation; therefore, it is assumed that *P. debilis* is a poor competitor (McMullen 1998, p. 72). The areas where *P. debilis* are found are characterized as ''Rocky Mountain cliff and canyon'' (NatureServe 2004, p. 10). The plant community where *P. debilis* is found is unique, because instead of being dominated by one or two common species as most plant communities are, it has a high diversity of uncommon species that also are oil shale endemics (McMullen 1998, p. 5). These uncommon endemic species include *Mentzelia rhizomata* (Roan Cliffs blazingstar), *Thalictrum heliophilum* (sun-loving meadowrue), *Astragalus lutosus* (dragon milkvetch), and *Lesquerella parviflora* (Piceance bladderpod), *Penstemon osterhoutii* (Osterhout beardtongue), and *Festuca dasyclada* (Utah or oil shale fescue) (McMullen 1998, p. 5). More common species include *Holodiscus discolor* (oceanspray), *Penstemon caespitosus* (mat penstemon), *Cercocarpus montanus* (Mountain mahogany), and *Chrysothamnus viscidiflorus* (Yellow rabbitbrush) (O'Kane and Anderson 1987, p. 415; McMullen 1998, p. 5). *Penstemon caespitosus* is especially important because it supports the pollinators of *P. debilis* and may provide connectivity between populations (McMullen 1998, p. 27; Tepedino 2011, p. 3). We consider sparse vegetation (with less than 10 percent plant cover), assembled of other oil shale specific plants, including *P. caespitosus,* and not dominated by any one species, to be a physical or biological feature for this plant.

Elevation—Known populations of *Penstemon debilis* are found from 5,600 to 9,250 ft (1,700 to 2,820 m) in elevation (Service 2011a, p. 3) on specific soils (as described below). Because plants have not been documented outside of this elevation band and because growing conditions frequently change across elevation gradients, we have identified elevations from 5,250 to 9,600 ft (1,600 to 2,920 m) to be a physical or biological feature for this plant. We have extended the elevation range 328 ft (100 m) upward

and downward in an attempt to provide areas where the plant could migrate, given shifting climates (Callaghan *et al.* 2004, pp. 418–435; Crimmins *et al.* 2011, pp. 324–327). We consider this 328 ft (100 m) to be a conservative allowance since studies on climate change elevational shifts have found more dramatic changes even in the last century: 95 ft (29 m) upward per decade (Lenoir *et al.* 2008, pp. 1768–1770), or an average of 279 ft (85 m) downward since the 1930s (Crimmins *et al.* 2011, pp. 324–327). The above studies were done in different areas, Western Europe and California, and looking at different species. We do not have information specific to *P. debilis* elevational shifts; however, oil shale habitats extend into these higher and lower elevations.

Slope—*Penstemon debilis* is generally found only on steep slopes (mean of 37 percent slope) and between cliff bands where the oil shale is constantly shifting and moving downhill (Service 2011a, p. 2). The plant also can be found on relatively flat sites, although nearby habitats are often steep. In general, the plant is found on steep, constantly eroding slopes; therefore, we identify moderate to steep slopes, generally over 15 percent slope, to be a physical or biological feature for this plant.

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

Soils—*Penstemon debilis* is known only from oil shale cliffs on the Roan Plateau escarpment and was previously described as occurring only on the Parachute Creek Member of the Green River Formation (McMullen 1998, p. 57). Utilizing geologic spatial data, our mapping exercises have found that the plant also is found on the Lower Part of the Green River Formation (Tweto 1979, pp. 1,4). Populations are generally located either directly above or below the geologic feature known as the Mahogany Ledge (McMullen 1998, p. 63). All occupied sites are similar in soil morphology (form and structure) and are characterized by a surface layer of small to moderate shale channers (small flagstones) that shift continually due to the steep slopes (McMullen 1998, p. 64). Below the channers is a weakly developed calcareous, sandy to loamy layer, with 40 to 90 percent coarse material.

Toxic elements in the soil such as arsenic and selenium accumulate in the tissues of *Penstemon debilis* (McMullen 1998, p. 65) and may allow *P. debilis* to grow in areas that are more toxic to other species, thereby reducing plant competition. Toxic elements in the soil vary between populations. In a greenhouse setting, *P. debilis* plants were grown easily in potting soil. Soil may not directly influence *P. debilis'* distribution, but may instead have an indirect effect on the plant's distribution by limiting the establishment of other vegetation (McMullen 1998, p. 67). Soil morphology, rather than soil chemistry, appears to better explain the plant's distribution (McMullen 1998, p. 74). Because the plant is only found on the Parachute Creek Member and Lower Part of the Green River Formation and because of the consistent soil morphology between sites, we are identifying these geologic formations as a physical or biological feature for the plant. We also looked at soil type as discussed below in *Criteria Used to Identify Critical Habitat* but do not include it here as a physical or biological feature because it is a component of the soil characteristics already described.

Climate—The average annual precipitation in the area where *Penstemon debilis* is found ranges from 12 to 18 in (30 to 46 cm) (McMullen 1998, p. 63). Winters are cold (averaging roughly 30 degrees Fahrenheit (°F) (−1 degree Celsius (°C)) with snow staying on the ground in flatter areas), and summers are warmer (averaging roughly 65 °F (18 °C). Because *P. debilis* has evolved under these climatic conditions, we have identified suitable precipitation and suitable temperatures as physical or biological features for this plant. These climatic conditions are likely influenced, in part, by elevation.

Cover or Shelter

While *Penstemon* seeds and seedlings certainly require ''safe sites'' for their germination and establishment, these microclimates are too small to be considered or managed here as a physical or biological feature for this plant. We do not understand exactly what physical characteristics constitute a safe site other than that they are locations where the appropriate conditions for seedling germination and growth exist. We believe these features are encompassed in the ''Plant Community and Competitive Ability'' and ''Soils'' sections discussed above.

Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring

Reproduction—*Penstemon debilis* requires insect pollinators for reproduction and is twice as reproductively successful if pollen comes from another plant (McMullen 1998, pp. 25, 43). Over 40 species of pollinators have been collected from *P. debilis;* the primary pollinators include 4 *Osmia* (mason bee) species, *Atoposmia elongata* (a close relative of *Osmia*), several *Bombus* (bumblebee) species, and a native wasp *Pseudomasaris vespoides* (McMullen 1998, pp. 28–29, 89–100). All of these pollinators are either ground or twig nesting or construct mud nests on the underside of rocks or shale. None of these pollinators are rare, nor are they specialists on *P. debilis,* although some of these pollinators, such as *Osmia,* are specialists within the genus *Penstemon* (McMullen 1998, p. 11). The number and type of pollinators differed between *P. debilis* sites (McMullen 1998, p. 27). Fruit set was not limited by inadequate numbers of pollinators (McMullen 1998, p. 27). Because pollinators are necessary for successful reproduction of *P. debilis,* we have identified pollinators and their associated habitats as a physical or biological feature for this plant.

Habitats Protected From Disturbance or Representative of the Historic Geographical and Ecological Distributions of the Species

Disturbance Regime—*Penstemon debilis* is found on steep oil shale slopes that are constantly shifting. The plant has underground stems (rhizomes) that are an adaptation to this constant shifting (McMullen 1998, p. 58). As the shale shifts downward, the underground stems and clusters of leaves emerge downhill. A single plant may actually appear as many different plants that are connected by these underground stems (McMullen 1998, p. 58). In sites where the soils have stabilized and vegetation has encroached, *P. debilis* has been lost (McMullen 1998, p. 72). Some plants are found on soils that have been disturbed by humans, such as roadsides. Managing for an appropriate disturbance type or level can be difficult since we lack research to better quantify these measures. For these reasons, we consider these unstable and slow to moderate levels of constantly shifting shale slopes to be a physical or biological feature for the species.

Phacelia submutica

We have determined that *Phacelia submutica* requires the following physical and biological features:

Space for Individual and Population Growth

Plant Community and Competitive Ability—Predominant vegetation classifications within the occupied range of *Phacelia submutica* include clay badlands, mixed salt desert scrub, and *Artemisia tridentata* (big sagebrush) shrubland, within the greater *Pinus edulis* (pinyon)—*Juniperus* spp. (juniper) woodlands type (O'Kane 1987,

pp. 14–15; Ladyman 2003, pp. 14–16). Within these vegetated areas, *P. submutica* is found on sparsely vegetated barren areas with total plant cover generally less than 10 percent (Burt and Spackman 1995, p. 20). On these barren areas, *P. submutica* can be found alone or in association with other species. Associated plant species at sites occupied by *P. submutica* include: The nonnative *Bromus tectorum* (cheatgrass) and native species *Grindelia fastigiata* (pointed gumweed), *Eriogonum gordonii* (Gordon buckwheat), *Monolepis nuttalliana* (Nutall povertyweed), and *Oenothera caespitosa* (tufted evening primrose) (Burt and Spackman 1995, p. 20; Ladyman 2003, pp. 15–16). Many of these associated species also are annuals (growing for only 1 year). Because of the harshness (heavy clay soils are difficult for plant growth) and sometimes the steepness of occupied sites, these areas are maintained in an early successional state (Ladyman 2003, p. 18). Therefore, the species found in these habitats are regarded as pioneers that are continually colonizing these bare areas and then dying (O'Kane 1987, p. 15). Pioneer species are often assumed to be poor competitors (Grime 1977, p. 1169). For the reasons discussed above, we identify barren clay badlands with less than 20 percent cover of other plant species to be a physical or biological feature for this plant. We have adjusted the relative plant cover upwards, from less than 10 percent plant cover, to capture the potential plant cover in moist years when other species may be somewhat more abundant.

Elevation—Known populations of *Phacelia submutica* occur within a range of elevations from about 5,000 to 7,150 ft (1,500 to 2,175 m) (Service 2011a, p. 3) on barren clay soils (as described below). Elevation is a key factor in determining the temperature and moisture microclimate of this species. Because plants have not been identified outside of this elevation band and because growing conditions frequently change across elevation gradients, we have identified elevations from 4,600 to 7,450 ft (1,400 to 2,275 m) to be a physical or biological feature for this plant. We have extended the elevation range 328-ft (100-m) upward and downward in an attempt to provide areas where the plant could migrate, given shifting climates (Callaghan *et al.* 2004, pp. 418–435; Crimmins *et al.* 2011, pp. 324–327). We consider this 328-ft (100-m) value to be a conservative allowance since studies on climate change elevational shifts have found more dramatic changes even in the last century: 95 ft (29 m) upward per decade (Lenoir *et al.* 2008, pp. 1768–1770), or an average of 279 ft (85 m) downward since the 1930s (Crimmins *et al.* 2011, pp. 324–327). The above studies were done in different areas, Western Europe and California, and looking at different species. We do not have information specific to *P. submutica* elevational shifts; however, suitable habitat for *P. submutica* extend into these higher and lower elevations.

Topography (surface shape)—*Phacelia submutica* is found on slopes ranging from almost flat to 42 degrees, with the average around 14 degrees (Service 2011a, p. 3). Plants are generally found on moderately steep slopes, benches, and ridge tops adjacent to valley floors (Ladyman 2003, p. 15). The relative position of *P. submutica* is consistent from site to site; therefore, we recognize appropriate topography (suitable slopes, benches and ridge tops, or moderately steep slopes adjacent to valley floors) as a physical or biological feature for the plant.

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

Soils—Phacelia submutica grows only on barren clay soils derived from the Atwell Gulch and Shire members of the Eocene and Paleocene Wasatch geological formation (Donnell 1969, pp. M13–M14; O'Kane 1987, p. 10) within the elevation range described above. The Atwell Gulch member is found below the bluish gray Molina member, and the Shire member is found above the Molina member (Decker *et al.* 2005, p. 3). The plant is found in unique, very small areas (from 10 to 1,000 ft^2 (1 to 100 m^2)), on colorful exposures of chocolate to purplish brown, dark charcoal gray, and tan clay soils (Burt and Spackman 1995, pp. 15, 20; Ladyman 2003, p. 15; Grauch 201, p. 3). We do not fully understand why *P. submutica* is limited to the small areas where it is found, but the plant usually grows on the one unique small spot of shrink-swell clay that shows a slightly different texture and color than the similar surrounding soils (Burt and Spackman 1995, p. 15). Ongoing species-specific soil analyses have found that the alkaline soils (with specific pH ranging from 7 to 8.9) where *P. submutica* are found have higher clay content than nearby unoccupied soils, although there is some overlap (Grauch 2011, p. 4). The shrink-swell action of these clay soils and the cracks that are formed upon drying appear essential to maintenance of the species' seed bank since the cracks capture the seeds and maintain the seed bank on site (O'Kane 1988, p. 462; Ladyman 2003, pp. 16–17). Based on the information above, we consider the small soil inclusions where *P. submutica* is found that are characterized by shrink-swell alkaline clay soils within the Atwell Gulch and Shire members of the Wasatch Formation to represent a physical or biological feature for *P. submutica.*

Climate—Phacelia submutica abundance varies considerably from year to year. In 1 year almost no plants may emerge at a site, and in another year at the same site, hundreds or even thousands of individuals may grow (Burt and Spackman 1995, p. 24). We do not understand what environmental factors (temperature, rainfall, or snowfall) affect these dramatic changes in abundance from 1 year to the next, but it is assumed they are climatic in nature (Burt and Spackman 1995, p. 24). Wetter years seem to produce more individuals (O'Kane 1987, p. 16). However, without the right combination of precipitation and temperature within a short window of time in the spring, the species may produce very few seedlings or mature plants, sometimes for several consecutive years. We believe it is necessary to conserve habitat across the entire range of the species to account for the variation in local weather events, to allow for plants to grow at some sites and not others on an annual basis. Because climatic factors dramatically influence the number of *P. submutica* individuals that are produced in a given year, we identify climate as a physical or biological feature for the plant; however, we recognize that we are unable to identify exactly what these climatic factors encompass except that the amount of moisture and its timing is critical. Climatic data from four weather stations indicate that average annual precipitation is between 10 to 16 in (25 and 41 cm), with less precipitation generally falling in June (as well as December–February) than other months, and with cold winters (sometimes with snow cover) and warmer summers (Service 2011b, pp. 1–43, 57–72).

Cover or Shelter

While *Phacelia submutica* seeds and seedlings certainly require ''safe sites'' for their germination and establishment, these microclimates are too small to be considered or managed here as a physical or biological feature for this plant. We do not understand exactly what physical characteristics constitute a safe site other than that they are locations where the appropriate conditions for seedling germination and growth exist. We believe these features are encompassed in the ''Plant

Community and Competitive Ability'' and ''Soils'' sections discussed above.

Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring

Reproduction and Seed Banks—We do not yet understand the pollination and seed dispersal mechanisms of *Phacelia submutica.* Pollinators have not been observed visiting the flowers of *P. submutica.* Currently, it is believed that pollinators may not be required for reproduction because of the minute flower size, a lack of obvious pollinators, and because the reproductive parts are hidden within the petals. We also do not understand how seeds are dispersed. Seed banks are established where seeds fall into the cracks of shrink-swell clay (O'Kane 1988, p. 462). We recognize that habitat conducive for successful reproduction is a physical or biological feature for *P. submutica.* However, we do not understand more specifically what features are important for this reproduction. In addition, seed banks are especially important for annual species that may not emerge when climatic conditions are unfavorable (Meyer *et al.* 2005, pp. 15–16, 21; Levine *et al.* 2008, pp. 795–806). For this reason, we identify maintaining the seed bank, through moist years where the plant successfully reproduces at regular intervals as a physical or biological feature for *P. submutica.* We lack further information on how long-lived seeds are in the seed bank and at what intervals the seed bank needs to be replenished to provide specifics but are hopeful that ongoing research will assist in answering some of these questions.

Habitats Protected from Disturbance or Representative of the Historic Geographical and Ecological Distributions of the Species

Disturbance Regime—The steeper clay barrens where *Phacelia submutica* is sometimes found experience some erosion, and the shrinking and swelling of clay soils creates a continuous disturbance (Ladyman 2003, p. 16). *Phacelia submutica* has adapted to these light to moderate disturbances, although occasionally plants are pushed out of the shrinking or swelling soils and die (O'Kane 1987, p. 20). Clay soils are relatively stable when dry but are extremely vulnerable to disturbances when wet (Rengasmy *et al.* 1984, p. 63). *Phacelia submutica* has evolved with some light natural disturbances, mostly in the form of erosion and the shrink-swell process. Heavy disturbances, and even light disturbances when soils are wet, could impact the species and its seed bank. Soil compaction alters the shrink-swell cycle of the soil, altering hydrologic properties of the soil that may subsequently prevent *P. submutica* germination. These disturbances can include off-highway vehicle (OHV) use, livestock and wild ungulate grazing, and activities associated with oil and gas development. Managing for an appropriate disturbance type or level can be difficult since we lack research to better quantify these measures. For the reasons discussed above, we identify an environment free from moderate to heavy disturbances when soils are dry and free from all disturbances when soils are wet to be a physical or biological feature for *P. submutica.*

Primary Constituent Elements for *Ipomopsis polyantha*, *Penstemon debilis*, and *Phacelia submutica*

Under the Act and its implementing regulations, we are required to identify the physical or biological features essential to the conservation of *Ipomopsis polyantha, Penstemon debilis,* and *Phacelia submutica* in areas occupied at the time of listing, focusing on the features' PCEs. We consider PCEs to be the elements of physical or biological features that provide for a species' life-history processes and are essential to the conservation of the species.

Ipomopsis polyantha

Based on our current knowledge of the physical or biological features and habitat characteristics required to sustain the species' life-history processes, we determine that the PCEs specific to *Ipomopsis polyantha* are:

(i) *Mancos shale soils.*

(ii) *Elevation and climate.* Elevations from 6,400 to 8,100 ft (1,950 to 2,475 m) and current climatic conditions similar to those that historically occurred around Pagosa Springs, Colorado. Climatic conditions include suitable precipitation; cold, dry springs; and winter snow.

(iii) *Plant Community.*

a. Suitable native plant communities (as described in b. below) with small (less than 100 ft^2 (10 m^2) or larger (several hectares or acres) barren areas with less than 20 percent plant cover in the actual barren areas.

b. Appropriate native plant communities, preferably with plant communities reflective of historical community composition, or altered habitats which still contain components of native plant communities. These plant communities include:

i. Barren shales,

ii. Open montane grassland (primarily Arizona fescue) understory at the edges of open Ponderosa pine, or

iii. Clearings within the Ponderosa pine/Rocky Mountain juniper and Utah juniper/oak communities.

(iv) *Habitat for pollinators.*

a. Pollinator ground and twig nesting areas. Nesting and foraging habitats suitable for a wide array of pollinators and their life history and nesting requirements. A mosaic of native plant communities and habitat types generally would provide for this diversity.

b. Connectivity between areas allowing pollinators to move from one site to the next within each plant population.

c. Availability of other floral resources, such as other flowering plant species that provide nectar and pollen for pollinators. Grass species do not provide resources for pollinators.

d. A 3,280-ft (1,000-m) area beyond occupied habitat to conserve the pollinators essential for plant reproduction.

(v) *Appropriate disturbance regime.*

a. Appropriate disturbance levels—Light to moderate, or intermittent or discontinuous disturbance.

b. Naturally maintained disturbances through soil erosion, or human-maintained disturbances, that can include light grazing, occasional ground clearing, and other disturbances that are not severe or continual.

With this designation of critical habitat, we identify the physical and biological features essential to the conservation of the species through the identification of the PCEs sufficient to support the life-history processes of the species. Two units designated as critical habitat are currently occupied by *Ipomopsis polyantha* and contain the PCEs to support the life-history needs of the species.

Because two populations do not offer adequate redundancy for the survival and recovery of *Ipomopsis polyantha,* we have determined that unoccupied areas are essential for the conservation of the species. Two additional units designated as critical habitat are currently unoccupied by *I. polyantha.* We consider these units essential for the conservation of the species, as discussed below under ''Special Management Considerations.'' In addition, we determine that the unoccupied units contain the PCEs necessary to support the life-history needs of the species.

Penstemon debilis

Based on our current knowledge of the physical or biological features and habitat characteristics required to sustain the species' life-history processes, we determine that the PCEs specific to *Penstemon debilis* are:

(i) *Suitable Soils and Geology.*

a. Parachute Member and the Lower part of the Green River Formation.

b. Appropriate soil morphology characterized by a surface layer of small to moderate shale channers (small flagstones) that shift continually due to the steep slopes and below a weakly developed calcareous, sandy to loamy layer with 40 to 90 percent coarse material.

(ii) *Elevation and climate.* Elevations from 5,250 to 9,600 ft (1,600 to 2,920 m). Climatic conditions similar to those of the Mahogany Bench, including suitable precipitation and temperatures.

(iii) *Plant Community.*

a. Barren areas with less than 10 percent plant cover.

b. Presence of other oil shale endemics, which can include: *Mentzelia rhizomata, Thalictrum heliophilum, Astragalus lutosus, Lesquerella parviflora, Penstemon osterhoutii,* and *Festuca dasyclada.*

c. Presence of *Penstemon caespitosa* for support of pollinators and connectivity between sites.

(iv) *Habitat for pollinators.*

a. Pollinator ground, twig, and mud nesting areas. Nesting and foraging habitats suitable for a wide array of pollinators and their life-history and nesting requirements. A mosaic of native plant communities and habitat types generally would provide for this diversity (see *Plant Community* above). These habitats can include areas outside of the soils identified in *Suitable Soils and Geology.*

b. Connectivity between areas allowing pollinators to move from one population to the next within units.

c. Availability of other floral resources, such as other flowering plant species that provide nectar and pollen for pollinators. Grass species do not provide resources for pollinators.

d. A 3,280-ft (1,000-m) area beyond occupied habitat to conserve the pollinators essential for plant reproduction.

(v) *High levels of natural disturbance.*

a. Very little or no soil formation.

b. Slow to moderate, but constant, downward motion of the oil shale that maintains the habitat in an early successional state.

With this designation of critical habitat, we identify the physical and biological features essential to the conservation of the species through the identification of the PCEs sufficient to support the life-history processes of the species. Two units designated as critical habitat are currently occupied by *Penstemon debilis* and contain the PCEs to support the life-history needs of the species. Two additional units designated as critical habitat are currently unoccupied by *P. debilis.* Currently occupied areas do not adequately provide for the conservation of the species, because of a lack of redundancy. We consider these units essential for the conservation of the species, as discussed below under ''Special Management Considerations.'' In addition, we determine the unoccupied units contain the PCEs necessary to support the life-history needs of the species.

Phacelia submutica

Based on our current knowledge of the physical or biological features and habitat characteristics required to sustain the species' life-history processes, we determine that the PCEs specific to *Phacelia submutica* are:

(i) *Suitable Soils and Geology.*

a. Atwell Gulch and Shire members of the Wasatch formation.

b. Within these larger formations, small areas (from 10 to 1,000 ft^2 (1 to 100 m^2)) on colorful exposures of chocolate to purplish brown, light to dark charcoal gray, and tan clay soils. These small areas are slightly different in texture and color than the similar surrounding soils. Occupied sites are characterized by alkaline (pH range from 7 to 8.9) soils with higher clay content than similar nearby unoccupied soils.

c. Clay soils that shrink and swell dramatically upon drying and wetting and are likely important in the maintenance of the seed bank.

(ii) *Topography.* Moderately steep slopes, benches, and ridge tops adjacent to valley floors. Occupied slopes range from 2 to 42 degrees with an average of 14 degrees.

(iii) *Elevation and climate.*

a. Elevations from 4,600 to 7,450 ft (1,400 to 2,275 m).

b. Climatic conditions similar to those around DeBeque, Colorado, including suitable precipitation and temperatures. Annual fluctuations in moisture (and probably temperature) greatly influences the number of *Phacelia submutica* individuals that grow in a given year and are thus able to set seed and replenish the seed bank.

(iv) *Plant Community.*

a. Small (from 10 to 1,000 ft^2 (1 to 100 m^2)) barren areas with less than 20 percent plant cover in the actual barren areas.

b. Presence of appropriate associated species that can include (but are not limited to) the natives *Grindelia fastigiata, Eriogonum gordonii, Monolepis nuttalliana,* and *Oenothera caespitosa.* Some presence of, or even domination by, invasive nonnative species, such as *Bromus tectorum,* may occur, as *Phacelia submutica* may still be found there.

c. Appropriate plant communities within the greater pinyon–juniper woodlands that include:

i. Clay badlands within the mixed salt desert scrub, or

ii. Clay badlands within big sagebrush shrublands.

(v) *Maintenance of the Seed Bank and Appropriate Disturbance Levels.*

a. Within suitable soil and geologies, undisturbed areas where seed banks are left undamaged.

b. Areas with light disturbance when dry and no disturbance when wet.

Phacelia submutica has evolved with some light natural disturbances, including erosional and shrink-swell processes. However, human disturbances that are either heavy or light when soils are wet could impact the species and its seed bank. Because we do not understand how the seed bank may respond to disturbances, more heavily disturbed areas should be evaluated, over the course of several years, for the species' presence.

With this designation of critical habitat, we identify the physical and biological features essential to the conservation of the species through the identification of the PCEs sufficient to support the life-history processes of the species. All units and subunits designated as critical habitat are currently occupied by *Phacelia submutica* and contain the PCEs sufficient to support the life-history needs of the species.

Special Management Considerations or Protections

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features that are essential to the conservation of the species and which may require special management considerations or protection. All areas designated as critical habitat will require some level of management to address the current and future threats to the physical and biological features essential to the conservation of the three plants. In all units, special management will be required to ensure that the habitat is able to provide for the growth and reproduction of the species.

A detailed discussion of threats to *Ipomopsis polyantha, Penstemon debilis,* and *Phacelia submutica* and their habitat can be found in the final listing rule (76 FR 45054). The primary threats impacting the physical and biological features essential to the conservation of *I. polyantha, P. debilis,* and *P. submutica* that may require

special management considerations or protection within CHUs include, but are not limited to, the following:

Ipomopsis polyantha

The features essential to the conservation of this species (plant community and competitive ability, elevation, soils, climate, reproduction, and disturbance regime) may require special management considerations or protection to reduce threats. *Ipomopsis polyantha's* highly restricted soil requirements and geographic range make it particularly susceptible to extinction at any time from commercial, municipal, and residential development; associated road and utility improvements and maintenance; heavy livestock use; inadequacy of existing regulatory mechanisms; fragmented habitat; and prolonged drought (76 FR 45054). Over 86 percent of the species' occupied habitat is on private land with no limits on development (Service 2011c, p. 2).

Special management considerations or protections are required within critical habitat areas to address these threats. Management activities that could ameliorate these threats include (but are not limited to): Introducing new *Ipomopsis polyantha* populations; establishing permanent conservation easements or acquiring land to protect the species on private lands; developing zoning regulations that could serve to protect the species; establishing conservation agreements on private and Federal lands to identify and reduce threats to the species and its features; eliminating the use of smooth brome and other competitive species in areas occupied by the species; promoting and encouraging habitat restoration; developing other regulatory mechanisms to further protect the species; placing roads and utility lines away from the species; minimizing heavy use of habitat by livestock; and minimizing habitat fragmentation.

These management activities would protect the PCEs for the species by preventing the loss of habitat and individuals, maintaining or restoring plant communities and natural levels of competition, protecting the plant's reproduction by protecting its pollinators, and managing for appropriate levels of disturbance.

Penstemon debilis

The features essential to the conservation of this species (plant community and competitive ability, elevation, slope, soils, climate, reproduction, and disturbance regime) may require special management considerations or protection to reduce threats. Extremely low numbers and a highly restricted geographic range make *Penstemon debilis* particularly susceptible to becoming endangered in the foreseeable future. Threats to the species and its habitat include energy development, road maintenance, and inadequacy of existing regulatory mechanisms (76 FR 45054).

Special management considerations or protections are required within critical habitat areas to address these threats. Management activities that could ameliorate these threats include (but are not limited to): The introduction of new *Penstemon debilis* populations; the establishment of permanent conservation easements or the acquisition of land to protect the species on private lands; the continuation and adequate management of *P. debilis* through the CNA Agreement with Oxy (see Exclusions section below); regulations and/or agreements that balance conservation with energy development in areas that would affect the species and its pollinators; the designation of protected areas with specific provisions and protections for the plant; the elimination or avoidance of activities that alter the morphology and status of the shale slopes; and avoidance of placing roads in habitats that would affect the plant or its pollinators.

These management activities would protect the PCEs for the species by preventing the loss of habitat and individuals, maintaining or restoring plant communities and natural levels of competition, protecting the plant's reproduction by protecting its pollinators, and managing for appropriate levels and types of disturbance.

Phacelia submutica

The features essential to the conservation of this species (plant community and competitive ability, elevation, topography, soils, climate, reproduction and seed bank, and disturbance regime) may require special management considerations or protection to reduce threats. Specifically, the clay soils on which *Phacelia submutica* are found are relatively stable when dry but are extremely vulnerable to disturbances when wet. The current range of *P. submutica* is subject to human-caused modifications from natural gas exploration and production with associated expansion of pipelines, roads, and utilities; development within the Westwide Energy Corridor; increased access to the habitat by OHVs; soil and seed disturbance by livestock and other human-caused disturbances; nonnative invasive species including *Bromus tectorum* and *Halogeton glomeratus* (halogeton); and inadequacy of existing regulatory mechanisms (76 FR 45054).

Special management considerations or protections are required within critical habitat areas to address these threats. Management activities that could ameliorate these threats include (but are not limited to): Development of regulations and agreements to balance conservation with energy development and minimize its effects in areas where the species resides; the establishment of additional protection areas that provide greater protections for the species; minimization of OHV use; placement of roads and utility lines away from the species and its habitat; minimization of livestock use or other human-caused disturbances that disturb the soil or seeds; and the minimization of habitat fragmentation.

These management activities would protect the PCEs for the species by preventing the loss of habitat and individuals, protecting the plant's habitat and soils, and managing for appropriate levels of disturbance.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(2) of the Act, we used the best scientific data available to designate critical habitat. We reviewed available information pertaining to the habitat requirements of this species. In accordance with the Act and its implementing regulation at 50 CFR 424.12(e), we considered whether designating additional areas—outside those currently occupied as well as those occupied at the time of listing—are necessary to ensure the conservation of the species. We are designating critical habitat in areas within the geographical area occupied by *Ipomopsis polyantha, Penstemon debilis,* and *Phacelia submutica* at the time of listing in 2011. We also are designating specific areas outside the geographical area occupied by *I. polyantha* and *P. debilis* at the time of listing because we have determined that such areas are essential for the conservation of the species. All units are designated based on sufficient elements of physical and biological features being present to support *Ipomopsis polyantha, Penstemon debilis,* and *Phacelia submutica* life-history processes.

Small populations and plant species with limited distributions, like those of *Ipomopsis polyantha* and *Penstemon debilis,* are vulnerable to relatively minor environmental disturbances (Given 1994, pp. 66–76; Frankham 2005, pp. 135–136), and are subject to the loss

of genetic diversity from genetic drift, the random loss of genes, and inbreeding (Ellstrand and Elam 1993, pp. 217–237; Leimu *et al.* 2006, pp. 942–952). Plant populations with lowered genetic diversity are more prone to local extinction (Barrett and Kohn 1991, pp. 4, 28). Smaller plant populations generally have lower genetic diversity, and lower genetic diversity may in turn lead to even smaller populations by decreasing the species' ability to adapt, thereby increasing the probability of population extinction (Newman and Pilson 1997, p. 360; Palstra and Ruzzante 2008, pp. 3428–3447). Because of the dangers associated with small populations or limited distributions, the recovery of many rare plant species includes the creation of new sites or reintroductions to ameliorate these effects.

Genetic analysis of *Ipomopsis polyantha* has not been conducted; therefore, we do not understand the genetic diversity of this species. Given the species' limited extent and presence in only two populations, we expect the species may be suffering from low genetic diversity, or could in the future.

Genetic research on *Penstemon debilis,* based on neutral genetic markers, has found that there is more genetic diversity in larger populations than smaller populations, that the northeastern populations are more closely related to one another than to the southwestern populations, that inbreeding is common within each population, and that genetic diversity for the species is low when compared with other species of plants with similar life-history traits (Wolfe 2010, p. 1). The plant is partially clonal, which likely explains the lowered genetic diversity and further reduces the actual population size. Small population sizes with few individuals are a problem for this species, as supported by this research.

When designating critical habitat for a species, we consider future recovery efforts and conservation of the species. Realizing that the current occupied habitat is not enough for the conservation and recovery of *Ipomopsis polyantha* and *Penstemon debilis,* we worked with species' experts to identify unoccupied habitat essential for the conservation of these two species. The justification for why unoccupied habitat is essential to the conservation of these species and methodology used to identify the best unoccupied areas for consideration for inclusion is described below.

Habitat fragmentation can have negative effects on biological populations, especially rare plants, and affect survival and recovery (Aguilar *et al.* 2006, pp. 968–980; Aguilar *et al.* 2008, pp. 5177–5188; Potts *et al.* 2010, pp. 345–352). Fragments are often not of sufficient size to support the natural diversity prevalent in an area, and thus exhibit a decline in biodiversity (Fahrig 2003, pp. 487–515). Fragmentation effects are especially prevalent in systems where multiple generations have elapsed since the fragmentation occurred (Aguilar *et al.* 2008, p. 5177). Habitat fragmentation has been shown to disrupt plant-pollinator interactions and predator-prey interactions (Steffan-Dewenter and Tscharntke 1999, p. 432–440; Aguilar *et al.* 2006, pp. 968–980; Eckert *et al.* 2010, pp. 35–43), alter seed germination percentages (Menges 1991, pp. 158–164), affect recruitment (Santos and Telleria 1997, pp. 181–187; Quesada *et al.* 2003, pp. 400–406), and result in lowered fruit set (Burd 1994, pp. 83–139; Cunningham 2000, pp. 1149–1152; Eckert *et al.* 2010, p. 38).

In general, habitat fragmentation causes habitat loss, habitat degradation, habitat isolation, changes in species composition, changes in species interactions, increased edge effects, and reduced habitat connectivity (Fahrig 2003, pp. 487–515; Fisher and Lindenmayer 2007, pp. 265–280). These effects are more prevalent in arid ecosystems with low native vegetation cover (Fisher and Lindenmayer 2007, p. 272). Habitat fragments are often functionally smaller than they appear because edge effects (such as increased nonnative invasive species or wind speeds) impact the available habitat within the fragment (Lienert and Fischer 2003, p. 597).

Shaffer and Stein (2000) identify a methodology for conserving imperiled species known as the three Rs: Representation, resiliency, and redundancy. Representation, or preserving some of everything, means conserving not just a species but its associated plant communities, pollinators, and pollinator habitats. Resiliency and redundancy ensure there is enough of a species so it can survive into the future. Resiliency means ensuring that the habitat is adequate for a species and its representative components. Redundancy ensures an adequate number of sites and individuals. This methodology has been widely accepted as a reasonable conservation strategy (Tear *et al.* 2005, p. 841).

We have addressed representation through our PCEs for each species (as discussed above) and by providing habitat for pollinators of *Ipomopsis polyantha* and *Penstemon debilis* (as discussed further under ''*Ipomopsis polyantha''* below). For *Phacelia submutica,* we believe that the occupied habitat provides for both resiliency and redundancy and that with conservation of these areas, the species should be conserved and sustained into the future. For *I. polyantha,* there are only two known populations, both with few or no protections in place (low resiliency). For adequate resiliency, we believe it is necessary for the conservation and recovery of *I. polyantha* that additional populations with further protections be established. Therefore, we have identified two unoccupied areas as designated CHUs for *I. polyantha.* For *P. debilis,* there are only approximately 4,000 known individuals (low redundancy), all within 2 concentrated areas (low resiliency). For adequate redundancy and resiliency, we believe it is necessary for conservation and recovery that additional populations of *P. debilis* be established. Therefore, we have identified two unoccupied areas as designated CHUs for *P. debilis.*

Ipomopsis polyantha

In accordance with the Act and its implementing regulation at 50 CFR 424.12(e), we consider whether designating additional areas—outside those currently occupied as well as those occupied at the time of listing—are necessary to ensure the conservation of the species. For *Ipomopsis polyantha,* we are designating critical habitat in areas within the geographical area occupied by the species at the time of listing in 2011. We also are designating specific areas outside the geographical area occupied by the species at the time of listing, because such areas are essential for the conservation of the species.

Occupied critical habitat was identified by delineating all known sites within a population (CNHP 2012a, pp. 1, 6, 11), placing a minimum convex polygon around the perimeter of all sites, and then adding an additional 3,280-ft (1,000-m) area for pollinator habitat. The distance that pollinators can travel is significant to plants including *Ipomopsis polyantha* because pollen transfer and seed dispersal are the only mechanisms for genetic exchange. Both pollen and seed dispersal can vary widely by plant species (Ellstrand 2003, p. 1164). In general, pollinators will focus on small areas where floral resources are abundant; however, occasional longer distance pollination will occur, albeit infrequently. No research has been conducted on flight distances of *I. polyantha's* pollinators. Therefore, we rely on general pollinator travel distances described in the literature.

Typically, pollinators fly distances that are in relation to their body sizes, with smaller pollinators flying shorter distances than larger pollinators (Greenleaf *et al.* 2007, pp. 589–596). Pollinators will, if possible, forage close to the nest. If a pollinator can fly long distances, pollen transfer also is possible across these distances. The largest pollinators of *Ipomopsis polyantha* are bumblebee species (*Bombus* spp.). In one study, the buff-tailed bumblebee (*Bombus terrestris*) flew a maximum distance of 2,037 ft (621 m) (Osborne *et al.* 1999, pp. 524–526). The bumblebee-pollinated plant species, *Scabiosa columbaria* (dove pincushions), experienced decreased pollen flow at a patch isolation distance of 82 ft (25 m), and little to no pollen transfer when patches were isolated by 656 ft (200 m) (Velterop 2000, p. 65). In the Colorado subalpine, most marked bumblebees were found within 328 ft (100 m), and never further than 3,280 ft (1,000 m) from the location where they were originally located (Elliott 2009, p. 752). In mixed farmland, two different bumblebees foraged at distances less than 1,024 and 2,050 ft (312 and 625 m), respectively (Darvill *et al.* 2004, pp. 471–478). Another study found that buff-tailed bumblebee workers (resource collectors) were recaptured while foraging on super-abundant resources at distances of 1.1 mi (1.75 km) from the nest (Walther-Hellwig and Frankl 2000, p. 303).

Foraging studies can be biased in that long-distance foraging bouts occur less frequently and so are less likely to be detected in experiments (Darvill *et al.* 2004, p. 476). Models have predicted that bumblebees can forage from 3 to 6 mi (5 to 10 km) and still return with a net profit in energy (Dukas and Edelstein-Keshet 1998, p. 127; Cresswell *et al.* 2000, p. 251). The maximum distance from which bumblebees have returned in homing experiments is almost 6 mi (10 km) (Goulson and Stout 2001, p. 105–111).

These studies suggest variability in the distances over which pollen transfer may occur and over which bumblebee species can travel. *Ipomopsis polyantha* sites within populations can be separated by more than 3,280 ft (1,000 m), making conservation of these large pollinators especially important for genetic exchange between sites. In the interest of protecting *I. polyantha*'s pollinators, we have identified a 3,280-ft (1,000-m) wide pollinator area. This area has the added benefit of providing more habitat for *I. polyantha* potential expansion in the future. Pollinators generally need the following: (1) A diversity of native plants whose blooming times overlap to provide flowers for foraging throughout the seasons; (2) nesting and egg-laying sites, with appropriate nesting materials; (3) sheltered, undisturbed places for hibernation and overwintering; and (4) a landscape free of poisonous chemicals (Shepherd *et al.* 2003, pp. 49–50). Encompassing a diversity of habitats and vegetation types, which our pollinator area does, will encourage a diversity of pollinators.

A recovery plan has not yet been written for *Ipomopsis polyantha.* However, as described above, with only two known populations of *I. polyantha,* both of which are located largely on private lands with few protections, we expect that future recovery efforts will include efforts to improve resiliency by increasing the number of populations; therefore, we also are designating unoccupied habitat. We determined that not all potential habitat (Mancos shale soil layer near the town of Pagosa Springs) for *I. polyantha* was essential to the conservation of the species. In keeping with section 3(5)(C) of the Act, which states that critical habitat may not include the entire geographical area which can be occupied by the species, except in certain circumstances determined by the Secretary, we have designated only a portion of the potential habitat for the species.

To assist us in determining which specific unoccupied areas may be essential to the conservation of the species and considered for inclusion, we not only evaluated the biological contribution of an area, but also evaluated the conservation potential of the area through the overlay of a designation of critical habitat. While we recognize that there is an education value to designating an area as critical habitat, the more prevailing benefit is consultation under section 7 of the Act on activities that may affect critical habitat on Federal lands or where a Federal action may exist. Thus, in evaluating the potential conservation value of an unoccupied area for inclusion in critical habitat, we first focused on lands that are biologically important to the species and then considered which of those lands were under Federal ownership or likely to have a Federal action occur on them. If the inclusion of areas that met those criteria were not sufficient to conserve the species, we then evaluated other specific areas on private lands that were not likely to have a Federal action on them.

Unoccupied critical habitat was identified by overlaying the Mancos shale soil layer around Pagosa Springs with Federal ownership (Service 2011d, p. 1). As little overlap occurred where Mancos shale soils and Federal lands intersected with habitat supporting the appropriate plant communities for future *Ipomopsis polyantha* introductions, habitat is somewhat limited in suitable areas. Upon discussions with local species and area experts as well as land managers, we identified two areas on USFS lands as potential recovery or introduction areas for *I. polyantha.* These two areas include the O'Neal Hill Special Botanical Area and Eight Mile Mesa, both within the San Juan National Forest. These areas contain the PCEs sufficient to support the life-history needs of the species, including Mancos shale soils and appropriate plant communities, and when added to the occupied areas would provide sufficient resiliency, redundancy, and representation for the conservation of the species.

We delineated the CHU boundaries for *Ipomopsis polyantha* using the following steps:

(1) In determining what areas were occupied by *Ipomopsis polyantha,* we used data on all known populations collected by the CNHP (O'Kane 1985, maps; Lyon 2002, p. 3; Lyon 2005, pp. 1–7; CNHP 2008, pp. 1–8; CNHP 2012b, pp. 1–7), BLM (Brinton 2010, pp. 1–7), USFS (Brinton 2010, pp. 1–7), the Service (Mayo 2005, pp. 1–35; Mayo and Glenne 2009, spatial data; Langton 2010b, spatial data), research efforts (Collins 1995, maps), and consulting firms (JGB Consulting 2005, pp. 2–7; Ecosphere Environmental Services 2012, pp. 1–28) to map specific locations of *I. polyantha.* These data were input into ArcMap 9.3.1 and 10. Based on criteria developed by the CNHP, sites were classified into discrete populations if they were within 2 mi (3 km) of each other and were not separated by unsuitable habitat (CNHP 2012a, p. 1).

(2) For currently occupied CHUs, we delineated critical habitat areas by creating minimum convex polygons around each population and adding a 3,280-ft (1,000–m) wide area for pollinator habitat as previously described.

(3) For currently unoccupied CHUs, we identified two areas where the Mancos shale (Tweto 1979, spatial data) intersected with Federal ownership (COMaP version 8—Theobald *et al.* 2010, spatial data). We delineated these areas by following the Federal land management boundary and identifying suitable habitats based on species and area experts' input and aerial imagery. Our reasoning for identifying unoccupied units is described above.

We are designating as critical habitat lands that we have determined are occupied at the time of listing and contain sufficient physical or biological features to support life-history processes essential for the conservation of *Ipomopsis polyantha* and lands outside of the geographical area occupied at the time of listing that we have determined are essential for the conservation of *I. polyantha.*

We designated four units based on sufficient elements of physical or biological features being present to support *I. polyantha* life processes. All units contain all of the identified elements of physical or biological features and supported multiple life processes.

Penstemon debilis

In accordance with the Act and its implementing regulations at 50 CFR 424.12(e), we consider whether designating additional areas—outside those currently occupied as well as those occupied at the time of listing—are necessary to ensure the conservation of the species. We are designating critical habitat in areas within the geographical area occupied by the species at the time of listing in 2011. We also are designating specific areas outside the geographical area occupied by the species at the time of listing, because such areas are essential for the conservation of the species.

Occupied critical habitat was identified by delineating all known sites within a population (CNHP 2012a, p. 5), placing a minimum convex polygon around the perimeter of all these sites, and then adding a 3,280-ft (1,000-m) area for pollinator habitat as previously described for *Ipomopsis polyantha.* Like *I. polyantha, Penstemon debilis'* largest pollinators are the bumblebee species (*Bombus* sp.) (discussed above under *I. polyantha*).

To allow for future seed dispersal and population growth, occupied areas were expanded into adjacent habitats containing the PCEs. This roughly doubled the size of these occupied units. In doing this, we also have provided more potential habitat for future recovery and introduction efforts, and given the difficulties of surveying cliff areas, have allowed for the possibility that there are more populations of *Penstemon debilis* than we know.

A recovery plan has not yet been written for *Penstemon debilis.* With only 4,100 known individuals of *P. debilis* concentrated in 2 areas, we conclude that future recovery efforts will necessitate actions to improve redundancy by increasing the number of individuals and sites. Therefore, we also are designating unoccupied habitat as critical habitat. Unoccupied critical habitat was delineated by identifying potential habitat on large contiguous areas of Federal ownership (see Number 3 below) (Service 2011d, p. 2). We determined that not all potential habitat (as defined below) for *P. debilis* was essential to the conservation of the species, and in keeping with section 3(5)(C) of the Act, which states that critical habitat may not include the entire geographical area which can be occupied by the species, except in certain circumstances determined by the Secretary, we have designated only a portion of the potential habitat for the species.

When we overlaid our rough suitable habitat layer (described in further detail in step 3 below) for *Penstemon debilis* with private and Federal lands, we mapped 16,862 ac (6,824 ha) of suitable habitat, 68 percent on private lands and 32 percent on Federal (BLM) lands with a spotty distribution measuring roughly 39 mi (63 km) from east to west and 17 mi (28 km) from north to south. Of the 5,323 ac (2,154 ha) on BLM lands, 1,515 ac (613 ha) fell within occupied units (Units 3 and 4), leaving 3,808 ac (1,541 ha) of suitable habitat (23 percent of the total suitable habitat) on BLM lands. In looking at the remaining BLM ownership, two obvious large patches of suitable habitat were evident, which is how we identified the unoccupied units. These unoccupied units contain 1,358 ac (550 ha) of suitable habitat, representing 40 percent of the remaining suitable habitat acreage on BLM lands. Additional suitable habitat on BLM lands was much more fragmented and spotty, not comprising the same contiguous blocks as the unoccupied units, and thus, of lower value for recovery; these areas were not included in the critical habitat designation. The four CHUs span an area roughly 30 mi (49 km) from east to west and 11 mi (17 km) from north to south, representing a good portion of the range of the suitable habitat we mapped.

To assist us in determining which specific areas may be essential to the conservation of the species and considered for inclusion here, we not only evaluated the biological contribution of an area, but also evaluated the conservation potential of the area through the overlay of a designation of critical habitat. While we recognize that there is an education value to designating an area as critical habitat, the more prevailing benefit is consultation under section 7 of the Act on activities that may affect critical habitat on Federal lands or where a Federal action may exist. Thus, in evaluating the potential conservation value of an unoccupied area for inclusion in critical habitat, we first focused on lands that are biologically important to the species and then considered which of those lands were under Federal ownership or likely to have a Federal action occur on them. If the inclusion of areas that met those criteria were not sufficient to conserve the species, we then evaluated other specific areas on private lands that were not likely to have a Federal action on them. Upon discussions with local species and area experts, as well as land managers, we identified two areas on BLM lands as potential recovery or introduction areas for *Penstemon debilis.* These two areas include Brush Mountain and Cow Ridge, both managed by BLM. These areas contain the PCEs sufficient to support the life-history needs of the species, including oil shale soils and appropriate plant communities.

We delineated the CHU boundaries for *Penstemon debilis* using the following steps:

(1) In determining what areas were occupied by *Penstemon debilis,* we used data for all the known populations collected by the CNHP (O'Kane and Anderson 1986, p. 1; Spackman *et al.* 1997, p. 108; CNHP 2012b, pp. 8–19, spatial data), the BLM (Scheck and Kohls 1997, p. 3; DeYoung 2010a, spatial data; DeYoung 2010b; DeYoung *et al.* 2010, p. 1), CNAP (CNAP 2006, spatial data), the Service (Ewing 2009, spatial data), and a consulting firm (Graham 2009, spatial data) to map populations using ArcMap 9.3.1 and 10. These locations were classified into discrete element occurrences (populations) by CNHP (CNHP 2012a, p. 6).

(2) We delineated preliminary units by creating minimum convex polygons around each population and adding a 3,280-ft (1,000-m) wide area for pollinator habitat as described above.

(3) We then identified potential habitat (Service 2011d, p. 2) in ArcMap 9.3.1 by intersecting the following criteria: The Parachute Creek Member and the Lower part of the Green River Formation geological formations (Tweto 1979, spatial data), with elevations between 6,561 to 9,350 ft (2,000 and 2,850 m), with suitable soil types that included five soil series (Irigul-Starman channery loams, Happle-Rock outcrop association, Rock outcrop-Torriorthents complex, Torriorthents-Camborthids-Rock outcrop complex, and Tosca channery loam), which represented 89 percent of all known *Penstemon debilis* sites (Natural Resource Conservation

Service 2008, spatial data; Service 2011a, p. 2), and with the ''Rocky Mountain cliff and canyon'' landcover classification (NatureServe 2004, spatial data). We chose the ''Rocky Mountain cliff and canyon'' landcover classification because 75 percent of all the known *P. debilis* locations fall within this mapping unit (and all sites outside are either on artificially created habitats or are directly below this classification where both oil shale substrate and *P. debilis* seed dispersal down drainage constantly occurs). We did not include the lower elevations currently occupied by *P. debilis* in our minimum convex polygon edges that we used for delineating pollinator habitat (step 2) or in our potential habitat analysis (step 3), because there are few plants in these more ephemeral wash-out habitat types and because these unusual habitat types do not seem to represent the species' typical habitat requirements. However, it should be noted that these unusual sites are still included within the boundaries of Unit 3 (as delineated by step 2).

(4) From this potential habitat analysis (as delineated in step 3), we took the two continuous bands of potential habitat that include the areas where *Penstemon debilis* is currently found and added them to our existing polygons, including pollinator habitat (as delineated in step 2). We did this by again creating a minimum convex polygon. This condensed all known populations into two currently occupied CHUs (Units 3 and 4).

(5) For currently unoccupied CHUs, we identified two areas where our potential habitat was intersected with Federal ownership (COMaP version 8—Theobald *et al.* 2010, spatial data). Our reasoning for identifying unoccupied units is described above.

We are designating as critical habitat lands that we have determined were occupied at the time of listing and contain sufficient physical or biological features to support life-history processes essential for the conservation of *Penstemon debilis,* and lands outside of the geographical area occupied at the time of listing that we have determined are essential for the conservation of *P. debilis.*

Four units were designated based on sufficient elements of physical or biological features being present to support *P. debilis* life processes. All units contained all of the identified elements of physical or biological features and supported multiple life processes.

Phacelia submutica

In accordance with the Act and its implementing regulation at 50 CFR 424.12(e), we consider whether designating additional areas—outside those currently occupied as well as those occupied at the time of listing—are necessary to ensure the conservation of the species. We are not designating any areas outside the geographical area occupied by the species because occupied areas are sufficient for the conservation of the species.

Occupied critical habitat was identified by delineating all known sites within a population (CNHP 2012a, p. 11), and placing a minimum convex polygon around the perimeter of all these sites. We then added a 328-ft (100-m) wide area to account for indirect effects from factors such as edge effects from roads, nonnative species, dust impacts, and others (as discussed above).

Phacelia submutica has a large enough range (sufficient representation and resiliency), enough populations (sufficient redundancy), and enough individuals (sufficient redundancy) that we felt that the occupied habitat alone would be adequate for the future conservation and recovery of the species. Therefore, no unoccupied habitat was included in this critical habitat designation.

We delineated the CHU boundaries for *Phacelia submutica* using the following steps:

(1) In determining what areas were occupied by *Phacelia submutica,* we used data on all known locations collected by CNHP (CNHP 1982, pp. 1–17; Burt and Carston 1995, pp. 10–14; Burt and Spackman 1995, p. 3; Spackman and Fayette 1996, p. 5; Lyon 2008, spatial data; Lyon and Huggins 2009a, p. 3; Lyon and Huggins 2009b, p. 3; Lyon 2010, spatial data; CNHP 2012b, spatial data), the Colorado Native Plant Society (Colorado Native Plant Society 1982, pp. 1–9), the BLM (DeYoung 2010a, spatial data; DeYoung 2010b, spatial data; Diekman 2010, spatial data), USFS (Johnston 2010, spatial data; Potter 2010, spatial data; Proctor 2010, spatial data; Kirkpatrick 2011, p. 1), CNAP (Wenger 2008; 2009; 2010, spatial data), the Service (Ewing and Glenne 2009, spatial data; Langton 2010a, spatial data; Langton 2011, spatial data), and consulting firms (Ellis and Hackney 1982, pp. 7–8; Klish 2004, pp. 1–2; WestWater Engineering 2007b, spatial data; WestWater Engineering 2007a, spatial data; Westwater Engineering 2010, maps and spatial data) to map specific locations of *P. submutica* using ArcMap 9.3.1 and 10. These locations were classified into discrete element occurrences or populations if they were within 1.2 mi (2 km) and were not separated by unsuitable habitat, based on criteria developed by CNHP (CNHP 2012a, p. 11). Then, we used 2009 aerial imagery (National Agricultural Inventory Project 2009, spatial data) to look at all sites that were considered historically occupied because they had not been revisited in the last 20 years. Based on our analysis, we determined all historically occupied sites were suitable habitat and considered these sites still in existence and occupied at the time of listing.

(2) We delineated critical habitat areas by creating minimum convex polygons around each population and adding a 328-ft (100-m) wide area to account for indirect effects as described immediately above.

(3) We then modified these critical habitat polygon boundaries to exclude unsuitable habitat as defined by a potential habitat model (Decker *et al.* 2005, p. 9). From this modeling exercise, we chose the more restrictive of the two habitat models (the envelope model) to further refine our critical habitat polygons. This model was developed by comparing occupied areas with environmental variables, such as elevation, slope, precipitation, temperature, geology, soil type, and vegetation type. The environmental variables with the highest predictive abilities influence the potential habitat the model then identifies.

We are designating as critical habitat lands that we have determined are occupied at the time of listing and contain sufficient physical or biological features to support life-history processes essential for the conservation of *Phacelia submutica.*

Nine units were designated based on sufficient elements of physical or biological features being present to support *P. submutica* life processes. All units contain all of the identified elements of physical or biological features and support multiple life processes.

When determining critical habitat boundaries in this final rule, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack physical and biological features for *Penstemon debilis* and *Phacelia submutica.* The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside

critical habitat boundaries shown on the maps of this final rule have been excluded by text in the rule and are not designated as critical habitat. Therefore, a Federal action involving these lands will not trigger section 7 consultation with respect to critical habitat and the requirement to avoid destruction and adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat. In the case of *Ipomopsis polyantha,* because the plant is often found growing on partially developed sites, around buildings, or immediately adjacent to roads, we did not exclude buildings, pavement, and other structures.

Final Critical Habitat Designation

Ipomopsis polyantha

We are designating four units as critical habitat for *Ipomopsis polyantha.* The critical habitat areas described below constitute our best assessment at this time of areas that meet the definition of critical habitat. Those four units are: (1) Dyke, (2) O'Neal Hill Special Botanical Area, (3) Pagosa Springs, and (4) Eight Mile Mesa. Table 1 shows the occupancy of the units.

TABLE 1—OCCUPANCY OF *Ipomopsis polyantha* BY DESIGNATED CRITICAL HABITAT UNITS

Unit	Currently occupied? and occupied at time of listing?
1. Dyke	Yes.
2. O'Neal Hill Special Botanical Area	No.
3. Pagosa Springs	Yes.
4. Eight Mile Mesa	No.

The approximate area of each CHU is shown in Table 2.

TABLE 2—DESIGNATED CRITICAL HABITAT UNITS (CHUS) FOR *Ipomopsis Polyantha*

[Area estimates reflect all land within CHU boundaries]

Critical habitat unit	Land ownership	Size of unit
1. Dyke	BLM	42 ac (17 ha).
	Private	1,415 ac (573 ha).
	Archuleta County (County Road right-of-ways (ROWs))	5 ac (2 ha).
	Colorado Dept. of Transportation	13 ac (5 ha).
Total for Dyke Unit		1,475 ac (597 ha).
2. O'Neal Hill Special Botanical Unit	USFS–San Juan National Forest	564 ac (228 ha).
3. Pagosa Springs	Town of Pagosa Springs	599 ac (242 ha).
	Colorado Division of Wildlife (CDOW)	28 ac (11 ha).
	Private	5,560 ac (2,251 ha).
	Archuleta County (County Road ROWs)	18 ac (7 ha).
	Archuleta County (County Land)	92 ac (37 ha).
	Colorado Dept. of Transportation (Highway ROWs)	50 ac (20 ha).
	State Land Board (SLB)	110 ac (44 ha).
Total for Pagosa Spring Unit		6,456 ac (2,613 ha).
4. Eight Mile Mesa	USFS–San Juan National Forest	1,146 ac (464 ha).
Total		9,641 ac (3,902 ha).

Note: Area sizes may not sum due to rounding.

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for *Ipomopsis polyantha,* below. The units are listed in order geographically west to east.

Unit 1: Dyke

Unit 1, the Dyke Unit, consists of 1,475 ac (597 ha) of Federal and private lands. The Unit is located at the junction of U.S. Hwy 160 and Cat Creek Road (County Road 700) near the historic town of Dyke in Archuleta County, Colorado. Ninety-seven percent of this Unit is on private lands; of these private lands, 1 percent is within highway ROWs. Three percent is on Federal land managed by the BLM, through the Pagosa Springs Field Office of the San Juan Public Lands Center. This Unit is currently occupied.

This Unit currently has all the physical and biological features essential to the conservation of the species including a collection of all three communities (barren shales, open montane grassland (primarily Arizona fescue) understory at the edges of open Ponderosa pine, or clearings within the Ponderosa pine and Rocky Mountain juniper and Utah juniper and oak communities), pockets of shale with little to no competition from other species, suitable elevational ranges from 6,720 to 7,285 ft (2,048 to 2,220 m), Mancos shale soils, suitable climate, pollinators and habitat for these pollinators, and areas where the correct disturbance regime is present. Lands within this Unit are largely agricultural although some housing is present within the Unit. A large hunting ranch also falls within this Unit. While these lands currently have the physical and biological features essential to the conservation of *Ipomopsis polyantha,* because of a lack of cohesive management and protections, special management will be required to maintain these features in this Unit.

Threats to *Ipomopsis polyantha* in this Unit include highway maintenance and disturbance (several hundred plants have been documented along Highway 160 (CNHP 2012b, p. 5)), grazing, agricultural use, *Bromus inermis* encroachment, potential development, and a new road that was constructed through the *I. polyantha* population.

Unit 2: O'Neal Hill Special Botanical Unit

Unit 2, the O'Neal Hill Botanical Unit consists of 564 ac (228 ha) of USFS land managed by the San Juan National Forest. The Unit is north of Pagosa Springs, roughly 13 mi (21 km) north along Piedra Road. Roughly 49 percent of this Unit (279 ac (113 ha)) falls within the O'Neal Hill Special Botanical Area that was designated to protect another Mancos shale endemic, *Lesquerella pruinosa* (Pagosa bladderpod). Because *L. pruinosa* is sometimes found growing with *Ipomopsis polyantha,* we believe the site has high potential for introduction of *I. polyantha.* This Unit is not currently occupied. We reduced this Unit from our proposed critical habitat designation in our notice of availability (77 FR 18161) so that the thick pasture grass and riparian areas in the bottomlands that do not contain many of the PCEs for *I. polyantha* would no longer be included (Holtrop 2011, p. 1).

This Unit currently has all the physical and biological features essential to the conservation of the species, including a collection of all three plant communities, pockets of shale with little to no competition from other species, suitable elevational ranges from 7,640 to 8,360 ft (2,330 to 2,550 m), Mancos shale soils, suitable climate, habitat for pollinators (although we do not know if *Ipomopsis polyantha* pollinators are found here), and areas where the correct disturbance regime is present. Because of the presence of these features, we believe this may make a good introduction area for *I. polyantha* in the future and is needed to ensure conservation of the species.

Threats to *Ipomopsis polyantha* in this Unit include road maintenance and disturbance, low levels of recreation, including hunting, deer and elk use, and a utility corridor and related maintenance (Brinton 2011, p. 1).

Ipomopsis polyantha is known from only two populations, both with few or no protections (little resilience). For adequate resiliency and protection we believe it is necessary for survival and recovery that additional populations with further protections be established. Because this area receives low levels of use and because it is already partially protected through the special botanical area, the area would make an ideal site for future introductions of *I. polyantha.* Therefore, we have identified this Unit as critical habitat for *I. polyantha.*

Unit 3: Pagosa Springs

Unit 3, the Pagosa Springs Unit, is the largest of the four *Ipomopsis polyantha* CHUs and consists of 6,456 ac (2,613 ha) of municipal, State, and private lands. The Unit is located at the junction of Highways 160 and 84, south along Highway 84, west along County Road 19, and east along Mill Creek Road. Ownership of the land in Unit 3 is divided as follows: 86.1 percent is under private ownership, 9.2 percent is owned by the Town of Pagosa Springs, 1.7 percent is owned and operated by the Colorado State Land Board (SLB), 0.7 percent falls within the Colorado Department of Transportation (CDOT) ROWs, 0.4 percent is found on CDOW lands, 0.2 percent is located on Archuleta County ROWs, and 1.4 percent is located on a parcel newly acquired by Archuleta County. This Unit is currently occupied and contains the majority of *I. polyantha* individuals.

This Unit currently has all the physical and biological features essential to the conservation of the species, including a collection of all three plant communities, pockets of shale with little to no competition from other species, suitable elevational ranges from 6,960 to 7,724 ft (2,120 to 2,350 m), Mancos shale soils, suitable climate, pollinators and habitat for these pollinators, and areas where the correct disturbance regime is present. Lands within this Unit fall into a wide array of land management scenarios, including agricultural use, junkyards, urban areas, small residential lots, and large 30- to 40-ac (12- to 16-ha) residential parcels. While these lands currently have the physical and biological features essential to the conservation of *Ipomopsis polyantha,* because of a lack of cohesive management and protections, special management will be required to maintain these features in this Unit.

Since 86 percent of this Unit is under private ownership and there is no land under Federal ownership, the primary threat to the species in this Unit is agricultural or urban development. Other threats include highway ROW disturbances, *Bromus inermis* and other nonnative invasive species, excessive livestock grazing, and mowing.

Unit 4: Eight Mile Mesa

Unit 4, Eight Mile Mesa, consists of 1,146 ac (464 ha) of USFS lands that are managed by the Pagosa Springs Field Office of the San Juan National Forest. This Unit is located roughly 6.5 mi (10.5 km) south of the intersections of Highways 160 and 84 in Pagosa Springs, Colorado, and on the western side of Highway 84. This Unit is not currently occupied. We reduced this Unit from our proposed critical habitat designation in our notice of availability (77 FR 18161) so that isolated patches, separated from the rest of the Unit by roads, would no longer be included (Holtrop 2011, p. 1).

This Unit currently has all the physical and biological features essential to the conservation of the species including a collection of all three plant communities, pockets of shale with little to no competition from other species, suitable elevational ranges from 7,320 to 7,858 ft (2,230 to 2,395 m), Mancos shale soils, suitable climate, habitat for pollinators, and areas where the correct disturbance regime is present. Because there are so few Mancos shale sites on Federal lands, and because this site has an array of habitat types, it provides the best potential area for introduction of *Ipomopsis polyantha* in the future.

Threats to *Ipomopsis polyantha* in this Unit include a road running through the site, recreational use, horseback riding, dispersed camping and hunting, and firewood gathering. The road is a threat because it generates fugitive dust and pollutants, provides a source for nonnative invasive plants, causes habitat fragmentation, increases edge effects and drying, and may limit pollinator movement, among other reasons. The Unit has some dense Ponderosa pine stands, and several small wildfires, which are actively suppressed, occur every year. Benefiting the designation, there is a vacant grazing allotment at this Unit, and noxious weeds are being actively controlled (Brinton 2011, p. 1).

Ipomopsis polyantha is known from only two populations, both with few or no protections (little resilience). For adequate resiliency and protection we believe it is necessary for survival and recovery that additional populations with further protections be established. Therefore, we have identified this Unit and one other unoccupied area as critical habitat for *I. polyantha.*

Penstemon debilis

We are designating four units as critical habitat for *Penstemon debilis.* The critical habitat areas described below constitute our best assessment at this time of areas that meet the definition of critical habitat. Those four units are: (1) Brush Mountain, (2) Cow Ridge, (3) Mount Callahan, and (4)

Anvil Points. Table 3 shows the occupancy of the units.

TABLE 3—OCCUPANCY OF *Penstemon Debilis* BY DESIGNATED CRITICAL HABITAT UNITS

Unit	Currently occupied? and occupied at time of listing?
1. Brush Mountain	No.
2. Cow Ridge	No.
3. Mount Callahan	Yes.
4. Anvil Points	Yes.

TABLE 4—DESIGNATED CRITICAL HABITAT UNITS (CHUS) FOR *Penstemon Debilis*

[Area estimates reflect all land within CHU boundaries]

Critical habitat unit	Land ownership by type		Size of unit
	Federal	Private	
1. Brush Mountain	1,437 ac (582 ha)	0 ac (0 ha)	1,437 ac (582 ha).
2. Cow Ridge	4,819 ac (1,950 ha)	0 ac (0 ha)	4,819 ac (1,950 ha).
3. Mount Callahan	4,232 ac (1,713 ha)	137 ac (55 ha)	4,369 ac (1,768 ha).
4. Anvil Points	3,424 ac (1,386 ha)	1,461 ac (591 ha)	4,885 ac (1,977 ha).
Total	13,912 ac (5,631 ha)	1,598 ac (646 ha)	15,510 ac (6,277 ha).

Note: Area sizes may not sum due to rounding.

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for *Penstemon debilis,* below. The units are listed in order geographically west to east, and north to south.

Unit 1: Brush Mountain

Unit 1, the Brush Mountain Unit, consists of 1,437 ac (582 ha) of federally owned lands, managed by BLM through the Grand Junction Field Office. It is located approximately 16 mi (26 km) northwest of the town of DeBeque in Garfield County, Colorado. It is northwest of the intersection of Roan Creek Road (County Road 204) and Brush Creek Road (County Road 209). This Unit is not currently occupied.

This Unit has all the physical and biological features essential to the conservation of the species, including the Rocky Mountain Cliff and Canyon plant community (NatureServe 2004, spatial data) with less than 10 percent plant cover, suitable elevational ranges of 6,234 to 8,222 ft (1,900 to 2,506 m), outcrops of the Parachute Creek Member of the Green River Formation, steep slopes of these soil outcrops that lend to the appropriate disturbance levels, pollinator habitat, and a climate with between 12 to 18 in. (30 and 46 cm) in annual rainfall and winter snow. Because of the presence of these features, we believe this may make a good introduction area for *Penstemon debilis* in the future and is needed to ensure conservation of the species.

The primary threat to *Penstemon debilis* in this Unit is energy development and associated activities. *Penstemon debilis* consists of only 4,100 known individuals (little redundancy), and all occur within 2 concentrated areas (little resilience). For adequate redundancy and resiliency, we believe it is necessary for survival and recovery that additional populations be established. Therefore, we have identified this Unit as critical habitat for *P. debilis.*

Unit 2: Cow Ridge

Unit 2, the Cow Ridge Unit, is 4,819 ac (1,950 ha) of federally owned lands managed by BLM through the Grand Junction Field Office. It is located approximately 8 mi (13 km) northwest of the town of DeBeque in Garfield County, Colorado, and north of Dry Fork Road. This Unit is not currently occupied.

This Unit has all the physical and biological features essential to the conservation of the species, including the Rocky Mountain Cliff and Canyon plant community (NatureServe 2004, spatial data) with less than 10 percent cover, suitable elevational ranges of 6,273 to 8,284 ft (1,912 to 2,525 m), outcrops of the Parachute Creek Member of the Green River Formation, steep slopes of these soil outcrops that lend to the appropriate disturbance levels, habitat for pollinators, and a climate with between 12 to 18 in (30 and 46 cm) in annual rainfall and winter snow. Because of the presence of these features, we believe this may make a good introduction area for *Penstemon debilis* in the future and is needed to ensure conservation of the species.

The primary threat to *Penstemon debilis* in this Unit is energy development and associated activities. *Penstemon debilis* consists of only 4,100 known individuals (little redundancy) and all within 2 concentrated areas (low resilience). For adequate redundancy and resiliency, we believe it is necessary for survival and recovery that additional populations be established. Therefore, we have identified this Unit as a CHU for *P. debilis.*

Unit 3: Mount Callahan

Unit 3, the Mount Callahan Unit, consists of 4,369 ac (1,768 ha) of Federal and private land. It is located approximately 2 mi (3 km) west of the town of Parachute on the south-facing slopes of Mount Callahan and westward along the cliffs of the Roan Plateau. Fifty-five percent of Unit 3 is managed by the BLM under the management of two field offices: 80 Percent of these Federal lands are managed by the Colorado River Valley Field Office and 20 percent are managed by the Grand Junction Field Office.

Oxy has been a partner in the conservation of *Penstemon debilis* since 1987. We have excluded all Oxy lands based on: (1) This continuing partnership, (2) existing CNA Agreements (674 ac (273 ha)) for two CNAs (the Mount Callahan and Mount Callahan Saddle), (3) commitments to create a third CNA (the Logan Wash Mine Natural Area) totaling 82 ac (33 ha), (4) already-implemented and

further commitments to develop Best Management Practices for the CNAs as well as other adjacent lands, and (5) commitments on Oxy lands to conserve newly discovered *P. debilis* populations with more than 75 individuals. This exclusion totals 3,350 ac (1,356 ha). These exclusions are discussed in further detail below under Exclusions. Three percent of this Unit falls on private lands. This Unit is currently occupied.

Once Oxy lands were excluded, four parcels (two BLM and two private) of land remained along the northern edge of the CHU, as proposed. We have elected not to include three (both BLM and one of the two private parcels) of these four parcels in our critical habitat designation because: (1) They would be isolated from the rest of Unit 3; (2) they contain no suitable habitat for *Penstemon debilis* (only pollinator habitat); (3) the pollinator and habitat protection measures on Oxy lands will provide adequate protections for the pollinators on their lands, making these three parcels less important; and (4) they are distant (at least 2,133 ft (650 m)) from occupied and suitable habitat; and (5) we believe they are not necessary for the conservation of the species. The remaining private parcel (137 ac (55 ha)) is closer to occupied habitat, contains suitable habitat, and, therefore, is included in our critical habitat designation.

This Unit currently has all the physical and biological features essential to the conservation of *Penstemon debilis,* including the Rocky Mountain Cliff and Canyon plant community (NatureServe 2004, spatial data) with less than 10 percent cover, suitable elevational ranges of 5,413 to 8,809 ft (1,650 to 2,685 m), outcrops of the Parachute Creek Member of the Green River Formation, suitable pollinators and habitat for these pollinators, steep slopes of these soil outcrops that lend to the appropriate disturbance levels, and a climate with between 12 to 18 in (30 and 46 cm) in annual rainfall and winter snow.

The primary threat to *Penstemon debilis* and its habitat in this Unit is energy development and associated activities.

Unit 4: Anvil Points

Unit 4, the Anvil Points Unit, consists of 4,885 ac (1,977 ha) of Federal and private land. It is located approximately 1 mi (2 km) north of the town of Rulison in Garfield County, Colorado. Seventy percent of this Unit is managed by the BLM, Colorado River Valley Field Office. Twenty-three percent of the Unit (1,102 ac (446 ha)) is within several potential BLM Areas of Critical Environmental Concern (ACECs). If these become ACECs, they would have several stipulations to protect *Penstemon debilis,* particularly from oil and gas development. These areas are discussed further in the proposed (75 FR 35732; June 23, 2010) and final listing rules (76 FR 45054). Thirty percent of this Unit is on private lands. This Unit is currently occupied.

This Unit currently has all the physical and biological features essential to the conservation of *Penstemon debilis,* including the Rocky Mountain Cliff and Canyon plant community (NatureServe 2004, spatial data) with less than 10 percent plant cover, suitable elevational ranges of 6,318 to 9,288 ft (1,926 to 2,831 m), outcrops of the Parachute Creek Member of the Green River Formation, suitable pollinators and habitat for these pollinators, steep slopes of these soil outcrops that lend to the appropriate disturbance levels, and a climate with between 12 to 18 in (30 and 46 cm) in annual rainfall and winter snow.

The primary threat to *Penstemon debilis* and its habitat in this Unit is energy development and associated activities. This Unit falls within the boundary of the BLM's Roan Plateau RMP. The RMP has two lease stipulations that directly address endangered, threatened and candidate plants. A no surface occupancy lease stipulation (NSO–12) protects occupied habitat and adjacent potential habitat from ground disturbing activities, with narrow exceptions. A controlled surface use stipulation (CSU–12) protects special status plant species and plant communities by authorizing BLM to impose special design, operation, mitigation and reclamation measures, including relocation of ground disturbing activities by more than 200 meters, with some exceptions. Special management considerations and protections are thus contemplated.

Phacelia submutica

We are designating nine units as critical habitat for *Phacelia submutica*. The critical habitat areas described below constitute our best assessment at this time of areas that meet the definition of critical habitat. The nine units we designate as critical habitat are: (1) Sulphur Gulch, (2) Pyramid Rock, (3) Roan Creek, (4) DeBeque, (5) Mount Logan, (6) Ashmead Draw, (7) Baugh Reservoir, (8) Horsethief Mountain, and (9) Anderson Gulch. All units are currently occupied and were occupied at the time of listing. The approximate area of each CHU is shown in Table 5.

TABLE 5—DESIGNATED CRITICAL HABITAT UNITS (CHUS) FOR *Phacelia submutica*

[Area estimates reflect all land within CHU boundaries.]

Unit No./unit name	Land ownership by type			Size of unit
	Federal	State	Private	
1. Sulphur Gulch	1,046 ac (423 ha)	0 ac (0 ha)	0 ac (0 ha)	1,046 ac (423 ha)
2. Pyramid Rock	15,429 ac (6,244 ha)	0 ac (0 ha)	1,892 ac (766 ha)	17,321 ac (7,010 ha)
3. Roan Creek	2 ac (1 ha)	0 ac (0 ha)	52 ac (21 ha)	54 ac (22 ha)
4. DeBeque	401 ac (162 ha)	0 ac (0 ha)	129 ac (52 ha)	530 ac (215 ha)
5. Mount Logan	242 ac (98 ha)	0 ac (0 ha)	35 ac (14 ha)	277 ac (112 ha)
6. Ashmead Draw	1,110 ac (449 ha)	0 ac (0 ha)	166 ac (67 ha)	1,276 ac (516 ha)
7. Baugh Reservoir	169 ac (68 ha)	0 ac (0 ha)	261 ac (106 ha)	430 ac (174 ha)
8. Horsethief Mountain	3,614 ac (1,463 ha)	0 ac (0 ha)	594 ac (240 ha)	4,209 ac (1,703 ha)
9. Anderson Gulch	0 ac (0 ha)	192 ac (78 ha)	149 ac (60 ha)	341 ac (138 ha)
Total	22,013 ac (8,908 ha)	192 ac (78 ha)	3,278 ac (1,327 ha)	25,484 ac (10,313 ha)

Note: Area sizes may not sum due to rounding.

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for *Phacelia submutica,* below. The units are listed in order geographically west to east.

Unit 1: Sulphur Gulch

Unit 1, the Sulphur Gulch Unit, consists of 1,046 ac (423 ha) of federally owned land. The Unit is located approximately 7.7 mi (12.5 km) southwest of the town of DeBeque in Mesa County, Colorado. This Unit is managed by BLM, through the Grand Junction Field Office. This Unit is currently occupied.

This Unit currently has all the physical and biological features essential to the conservation of the species including barren clay badlands with less than 20 percent plant/vegetation cover, suitable elevational ranges of 5,480 to 6,320 ft (1,670 to 1,926 m), appropriate topography, and shrink-swell alkaline clay soils within the Atwell Gulch and Shire members of the Wasatch Formation. All lands within this Unit are leased as grazing allotments, and less than 1 percent is managed as an active pipeline ROW by the BLM. While these lands currently have the physical and biological features essential to the conservation of *Phacelia submutica,* because of a lack of cohesive management and protections, special management will be required to maintain these features in this Unit.

Threats to *Phacelia submutica* and its habitat in this Unit include energy development, recreation (especially OHV use), domestic and wild ungulate grazing and use, and nonnative invasive species, such as *Bromus tectorum*.

Unit 2: Pyramid Rock

Unit 2, the Pyramid Rock Unit, is the largest Unit we are designating and consists of 17,321 ac (7,010 ha) of federally and privately owned lands in Mesa and Garfield Counties, Colorado. This Unit is approximately 1.6 mi (2.6 km) west of the town of DeBeque. The eastern boundary borders Roan Creek, and Dry Fork Creek runs through the northern quarter of the Unit. Eighty-nine percent is managed by BLM through the Grand Junction Field Office, and 11 percent is under private ownership. Three percent of this Unit is within the Pyramid Rock Natural Area and Pyramid Rock ACEC that was designated, in part, to protect *Phacelia submutica,* as discussed in the proposed (75 FR 35739) and final listing rules (76 FR 45054). This Unit is currently occupied.

This Unit currently has all the physical and biological features essential to the conservation of the species including barren clay badlands with less than 20 percent plant/vegetation cover, suitable elevational ranges of 4,960 to 6,840 ft (1,512 to 2,085 m), the appropriate topography, and shrink-swell alkaline clay soils within the Atwell Gulch and Shire members of the Wasatch Formation. Ninety-four percent of this Unit is managed as a grazing allotment on BLM and private lands. Additionally, 11 percent of this Unit is managed as an active pipeline ROW. While these lands currently have the physical and biological features essential to the conservation of *Phacelia submutica,* because of a lack of cohesive management and protections, special management will be required to maintain these features in this Unit.

Threats to *Phacelia submutica* and its habitat in this Unit include energy development, recreation (especially OHV use), livestock and wild ungulate grazing and use, and nonnative invasive species including *Bromus tectorum* and *Halogeton glomeratus*. The Westwide Energy corridor runs through this Unit. The corridor covers almost 10 percent of this Unit (Service 2011c, p. 9).

Unit 3: Roan Creek

Unit 3, the Roan Creek Unit, consists of 54 ac (22 ha) of federally and privately owned lands in Garfield County, Colorado. The Unit is located 3.3 mi (5.4 km) north of the town of DeBeque and for 1.7 mi (2.7 km) along both sides of County Road 299. Ninety-seven percent of this Unit is privately owned. Three percent of this Unit is managed by BLM through the Grand Junction Field Office. This Unit is currently occupied.

This Unit currently has all the physical and biological features essential to the conservation of the species including barren clay badlands with less than 20 percent cover, suitable elevational ranges of 5,320 to 5,420 ft (1,622 to 1,652 m), the appropriate topography, and shrink-swell alkaline clay soils within the Atwell Gulch and Shire members of the Wasatch Formation. The entire Unit is within a grazing allotment. While these lands currently have the physical and biological features essential to the conservation of *Phacelia submutica,* because of a lack of cohesive management and protections, special management will be required to maintain these features in this Unit.

Threats to *Phacelia submutica* and its habitat in this Unit include recreation (especially OHV use), livestock and wild ungulate grazing and use, nonnative invasive species including *Bromus tectorum* and *Halogeton glomeratus,* and a lack of protections on private lands.

Unit 4: DeBeque

Unit 4, the DeBeque Unit, consists of 530 ac (215 ha) of Federal and private lands in Mesa County, Colorado. This Unit is located 0.25 mi (0.4 km) north of DeBeque between Roan Creek Road and Cemetery Road. Seventy-six percent of this Unit is managed by BLM through the Grand Junction Field Office. This Unit is currently occupied.

This Unit currently has all the physical and biological features essential to the conservation of the species including barren clay badlands with less than 20 percent plant/vegetation cover, suitable elevational ranges of 5,180 to 5,400 ft (1,579 to 1,646 m), the appropriate topography, and shrink-swell alkaline clay soils within the Atwell Gulch and Shire members of the Wasatch Formation. While these lands currently have the physical and biological features essential to the conservation of *Phacelia submutica,* because of a lack of cohesive management and protections, special management will be required to maintain these features in this Unit.

Threats to *Phacelia submutica* and its habitat in this Unit include energy development, residential development, recreation (especially OHV use), livestock and wild ungulate grazing and use, and nonnative invasive species including *Bromus tectorum* and *Halogeton glomeratus.* Since 24 percent of the Unit is privately owned and borders the north of the town of DeBeque, this Unit is threatened by potential urban or agricultural development. The Westwide Energy corridor runs through this Unit. The corridor covers almost 66 percent of this Unit (Service 2011c, p. 9).

Unit 5: Mount Logan

Unit 5, the Mount Logan Unit, consists of 277 ac (112 ha) of Federal and private lands in Garfield County, Colorado. The Unit is located 2.7 mi (4.4 km) north, northeast of the town of DeBeque, Colorado, and 0.5 mi (0.8 km) west of Interstate 70. Eighty-eight percent of this Unit is managed by BLM through the Grand Junction Field Office. The remainder of this Unit is privately owned. This Unit is currently occupied.

This Unit currently has all the physical and biological features essential to the conservation of the species including barren clay badlands with less than 20 percent plant/vegetation cover, suitable elevational ranges of 4,960 to 5,575 ft (1,512 to 1,699 m), the appropriate topography, and shrink-swell alkaline clay soils within the Atwell Gulch and Shire members of the Wasatch Formation.

Eighty-eight percent of this Unit is managed as a grazing allotment by BLM, and 53 percent is managed as an active pipeline ROW. An access road runs through the Unit connecting several oil wells and associated infrastructure. While these lands currently have the physical and biological features essential to the conservation of *Phacelia submutica,* because of a lack of cohesive management and protections, special management will be required to maintain these features in this Unit.

Threats to *Phacelia submutica* and its habitat in this Unit include energy development, recreation (especially OHV use), livestock and wild ungulate grazing and use, and nonnative invasive species, including *Bromus tectorum* and *Halogeton glomeratus*.

Unit 6: Ashmead Draw

Unit 6, the Ashmead Draw Unit, consists of 1,276 ac (516 ha) of Federal and private lands in Mesa County, Colorado. The Unit is located 1.5 mi (2.5 km) southeast of the town of DeBeque, Colorado, and east of 45.5 Road (DeBeque Cut-off Road). Eighty-seven percent of this Unit is managed by BLM through the Grand Junction Field Office, the remainder is private lands. This Unit is currently occupied. We slightly increased the size of this Unit from our proposed critical habitat designation in our notice of availability (77 FR 18162) to include sites that were revisited and more accurately mapped during the spring of 2011 (Service 2011e, pp. 1–3).

This Unit currently has all the physical and biological features essential to the conservation of the species including barren clay badlands with less than 20 percent plant/vegetation cover, suitable elevational ranges of 4,940 to 5,808 ft (1,506 to 1,770 m), the appropriate topography, and shrink-swell alkaline clay soils within the Atwell Gulch and Shire members of the Wasatch Formation. A network of access roads runs through the Unit. Eighty-eight percent of this Unit is within a BLM grazing allotment, and 84 percent is within the Grand Junction Field Office's designated energy corridor. Thirty percent of the Unit is managed as an active pipeline ROW. While these lands currently have the physical and biological features essential to the conservation of *Phacelia submutica,* because of a lack of cohesive management and protections, special management will be required to maintain these features in this Unit.

Threats to *Phacelia submutica* and its habitat in this Unit include energy development, recreation (especially OHV use), livestock and wild ungulate grazing and use, and nonnative invasive species, including *Bromus tectorum* and *Halogeton glomeratus*. The Westwide Energy corridor runs through this Unit. The entire Unit is within the Westwide Energy corridor, and 88 percent is within several grazing allotments.

Unit 7: Baugh Reservoir

Unit 7, the Baugh Reservoir Unit, consists of 430 ac (174 ha) of Federal and private lands in Mesa County, Colorado. The Unit is located 6 mi (10 km) south of DeBeque, Colorado, near Kimball Mesa and Horse Canyon Road. Thirty-nine percent is managed by BLM through the Grand Junction Field Office, and the remaining 61 percent is on private lands. This Unit is currently occupied. We slightly increased the size of this Unit from our proposed critical habitat designation in our notice of availability (77 FR 18162) to include sites that were revisited and more accurately mapped during the spring of 2011 (Service 2011e, pp. 5–8).

This Unit currently has all the physical and biological features essential to the conservation of the species, including barren clay badlands with less than 20 percent plant/vegetation cover, a suitable elevational range of 5,400 to 5,700 ft (1,646 to 1,737 m), the appropriate topography, and shrink-swell alkaline clay soils within the Atwell Gulch and Shire members of the Wasatch Formation. An access road runs through the Unit, close to the occurrence of *Phacelia submutica*. While these lands currently have the physical and biological features essential to the conservation of *P. submutica,* because of a lack of cohesive management and protections, special management will be required to maintain these features in this Unit.

Threats to *Phacelia submutica* and its habitat in this Unit include energy development, recreation, livestock and wild ungulate grazing and use, and nonnative invasive species including *Bromus tectorum* and *Halogeton glomeratus*. The Westwide Energy corridor runs through this Unit. The entire Unit is within the Westwide Energy corridor and one grazing allotment.

Unit 8: Horsethief Mountain

Unit 8, the Horsethief Mountain Unit, consists of 4,209 ac (1,703 ha) of Federal and private lands in Mesa County, Colorado. It is located approximately 3.5 mi (5.6 km) southeast of DeBeque, Colorado, and along the eastern side of Sunnyside Road (V Road). Thirty-four percent is managed by BLM through the Grand Junction Field Office, 29 percent by the White River National Forest, 23 percent by the Grand Mesa Uncompahgre National Forest, and 14 percent is on private lands. This Unit is currently occupied.

This Unit currently has all the physical and biological features essential to the conservation of the species, including barren clay badlands with less than 20 percent plant/vegetation cover, a suitable elevational range of 5,320 to 6,720 ft (1,622 to 2,048 m), the appropriate topography, and shrink-swell alkaline clay soils within the Atwell Gulch and Shire members of the Wasatch Formation. While these lands currently have the physical and biological features essential to the conservation of *Phacelia submutica,* because of a lack of cohesive management and protections, special management will be required to maintain these features in this Unit. A portion of the site on USFS lands is within a proposed Research Natural Area.

Threats to *Phacelia submutica* and its habitat in this Unit include energy development, recreation (especially OHV use), livestock and wild ungulate grazing and use, and nonnative invasive species, including *Bromus tectorum* and *Halogeton glomeratus*.

Unit 9: Anderson Gulch

Unit 9, the Anderson Gulch Unit, consists of 341 ac (138 ha) of State and private lands in Mesa County, Colorado. It is located 11 mi (17 km) southeast of DeBeque, Colorado, and 3.5 mi (5.5 km) north of the town of Molina, Colorado. Within the Unit, 56 percent of the lands are managed by CDOW, within the Plateau Creek State Wildlife Area, and 44 percent is private. This Unit is currently occupied. We slightly increased the size of this Unit from our proposed critical habitat designation in our notice of availability (77 FR 18162) to include sites that were revisited and more accurately mapped during the spring of 2011 (CNHP 2012b, spatial data).

This Unit currently has all the physical and biological features essential to the conservation of the species, including barren clay badlands with less than 20 percent plant/vegetation cover, a suitable elevational range of 5,860 to 6,040 ft (1,786 to 1,841 m), the appropriate topography, and shrink-swell alkaline clay soils within the Atwell Gulch and Shire members of the Wasatch Formation. Forty-two percent of the Unit is a pending pipeline ROW. While these lands currently have the physical and biological features essential to the conservation of *Phacelia submutica,* special management may be required to maintain these features in this Unit.

Threats to *Phacelia submutica* and its habitat in this Unit include energy development, recreation (especially from OHV use), livestock and wild ungulate grazing and use, and nonnative invasive species, including *Bromus tectorum* and *Halogeton glomeratus*.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action that is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

Decisions by the 5th and 9th Circuit Courts of Appeals have invalidated our regulatory definition of ''destruction or adverse modification'' (50 CFR 402.02) (see *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service,* 378 F. 3d 1059 (9th Cir. 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service et al.,* 245 F.3d 434, 442 (5th Cir. 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, Tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat, and actions on State, Tribal, local, or private lands that are not federally funded or authorized, do not require section 7 consultation.

As a result of section 7 consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define ''reasonable and prudent alternatives'' (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies sometimes may need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Application of the ''Adverse Modification'' Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species. Activities that may destroy or adversely modify critical habitat are those that alter the physical or biological features to an extent that appreciably reduces the conservation value of critical habitat for *Ipomopsis polyantha, Penstemon debilis,* and *Phacelia submutica.* As discussed above, the role of critical habitat is to support the life-history needs of the species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that may affect critical habitat, when carried out, funded, or authorized by a Federal agency, should result in consultation for the *Ipomopsis polyantha, Penstemon debilis,* and *Phacelia submutica*.

For *Ipomopsis polyantha* these activities include, but are not limited to:

(1) Actions that would lead to the destruction or alteration of the plants or their habitat; or actions that would result in continual or excessive disturbance or prohibit overland soil erosion on Mancos shale soils. Such activities could include, but are not limited to, removing soils to a depth that the seed bank has been removed, repeatedly scraping areas, repeated mowing, excessive grazing, continually driving vehicles across areas, permanent developments, the construction or maintenance of utility or road corridors, and ditching. These activities could remove the seed bank, reduce plant numbers by prohibiting reproduction, impede or accelerate beyond historical levels the natural or artificial erosion processes on which the plant relies (as described above in ''*Physical and Biological Features''*), or lead to the total loss of a site.

(2) Actions that would result in the loss of pollinators or their habitat, such that *Ipomopsis polyantha* reproduction could be diminished. Such activities could include, but are not limited to, destroying ground or twig nesting habitat, habitat fragmentation that prohibits pollinator movements from one area to the next, spraying pesticides

that will kill pollinators, and eliminating other plant species on which pollinators are reliant for floral resources (this could include replacing native species that provide floral resources with grasses, which do not provide floral resources for pollinators). These activities could result in reduced fruit production for *Ipomopsis polyantha,* or increase the incidence of self-pollination, thereby reducing genetic diversity and seed production.

(3) Actions that would result in excessive plant competition at *Ipomopsis polyantha* sites. Such activities could include, but are not limited to, revegetation efforts that include competitive nonnative invasive species such as *Bromus inermis, Medicago sativa* (alfalfa), *Meliotus* spp. (sweetclover); planting native species, such as Ponderosa pine, into open areas where the plant is found; and creating disturbances that allow nonnative invasive species to invade. These activities could cause *I. polyantha* to be outcompeted and subsequently either lost at sites, or reduced in numbers of individuals.

For *Penstemon debilis* these activities include, but are not limited to:

(1) Actions that would lead to the destruction or alteration of the plants or their habitat. Such activities could include, but are not limited to, activities associated with oil shale mining, including the mines themselves, pipelines, roads, and associated infrastructure; activities associated with oil and gas development, including pipelines, roads, well pads, and associated infrastructure; activities associated with reclamation activities, utility corridors, or infrastructure; and road construction and maintenance. These activities could lead to the loss of individuals, fragment the habitat, impact pollinators, cause increased dust deposition, introduce nonnative invasive species, and alter the habitat such that important downhill movement or the shale erosion no longer occurs.

(2) Actions that would alter the highly mobile nature of the sites. Such activities could include, but are not limited to, activities associated with oil shale mining, including pipelines, roads, and associated infrastructure; activities associated with oil and gas development, including pipelines, roads, well pads, and associated infrastructure; activities associated with reclamation activities, utility corridors, or infrastructure; and road construction and maintenance. These activities could lead to increased soil formation and a subsequent increase in vegetation, alterations to the soil morphology, and the loss of *Penstemon debilis* plants and habitat.

(3) Actions that would result in the loss of pollinators or their habitat, such that reproduction of *Penstemon debilis* could be diminished. Such activities could include, but are not limited to, destroying ground, twig, or mud nesting habitat; habitat fragmentation that prohibits pollinator movements from one area to the next; spraying pesticides that will kill pollinators; and eliminating other plant species on which pollinators are reliant for floral resources. These activities could result in reduced fruit production for *P. debilis,* or increase the incidence of self-pollination, thereby further reducing genetic diversity and reproductive potential.

For *Phacelia submutica* these activities include, but are not limited to:

(1) Actions that would lead to the destruction or alteration of the plants, their seed bank, or their habitat, or actions that would destroy the fragile clay soils where *Phacelia submutica* is found. Such activities could include, but are not limited to, activities associated with oil and gas development, including pipelines, roads, well pads, and associated infrastructure; utility corridors or infrastructure; road construction and maintenance; excessive OHV use; and excessive livestock grazing. Clay soils are most fragile when wet, so activities that occur when soils are wet are especially harmful. These activities could lead to the loss of individuals, fragment the habitat, impact pollinators, cause increased dust deposition, and alter the habitat such that important erosional processes no longer occur.

(2) Actions that would result in excessive plant competition at *Phacelia submutica* sites. Such activities could include, but are not limited to, using highly competitive species in restoration efforts, or creating disturbances that allow nonnative invasive species, such as *Bromus tectorum* and *Halogeton glomeratus,* to invade. These activities could cause *P. submutica* to be outcompeted and subsequently either lost or reduced in numbers of individuals.

Exemptions

Application of Section 4(a)(3) of the Act

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resources management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

(1) An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;

(2) A statement of goals and priorities;

(3) A detailed description of management actions to be implemented to provide for these ecological needs; and

(4) A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: ''The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.''

No Department of Defense lands occur within the critical habitat designation. Therefore, we are not exempting lands from this final designation of critical habitat for *Ipomopsis polyantha, Penstemon debilis,* and *Phacelia submutica* pursuant to section 4(a)(3)(B)(i) of the Act.

Exclusions

Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he

determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

In considering whether to exclude a particular area from the designation, we identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and evaluate whether the benefits of exclusion outweigh the benefits of inclusion. If the analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, the Secretary may exercise his discretion to exclude the area only if such exclusion would not result in the extinction of the species.

When identifying the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive from the protection from adverse modification or destruction as a result of actions with a Federal nexus; the educational benefits of mapping essential habitat for recovery of the listed species; and any benefits that may result from a designation due to State or Federal laws that may apply to critical habitat.

When identifying the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation; the continuation, strengthening, or encouragement of partnerships; or implementation of a management plan that provides equal to or more conservation than a critical habitat designation would provide.

In the case of *Ipomopsis polyantha, Penstemon debilis,* and *Phacelia submutica,* the benefits of critical habitat include public awareness of their presence and the importance of habitat protection, and in cases where a Federal nexus exists, increased habitat protection for *I. polyantha, P. debilis,* and *P. submutica* due to the protection from adverse modification or destruction of critical habitat. For the reasons discussed below, we are not excluding any lands from our critical habitat designation for *P. submutica* and *I. polyantha,* but we are excluding all Oxy lands within *P. debilis* Unit 3, Mount Callahan.

For these three species, all of which are plants that receive limited protections under the Act, the primary impact and benefit of designating critical habitat will be on Federal lands or in instances where there is a Federal action for projects on private lands.

When we evaluate the existence of a conservation plan when considering the benefits of exclusion, we consider a variety of factors, including but not limited to, whether the plan is finalized; how it provides for the conservation of the essential physical or biological features; whether there is a reasonable expectation that the conservation management strategies and actions contained in a management plan will be implemented into the future; whether the conservation strategies in the plan are likely to be effective; and whether the plan contains a monitoring program or adaptive management to ensure that the conservation measures are effective and can be adapted in the future in response to new information.

After identifying the benefits of inclusion and the benefits of exclusion, we carefully weigh the two sides to evaluate whether the benefits of exclusion outweigh those of inclusion. If our analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, we then determine whether exclusion would result in extinction. If exclusion of an area from critical habitat will result in extinction, we will not exclude it from the designation.

Based on the information provided by entities seeking exclusion, species information, information in our files, as well as other public comments received, we evaluated whether certain lands in the proposed critical habitat unit for *Penstemon debilis,* Unit 3, Mount Callahan were appropriate for exclusion from this final designation pursuant to section 4(b)(2) of the Act. We are excluding the following areas from the critical habitat designation for *P. debilis:* All Oxy lands within the CHU for *P. debilis,* Unit 3, Mount Callahan (3,350 ac (1,356 ha)).

Table 7, below, provides approximate areas (ac, ha) of lands that meet the definition of critical habitat, but are being excluded under section 4(b)(2) of the Act from the final critical habitat rule.

TABLE 7—AREAS EXCLUDED FROM CRITICAL HABITAT DESIGNATION BY UNIT

Species	Unit	Specific area	Areas meeting definition of critical habitat in ac (ha)	Areas excluded from critical habitat in ac (ha)
Penstemon debilis	3, Mount Callahan	Oxy lands	7,719 ac (3,124 ha)	3,350 ac (1,356 ha)

We are excluding these areas because we determine that:

(1) They are appropriate for exclusion under the ''other relevant factor'' provisions of section 4(b)(2) of the Act.

These exclusions are discussed in detail below.

Exclusions Based on Economic Impacts

Under section 4(b)(2) of the Act, we consider the economic impacts of specifying any particular area as critical habitat. In order to consider economic impacts, we prepared a DEA of the proposed critical habitat designation and related factors (Industrial Economics, Incorporated 2012). The DEA, dated March 2, 2012, was made available for public review from March 27, 2012, through April 26, 2012 (77 FR 18157). Following the close of the comment period, a final analysis (dated June 7, 2012) of the potential economic effects of the designation was developed, taking into consideration the public comments received and any new information obtained (Industrial Economics 2012, entire).

The intent of the FEA is to quantify the economic impacts of all potential conservation efforts for *Ipomopsis polyantha, Penstemon debilis,* and *Phacelia submutica;* some of these costs will likely be incurred regardless of whether we designate critical habitat (baseline). The economic impact of the final critical habitat designation is analyzed by comparing scenarios both ''with critical habitat'' and ''without critical habitat.'' The ''without critical habitat'' scenario represents the baseline for the analysis, considering protections already in place for the species (e.g., under the Federal listing and other Federal, State, and local regulations). Therefore, the baseline represents the costs incurred regardless of whether critical habitat is designated. The ''with

critical habitat'' scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts are those not expected to occur absent the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat above and beyond the baseline costs; these are the costs we consider in the final designation of critical habitat. The analysis looks retrospectively at baseline impacts incurred since the species was listed, and forecasts both baseline and incremental impacts likely to occur with the designation of critical habitat.

The FEA also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on government agencies, private businesses, and individuals. The FEA measures lost economic efficiency associated with residential and commercial development and public projects and activities, such as economic impacts on water management and transportation projects, Federal lands, small entities, and the energy industry. Decision-makers can use this information to assess whether the effects of the designation might unduly burden a particular group or economic sector. Finally, the FEA looks retrospectively at costs that have been incurred since 2011 (year of the species' listing) (76 FR 45054), and considers those costs that may occur in the 20 years following the designation of critical habitat, which was determined to be the appropriate period for analysis because limited planning information was available for most activities to forecast activity levels for projects beyond a 20-year timeframe.

The FEA quantifies economic impacts of *Ipomopsis polyantha, Penstemon debilis,* and *Phacelia submutica* conservation efforts associated with the following categories of activity: (1) Oil and gas development, (2) transportation projects, (3) agriculture and grazing, (4) recreation, and (5) active species management.

The FEA estimates that total potential incremental economic impacts in critical habitat areas for all three species over the next 20 years will be $967,000 to $14.8 million (approximately $85,300 to $1.3 million on an annualized basis), assuming a 7 percent discount rate (Table 8). The largest contributor to the incremental costs is impacts to oil and gas development, which represent approximately 90 percent of incremental impacts in the low-cost scenario and 99 percent of impacts in the high-cost scenario.

TABLE 8—INCREMENTAL IMPACTS OF THE CRITICAL HABITAT DESIGNATION FOR *Ipomopsis polyantha, Penstemon debilis,* AND *Phacelia submutica* BY SPECIES, UNIT, AND ACTIVITY (2012 DOLLARS, ASSUMING A 7 PERCENT DISCOUNT RATE).

Unit #	Unit name	Oil & gas -Low-	Oil & gas -High-	Transportation	Agriculture & grazing	Recreation	Species mgmt	Subtotal -Low-	Subtotal -High-
Critical Habitat Designation									
***Ipomopsis polyantha* (Pagosa Skyrocket)**									
1 ...	Dyke	$0	$0	$9,370	$0	$0	$0	$9,370	$9,370
2 ...	O'Neal Hill Special Botanical Area.	0	0	0	0	7,500	0	7,500	7,500
3 ...	Pagosa Springs	0	0	3,330	0	0	0	3,330	3,330
4 ...	Eight Mile Mesa	0	0	0	0	7,500	0	7,500	7,500
***Penstemon debilis* (Parachute Beardtongue)**									
1 ...	Brush Mountain	11,600	195,000	0	0	0	0	11,600	195,000
2 ...	Cow Ridge	35,500	599,000	0	0	0	0	35,500	599,000
3 ...	Mount Callahan	10,900	184,000	0	0	2,130	0	13,000	186,000
4 ...	Anvil Points	8,470	143,000	0	0	2,130	0	10,600	145,000
***Phacelia submutica* (DeBeque Phacelia)**									
1 ...	Sulphur Gulch	37,300	629,000	0	1,590	1,060	0	39,900	632,000
2 ...	Pyramid Rock	627,000	10,600,000	0	1,590	1,060	0	630,000	10,600,000
3 ...	Roan Creek	398	6,720	0	0	0	0	398	6,720
4 ...	DeBeque	13,100	221,000	0	1,590	1,060	0	15,800	224,000
5 ...	Mount Logan	0	0	0	1,590	2,130	0	3,720	3,720
6 ...	Ashmead Draw	44,700	755,000	0	1,590	1,060	0	47,400	757,000
7 ...	Baugh Reservoir	18,200	307,000	0	1,590	1,060	0	20,800	310,000
8 ...	Horsethief Mountain ..	60,200	1,020,000	0	43,600	5,820	0	110,000	1,070,000
9 ...	Anderson Gulch	1,150	19,500	0	0	0	0	1,150	19,500
	Activity Subtotal	868,000	14,700,000	12,700	53,200	32,500	0	967,000	14,800,000
Areas Excluded									
Penstemon debilis									
3 ...	Mount Callahan	.....	0	0	0	0	0	.....	0

Note: Totals may not sum due to rounding.

In the low-cost scenario, proposed Unit 2 for *Phacelia submutica* has the highest incremental impacts (65 percent of total), followed by proposed Unit 8 for *P. submutica* (11 percent of total) and proposed Unit 6 for *P. submutica* (five percent of total). In the high-cost scenario, these same three units (proposed Units 2, 8, and 6 for *P. submutica*) have the highest incremental impacts with 72 percent, 7 percent, and 5 percent of the total incremental impacts, respectively.

Incremental impacts to oil and gas development range from $868,000 to $14.7 million, assuming a 7 percent discount rate. These impacts are related to future oil and gas development that occurs in areas greater than 100 meters from known *Phacelia submutica* occurrences and greater than 1,000 meters from known *Penstemon debilis* occurrences. Similar to the baseline impacts, the large range in incremental impacts is due to uncertainty regarding the level and distribution of future oil and gas development.

Incremental impacts to transportation projects are estimated to be $12,700, assuming a 7 percent discount rate. Incremental impacts to recreational activities are estimated to be $32,500, assuming a 7 percent discount rate. The incremental impacts to transportation and recreational activities are limited to the administrative cost of consultation. Incremental impacts to agriculture and grazing are estimated to be $53,200, assuming a 7 percent discount rate.

We are not excluding any lands based on economic impacts. A copy of the FEA with supporting documents may be obtained by contacting the Western Colorado Ecological Services Office (see **ADDRESSES**) or by downloading from the Internet at *http://www.regulations.gov.*

Exclusions Based on Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security. We consider a number of factors including whether the landowners have developed any HCPs or other management plans for the area, or whether there are conservation partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at any Tribal issues, and consider the government-to-government relationship of the United States with Tribal entities. We also consider any social impacts that might occur because of the designation.

Land and Resource Management Plans, Conservation Plans, or Agreements Based on Conservation Partnerships

We consider for exclusions areas that receive some protection due to the existence of partnerships that result in tangible benefits to listed species. For these exclusions, we consider a number of factors, including current management or the existence of a management plan. We consider a current land management or conservation plan (HCPs, as well as other types) to provide adequate management or protection if it meets the following criteria:

(1) The plan is complete and provides the same or better level of protection from adverse modification or destruction than that provided through a consultation under section 7 of the Act;

(2) There is a reasonable expectation that the conservation management strategies and actions will be implemented for the foreseeable future, based on past practices, written guidance, or regulations; and

(3) The plan provides conservation strategies and measures consistent with currently accepted principles of conservation biology.

We find that the Mount Callahan Natural Area, Mount Callahan Saddle Natural Area, and Logan Wash Mine Natural Area and their associated Best Management Practices fulfill the above criteria, and are excluding non-Federal lands covered by this partnership that provide for the conservation of *Penstemon debilis.*

Exclusions Based on the Partnership Between Oxy and CNAP (Mount Callahan Natural Area, the Mount Callahan Saddle Natural Area, and the Logan Wash Mine Natural Area)

We are excluding lands owned by Oxy based on the partnership between Oxy and the State of Colorado's CNAP to conserve the majority of three of the four viable populations of *Penstemon debilis.* This long standing partnership (over 25 years) is evidenced by the designation of Oxy lands that contain these *P. debilis* populations and their habitat as CNAs. The Mount Callahan Natural Area was designated by Oxy and CNAP in 1987, shortly after the discovery of *P. debilis* (CNAP 1987, pp. 1–7). The Mount Callahan Saddle Natural Area was designated by Oxy and CNAP in 2008 (CNAP 2008, pp. 1–11). A third area, the Logan Wash Mine Natural Area, is in the process of being designated (CNAP and Oxy 2012, pp. 1–64). All three CNAs were or are being designated on a voluntary basis as protected areas primarily to protect *P. debilis.* The agreement between Oxy and CNAP to designate these CNAs provides conservation strategies and measures consistent with currently accepted principles of conservation biology as explained in the following discussion. Evidence of the partnership between Oxy and CNAP and their commitment to the conservation of *P. debilis* is provided by the articles of designation for the CNAs and the associated BMPs, as described below. The articles of designation (for all three areas) identify the following conservation measures: Implement the BMPs both within the CNAs where the plant is found and also for nearby habitats; prohibit camping; conduct noxious weed management to minimize damage to *P. debilis;* limit grazing to preserve natural qualities; and prohibit most vehicle use (CNAP and Oxy 2012, pp. 1–64). Oxy currently operates gas wells on five pads and an access road in the proposed exclusion. Future plans include the drilling of eight multi-well pads, none of which are close to any populations of *P. debilis* (Biever 2011, p. 10).

Within the CNAs, the BMPs provide guidelines for surveys and require surveys prior to any surface disturbance. Within 330 ft (100 m) of occupied habitat, the BMPs require that impacts to *Penstemon debilis* be qualitatively monitored for 5 years; limit surface disturbance and require no surface disturbance within 100 ft (33 m) of occupied habitat (not including reclamation activities); provide stipulations to protect pollinators; recommend limiting surface disturbance to times when the plant is dormant (October to March); require avoidance of designing projects that affect storm water flows, sediment, or other surface materials flows into occupied habitat; limit undercutting; and require temporary fencing to prevent encroachment into occupied habitat. Further, the BMPs require specific protective measures for reclamation activities in the Logan Wash Areas, including coordinating with CNAP prior to reclamation activities, marking plants, constructing temporary barriers to protect the plants, installing protective matting over plants if necessary for reclamation activities, and transplanting plants (if necessary). Within the CNAs, general BMPs include limiting off-road vehicle use to existing routes and establishing procedures to limit this use in areas within 100 ft (33 m) of occupied habitat, limiting dust from roads, performing quantitative monitoring to track the status of *P. debilis,* and providing protective

stipulations for noxious weed control and revegetation efforts. The BMPs also limit collection of *P. debilis* (CNAP and Oxy 2012, Appendix E).

As further evidence of the partnership between Oxy and CNAP and their commitment to the conservation of *P. debilis,* additional general BMPs were recently developed for the CNAs and adjacent lands, extending benefits to the species beyond the borders of the CNA designation. These BMPs include guidelines to:

(1) limit surface disturbance by transporting water by pipelines instead of trucks, reducing visits to well-sites, maximizing drilling technology through high-efficiency rigs, directional drilling, multi-well pads, coiled-tubing unit rigs to minimize disturbance, and limiting the number of rig moves and traffic;

(2) conduct dust abatement activities during the growing season (April to September);

(3) reclaim disturbances and re-vegetate areas with native plants, including forb species that would provide resources for pollinators at optimal times for seed germination and establishment, and track the success of this seeding with follow up seeding if necessary;

(4) ensure that any straw bales used are weed free;

(5) increase pollinator presence by creating nesting substrates;

(6) conduct surveys in all accessible suitable habitat within 330 ft (100 m) of a project disturbance;

(7) protect any new populations of *Penstemon debilis* that are located, Oxy and CNAP would then protect these populations, with more than 75 individuals, through subsequent CNAs; and

(8) conduct noxious weed control that limits the use of herbicides within specific distances of occupied habitat, but that also protects occupied habitat from invasive plants (CNAP and Oxy 2012, Appendix F).

Benefits of Inclusion

If these private lands were included in the designation, section (7)(a)(2) consultations would occur on private (Oxy) lands only if there were proposed activities involving a Federal action. A Federal action would most likely arise for drainage crossings (Army Corps permits); other instances of a Federal action are unlikely because any Federal actions or funding would be extremely limited on lands owned by Oxy. There are no Federal minerals below Oxy lands that were proposed as critical habitat. Drainage crossings are generally far removed from *Penstemon debilis* habitat, making this action less likely.

By including these lands in the critical habitat designation, it would be more widely known that these areas have the PCEs for *Penstemon debilis.*

Benefits of Exclusion

- Cooperative efforts for the management and conservation of *Penstemon debilis* will continue, and ongoing conservation partnerships will be strengthened.
- Oxy will continue implementing conservation actions for *Penstemon debilis* on their lands through CNA Agreement and BMPs. This provides a better level of protection from adverse modification or destruction of habitat that that provided through a consultation under section 7 of the Act. Furthermore, Oxy has an excellent track record protecting *P. debilis.*
- Pollinator and habitat BMPs will apply outside of specific Natural Areas.

The exclusion would provide recognition for the proactive conservation efforts that have been implemented in practice by Oxy and CNAP.

Benefits of Exclusion Outweigh the Benefits of Inclusion

Ongoing management of the Mount Callahan Natural Area since 1987, consistent with the conservation measures and BMPs, demonstrates a long-term commitment and partnership by Oxy and the CNAP. Furthermore, the Mount Callahan Saddle Natural Area was added in 2008 and the Mount Logan Mine Natural Area is being added in 2012, demonstrating an expansion of and commitment to conservation efforts, as discussed above. In addition, Oxy has agreed to extend their termination clause on the agreement from 3 months to 2 years, again, demonstrating a commitment to conservation of the species and partnership with CNAP.

Oxy manages the majority of three of the four viable populations of *Penstemon debilis.* These populations all occur on private lands (over private minerals), where a Federal action will only seldom, if ever, provide protection through section (7)(a)(2) consultation. Without the cooperation of this important partner and their partnership with CNAP, the recovery of *P. debilis* will be much more difficult. We believe that the articles of designation and accompanying BMPs for *P. debilis* will benefit the species more than the occasional consultation that may occur because of a Federal nexus on these lands.

Exclusion Will Not Result in Extinction of the Species

The partnership between Oxy and CNAP has given rise to an agreement that provides conservation strategies and measures consistent with currently accepted principles of conservation biology and provides better protection for *Penstemon debilis* from adverse modification or destruction of habitat than that provided through a consultation under section 7 of the Act as explained above. Because of the long-term partnership between Oxy and CNAP, implementation of their agreement, Oxy's long-term and excellent commitment to conserving the species, evidence that Oxy intends to continue implementing this agreement, and intentions to expand these commitments, there is a reasonable expectation that the agreement will be implemented into the future and we believe this exclusion will not result in the extinction of the species.

Required Determinations

Regulatory Planning and Review—Executive Orders 12866 and 13563

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. The OIRA has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (5 U.S.C 801 *et seq.*), whenever an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory

flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. In this final rule, we are certifying that the critical habitat designation for *Ipomopsis polyantha, Penstemon debilis,* and *Phacelia submutica* will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

According to the Small Business Administration, small entities include small organizations, such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; as well as small businesses. Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts on these small entities are significant, we consider the types of activities that might trigger regulatory impacts under this rule, as well as the types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

To determine if the rule could significantly affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities (e.g., oil and gas development, transportation projects, and agriculture and grazing). We apply the ''substantial number'' test individually to each industry to determine if certification is appropriate. However, the SBREFA does not explicitly define ''substantial number'' or ''significant economic impact.'' Consequently, to assess whether a ''substantial number'' of small entities is affected by this designation, this analysis considers the relative number of small entities likely to be impacted in an area. In some circumstances, especially with critical habitat designations of limited extent, we may aggregate across all industries and consider whether the total number of small entities affected is substantial. In estimating the number of small entities potentially affected, we also consider whether their activities have any Federal involvement.

Designation of critical habitat only affects activities authorized, funded, or carried out by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. In areas where the species is present, Federal agencies already are required to consult with us under section 7 of the Act on activities they authorize, fund, or carry out that may affect *Ipomopsis polyantha, Penstemon debilis,* and *Phacelia submutica.* Federal agencies also must consult with us if their activities may affect critical habitat. Therefore, designation of critical habitat could result in an additional economic impact on small entities due to the requirement to reinitiate consultation for ongoing Federal activities (see *Application of the ''Adverse Modification Standard''* section).

In our FEA of the critical habitat designation, we evaluated the potential economic effects on small business entities resulting from conservation actions related to the listing of *Ipomopsis polyantha, Penstemon debilis,* and *Phacelia submutica* and the potential economic effects resulting from the designation of critical habitat. The analysis is based on the estimated impacts associated with the rulemaking as described in Chapters 2 through 5 and Appendix A of the analysis and evaluates the potential for economic impacts related to: (1) Oil and gas development, (2) transportation projects, (3) agriculture and grazing, (4) recreation, and (5) active species management, such as fencing efforts being done by Federal and State agencies.

Small entities represent 60 percent of all entities in the oil and gas development industry that may be affected. The analysis expects conservation efforts for the three plants to affect companies that are involved with drilling for oil and gas and that lease or plan to lease Federal lands. Although we predict that drilling activity will not be precluded by the designation, we anticipate requesting that drilling companies undertake project modifications to reduce potential impacts to the habitat. The costs of implementing these project modifications are one impact of the regulation. In addition, affected companies will incur administrative costs associated with the section 7 consultation process.

The FEA estimates that between 0.23 and 5.1 oil and gas development projects are undertaken in the study area annually (total number of projects divided by 20 years). We multiply these projects by the percentage of small entities in these counties, or approximately 60 percent, to identify the annual number of projects likely to be undertaken by small entities (0.14 to 3.06 projects annually). Some of these projects will only incur incremental administrative costs because they are located close to occupied habitat. In these cases, the project modification costs will be incurred regardless of the designation of critical habitat. Projects experiencing the highest annual incremental costs are located in unoccupied areas. We multiply the per-project costs in these unoccupied areas by the total number of annual projects undertaken by small entities and then divide by the number of affected small entities to estimate per-entity costs. These impacts are then compared to average annual sales per small business in the oil and gas development sector. On average, annual incremental impacts per small drilling company represent 0.01 to 0.27 percent of small developers' annual average sales.

Based on estimates and calculations, fewer than two to four small entities may be affected annually by the critical habitat designation. These entities will likely experience costs equivalent to less than 1 percent of annual revenues. Importantly, these estimates assume each well pad is drilled by a separate entity. In the case that one small company drills more well pads than predicted, impacts to that company are underestimated, and the annual number of affected entities is overstated.

In summary, we considered whether this designation would result in a significant economic effect on a substantial number of small entities. Based on the above reasoning and currently available information, we concluded that this rule would not result in a significant economic impact on a substantial number of small entities. Therefore, we are certifying that the designation of critical habitat for *Ipomopsis polyantha, Penstemon debilis,* and *Phacelia submutica* will not have a significant economic impact on a substantial number of small entities,

and a regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. OMB has provided guidance for implementing this Executive Order that outlines nine outcomes that may constitute ''a significant adverse effect'' when compared to not taking the regulatory action under consideration.

Critical habitat designation for the three plants is anticipated to affect oil and gas activities. However, the Service is more likely to recommend a series of project modifications that will allow for work within critical habitat, rather than complete avoidance of critical habitat. Therefore, reductions in oil and natural gas production are not anticipated. Furthermore, given the small fraction of projects affected, approximately three or fewer, project modification costs are not anticipated to increase the cost of energy production or distribution in the United States in excess of 1 percent, one of the nine thresholds contained in Executive Order 13211. Thus, none of the nine threshold levels of impact provided by OMB is exceeded. Therefore, designation of critical habitat is not expected to lead to any adverse outcomes (such as a reduction in oil and natural gas production or distribution), and a Statement of Energy Effects is not required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(1) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or Tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule will significantly or uniquely affect small governments because it would not produce a Federal mandate of $100 million or greater in any year; that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. The FEA concludes that incremental impacts may occur due to project modifications and administrative costs of consultation that may need to be made for oil and gas, transportation, grazing, and recreational activities; however, these are not expected to affect small governments to the extent described above. Consequently, we do not believe that the critical habitat designation would significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with Executive Order 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for *Ipomopsis polyantha, Penstemon debilis,* and *Phacelia submutica* in a takings implications assessment. As discussed above, the designation of critical habitat affects only Federal actions. Although private parties that receive Federal funding, assistance, or require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

We believe that the takings implications associated with this critical habitat designation will be insignificant, even though private lands are included as well as Federal lands. Impacts of critical habitat designation may occur on private lands where there is Federal involvement (e.g., Federal funding or permitting) subject to section 7 of the Act. Impacts on private entities also may result if the decision on a proposed action on federally owned land designated as critical habitat could affect economic activity on adjoining non-Federal land. Each action would be evaluated by the involved Federal agency, in consultation with the Service, in relation to its impact on these species' designated critical habitat. In the unexpected event that expensive modifications would be required to a project on private property, it is not likely that the economic impacts to the property owner would be such to support a takings action.

The takings implications assessment concludes that this designation of critical habitat for *Ipomopsis polyantha, Penstemon debilis,* and *Phacelia submutica* does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with Executive Order 13132 (Federalism), this rule does not have significant Federalism effects. A Federalism impact summary statement is not required. In keeping with

Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this critical habitat designation with appropriate State resource agencies in Colorado. We received three comments from the CNAP and have addressed them in the Summary of Comments and Recommendations section of the rule. The designation of critical habitat in areas currently occupied by *Ipomopsis polyantha, Penstemon debilis,* and *Phacelia submutica* imposes no additional restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments in that the areas that contain the physical or biological features essential to the conservation of the species are more clearly defined, and the elements of the features of the habitat necessary to the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist local governments in long-range planning (rather than having them wait for case-by-case section 7 consultations to occur).

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the applicable standards set forth in sections 3(a) and 3(b)(2) of the Order. We are designating critical habitat in accordance with the provisions of the Act. This final rule uses standard property descriptions and identifies the elements of physical or biological features essential to the conservation of *Ipomopsis polyantha, Penstemon debilis,* and *Phacelia submutica* within the designated areas to assist the public in understanding the habitat needs of the species.

*Paperwork Reduction Act of 1995 (*44 U.S.C. 3501 *et seq.)*

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

*National Environmental Policy Act (*42 U.S.C. 4321 *et seq.)*

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)). However, when the range of the species includes States within the Tenth Circuit, such as that of *Ipomopsis polyantha, Penstemon debilis,* and *Phacelia submutica,* under the Tenth Circuit ruling in *Catron County Board of Commissioners* v. *U.S. Fish and Wildlife Service,* 75 F.3d 1429 (10th Cir. 1996), we undertake NEPA analysis for critical habitat designation (77 FR 18157).

We completed NEPA analysis for this critical habitat designation. We notified the public of availability of the draft environmental assessment (Service 2012b, entire) for the proposed rule on March 27, 2012 (77 FR 18157). The final environmental assessment, as well as the finding of no significant impact, is available upon request from the Field Supervisor, Colorado Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT** section), at *http://www.regulations.gov* at Docket No. FWS–R6–2011–0040, or on our Web site at *http://www.fws.gov/mountain-prairie/species/plants/3ColoradoPlants/index.html*.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. We determined that there are no Tribal lands occupied by *Ipomopsis polyantha, Penstemon debilis,* and *Phacelia submutica* at the time of listing that contain the features essential for conservation of the species, and no Tribal lands unoccupied by *I. polyantha, P. debilis,* and *P. submutica* that are essential for the conservation of the species. Therefore, we are not designating critical habitat for the *I. polyantha, P. debilis,* and *P. submutica* on Tribal lands.

References Cited

A complete list of all references cited is available on the Internet at *http://www.regulations.gov* and upon request from the Western Colorado Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this rulemaking are the staff members of Western Colorado Ecological Services Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

■ 2. Amend § 17.12(h) by revising the entries for ''*Ipomopsis polyantha,*'' ''*Penstemon debilis,*'' and ''*Phacelia submutica*'' under ''Flowering Plants'' in the List of Endangered and Threatened Plants to read as follows:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common Name						
FLOWERING PLANTS							
*	*	*	*	*	*		*
Ipomopsis polyantha.	Pagosa skyrocket ..	U.S.A. (CO)	Polemoniaceae	E	792	17.96(a)	NA
*	*	*	*	*	*		*
Penstemon debilis	Parachute beardtongue.	U.S.A. (CO)	Plantaginaceae	T	792	17.96(a)	NA
*	*	*	*	*	*		*
Phacelia submutica	DeBeque phacelia	U.S.A. (CO)	Hydrophyllaceae	T	792	17.96(a)	NA
*	*	*	*	*	*		*

■ 3. In § 17.96, amend paragraph (a) by adding entries for ''*Phacelia submutica* (DeBeque phacelia)'' in alphabetical order under Family Hydrophyllaceae, ''*Penstemon debilis* (Parachute penstemon)'' in alphabetical order under Family Plantaginaceae, and ''*Ipomopsis polyantha* (Pagosa skyrocket)'' in alphabetical order under Family Polemoniaceae, to read as follows:

§ 17.96 Critical habitat—plants.

(a) *Flowering plants.*

* * * * *

Family Hydrophyllaceae: *Phacelia submutica* (DeBeque phacelia)

(1) Critical habitat units are designated for Garfield and Mesa Counties, Colorado.

(2) The primary constituent elements of the physical and biological features essential to the conservation of *Phacelia submutica* consist of five components:

(i) *Suitable soils and geology.*

(A) Atwell Gulch and Shire members of the Wasatch formation.

(B) Within these larger formations, small areas (from 10 to 1,000 ft^2 (1 to 100 m^2)) on colorful exposures of chocolate to purplish brown, light to dark charcoal gray, and tan clay soils. These small areas are slightly different in texture and color than the similar surrounding soils. Occupied sites are characterized by alkaline (pH range from 7 to 8.9) soils with higher clay content than similar nearby unoccupied soils.

(C) Clay soils that shrink and swell dramatically upon drying and wetting and are likely important in the maintenance of the seed bank.

(ii) *Topography.* Moderately steep slopes, benches, and ridge tops adjacent to valley floors. Occupied slopes range from 2 to 42 degrees with an average of 14 degrees.

(iii) *Elevation and climate.*

(A) Elevations from 4,600 ft (1,400 m) to 7,450 ft (2,275 m).

(B) Climatic conditions similar to those around DeBeque, Colorado, including suitable precipitation and temperatures. Annual fluctuations in moisture (and probably temperature) greatly influences the number of *Phacelia submutica* individuals that grow in a given year and are thus able to set seed and replenish the seed bank.

(iv) *Plant community.*

(A) Small (from 10 to 1,000 ft^2 (1 to 100 m^2)) barren areas with less than 20 percent plant cover in the actual barren areas.

(B) Presence of appropriate associated species that can include (but are not limited to) the natives *Grindelia fastigiata, Eriogonum gordonii, Monolepis nuttalliana,* and *Oenothera caespitosa.* Some presence, or even domination by, invasive nonnative species, such as *Bromus tectorum,* may occur, as *Phacelia submutica* may still be found there.

(C) Appropriate plant communities within the greater pinyon-juniper woodlands that include:

(1) Clay badlands within the mixed salt desert scrub; or

(2) Clay badlands within big sagebrush shrublands.

(v) *Maintenance of the seed bank and appropriate disturbance levels.*

(A) Within suitable soil and geologies (see paragraph (2)(i) of this entry), undisturbed areas where seed banks are left undamaged.

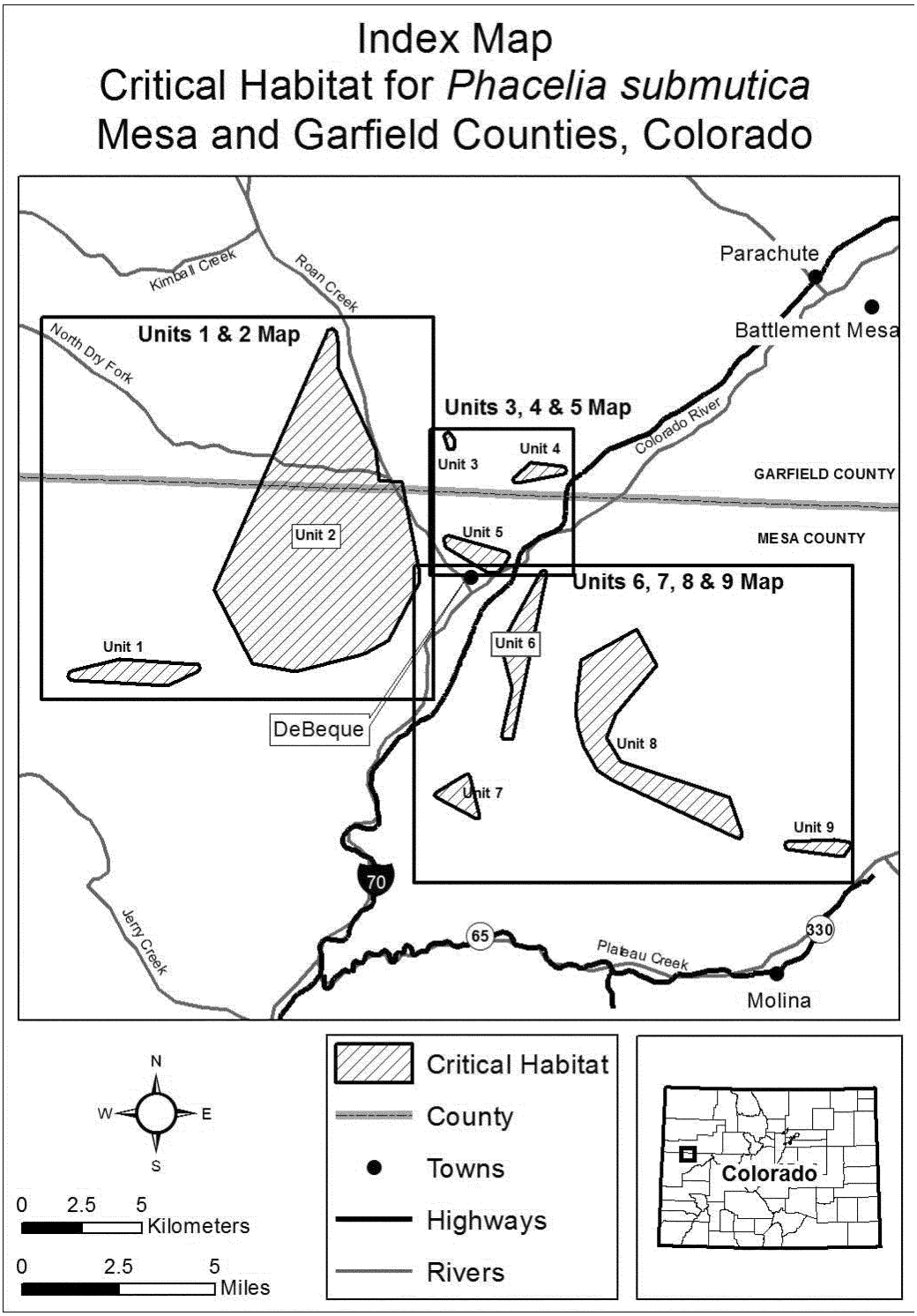
(B) Areas with light disturbance when dry and no disturbance when wet.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on September 12, 2012.

(4) *Critical habitat map units.* Data layers defining map units were created on a base of both satellite imagery (NAIP 2009) as well as USGS geospatial quadrangle maps and were mapped using NAD 83 Universal Transverse Mercator (UTM), zone 13N coordinates. Location information came from a wide array of sources. A habitat model prepared by the Colorado Natural Heritage Program also was utilized. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public on *http://regulations.gov* at Docket No. FWS–R6–ES–2011–0040, on our Internet site (*http://www.fws.gov/mountain-prairie/species/plants/3ColoradoPlants/index.html*), and at the Western Colorado Ecological Services Office, 764 Horizon Drive, Suite B, Grand Junction, CO 81506–3946.

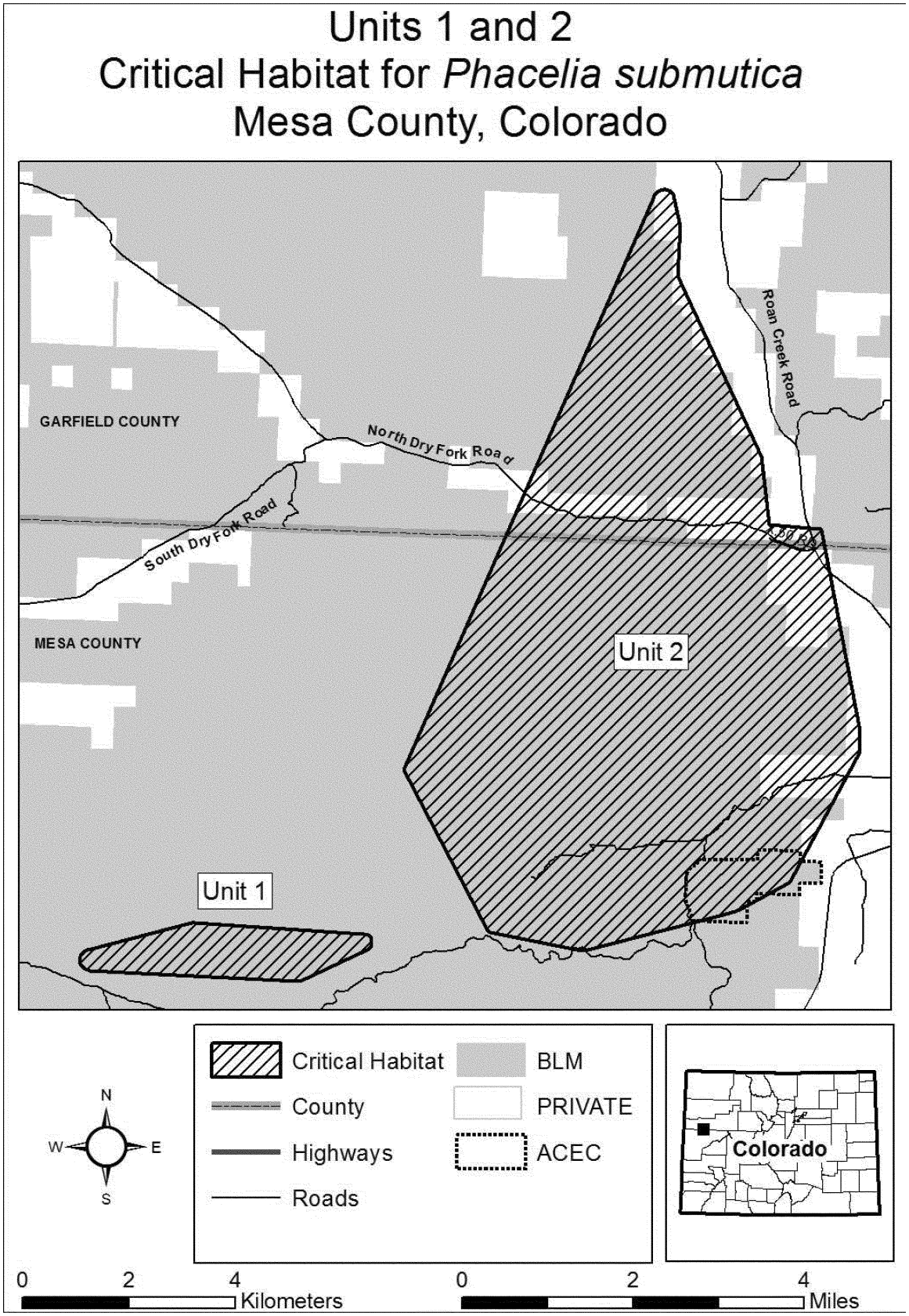
(5) **Note:** Index map follows:

BILLING CODE 4310–55–P



(6) Unit 1: Sulfur Gulch, Mesa County, Colorado. **Note:** Map of Unit 1 of critical habitat for *Phacelia submutica* is provided at paragraph (7) of this entry.

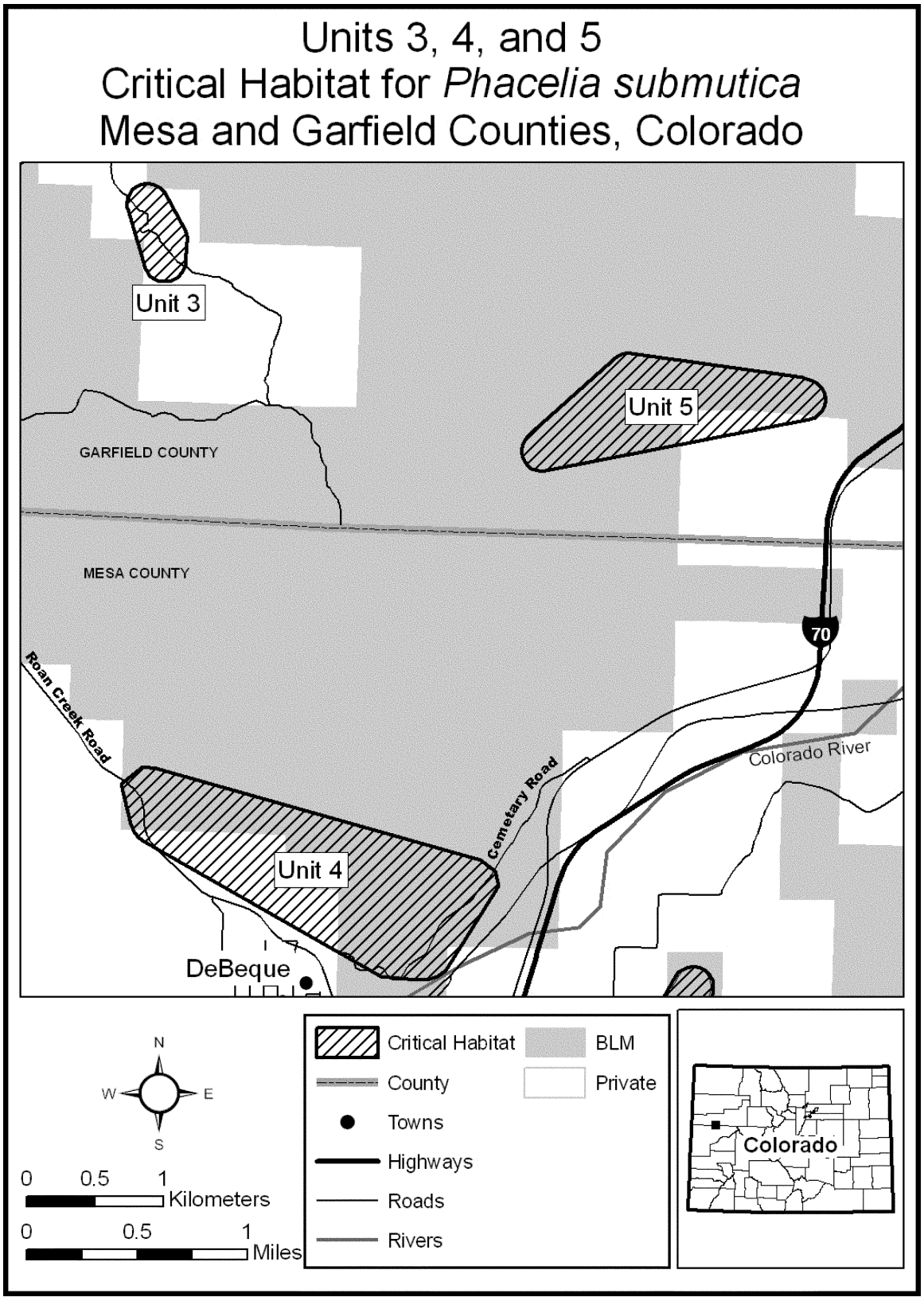
(7) Unit 2: Pyramid Rock, Garfield and Mesa Counties, Colorado. **Note:** Map of Units 1 and 2 of critical habitat for *Phacelia submutica* follows:


Units 1 and 2
Critical Habitat for *Phacelia submutica*
Mesa County, Colorado
GARFIELD COUNTY
MESA COUNTY
North Dry Fork Road
South Dry Fork Road
Roan Creek Road
Unit 1
Unit 2
Critical Habitat
County
Highways
Roads
BLM
PRIVATE
ACEC
N
W
E
S
Colorado
0 2 4
Kilometers
0 2 4
Miles

(8) Unit 3: Roan Creek, Garfield County, Colorado. **Note:** Map of Unit 3 of critical habitat for *Phacelia submutica* is provided at paragraph (10) of this entry.

(9) Unit 4: DeBeque, Mesa County, Colorado. **Note:** Map of Unit 4 of critical habitat for *Phacelia submutica* is provided at paragraph (10) of this entry.

(10) Unit 5: Mount Logan, Garfield County, Colorado. **Note:** Map of Units 3, 4, and 5 of critical habitat for *Phacelia submutica* follows:

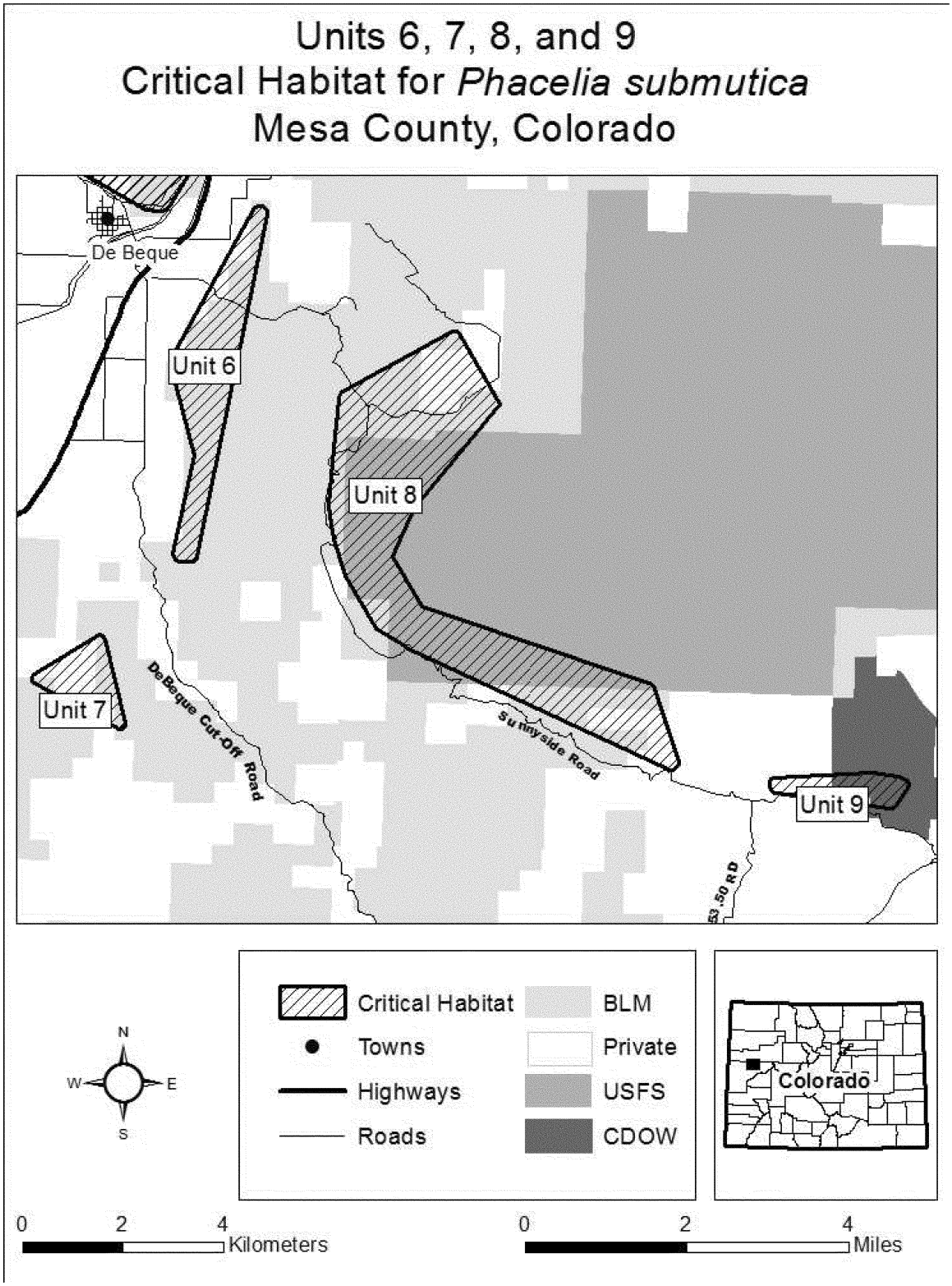


(11) Unit 6: Ashmead Draw, Mesa County, Colorado. **Note:** Map of Unit 6 of critical habitat for *Phacelia submutica* is provided at paragraph (14) of this entry.

(12) Unit 7: Baugh Reservoir, Mesa County, Colorado. **Note:** Map of Unit 7 of critical habitat for *Phacelia submutica* is provided at paragraph (14) of this entry.

(13) Unit 8: Horsethief Mountain, Mesa County, Colorado. **Note:** Map of Unit 8 of critical habitat for *Phacelia submutica* is provided at paragraph (14) of this entry.

(14) Unit 9: Anderson Gulch, Mesa County, Colorado. **Note:** Map of Units 6, 7, 8, and 9 of critical habitat for *Phacelia submutica* follows:



* * * * *

Family Plantaginaceae: *Penstemon debilis* (Parachute penstemon)

(1) Critical habitat units are designated for Garfield County, Colorado.

(2) The primary constituent elements of the physical and biological features essential to the conservation of *Penstemon debilis* consist of five components:

(i) *Suitable soils and geology.*

(A) Parachute Member and the Lower Part of the Green River Formation.

(B) Appropriate soil morphology characterized by a surface layer of small to moderate shale channers (small flagstones) that shift continually due to the steep slopes and below a weakly developed calcareous, sandy to loamy layer with 40 to 90 percent coarse material.

(ii) *Elevation and climate.* Elevations from 5,250 to 9,600 ft (1,600 to 2,920 m). Climatic conditions similar to those of the Mahogany Bench, including suitable precipitation and temperatures.

(iii) *Plant community.*

(A) Barren areas with less than 10 percent plant cover.

(B) Other oil shale endemics, which can include: *Mentzelia rhizomata, Thalictrum heliophilum, Astragalus lutosus, Lesquerella parviflora, Penstemon osterhoutii,* and *Festuca dasyclada.*

(C) Presence of *Penstemon caespitosa* for support of pollinators and connectivity between sites.

(iv) *Habitat for pollinators.*

(A) Pollinator ground, twig, and mud nesting areas. Nesting and foraging habitats suitable for a wide array of pollinators and their life-history and nesting requirements. A mosaic of native plant communities and habitat types generally would provide for this diversity (see paragraph (2)(iii) of this entry). These habitats can include areas outside of the soils identified in paragraph (2)(i) of this entry.

(B) Connectivity between areas allowing pollinators to move from one population to the next within units.

(C) Availability of other floral resources such as other flowering plant species that provide nectar and pollen for pollinators. Grass species do not provide resources for pollinators.

(D) A 3,280-ft (1,000-m) area beyond occupied habitat to conserve the pollinators essential for plant reproduction.

(v) *High levels of natural disturbance.*

(A) Very little to no soil formation.

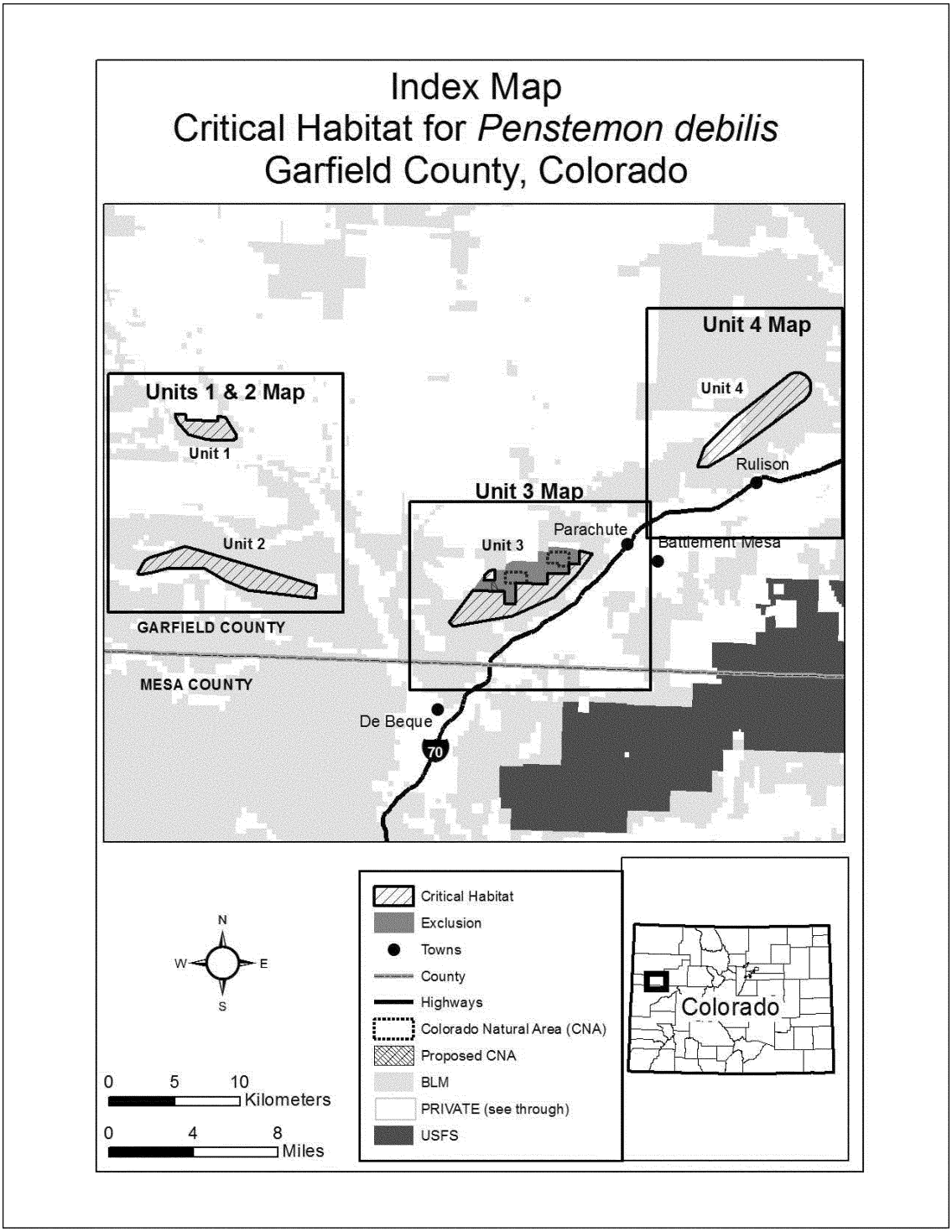
(B) Slow to moderate but constant downward motion of the oil shale that maintains the habitat in an early successional state.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on September 12, 2012.

(4) *Critical habitat map units.* Data layers defining map units were created on a base of both satellite imagery (NAIP 2009) as well as USGS geospatial quadrangle maps and were mapped using NAD 83 Universal Transverse Mercator (UTM), zone 13N coordinates. Location information came from a wide array of sources. Geology, soil, and landcover layers also were utilized. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public on *http://regulations.gov* at Docket No. FWS–R6–ES–2011–0040, on our Internet site (*http://www.fws.gov/mountain-prairie/species/plants/3ColoradoPlants/index.html*), and at the Western Colorado Ecological Services Office, 764 Horizon Drive, Suite B, Grand Junction, CO 81506–3946.

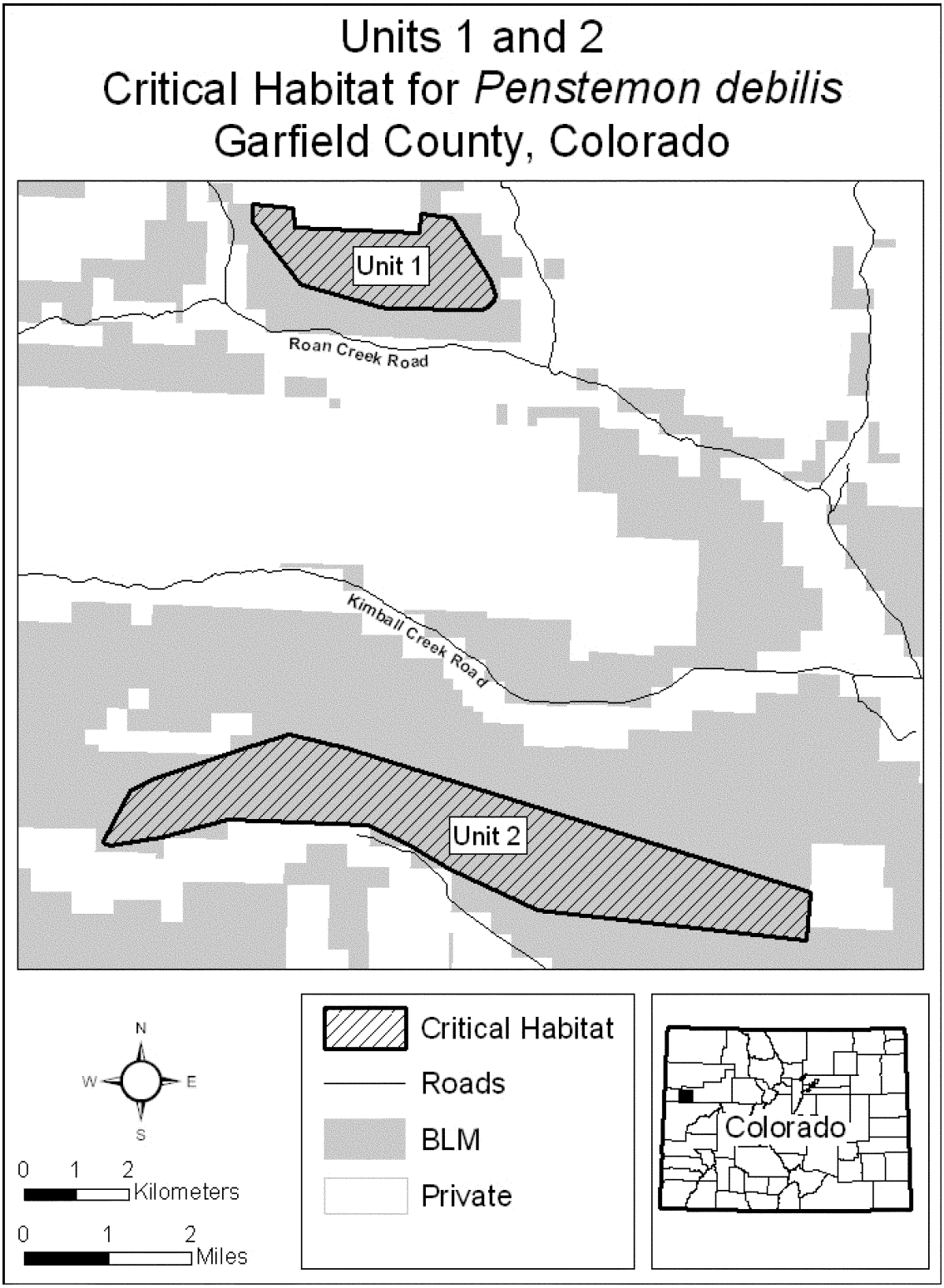
(5) **Note:** Index map of critical habitat for *Penstemon debilis* follows:

BILLING CODE 4310–55–P

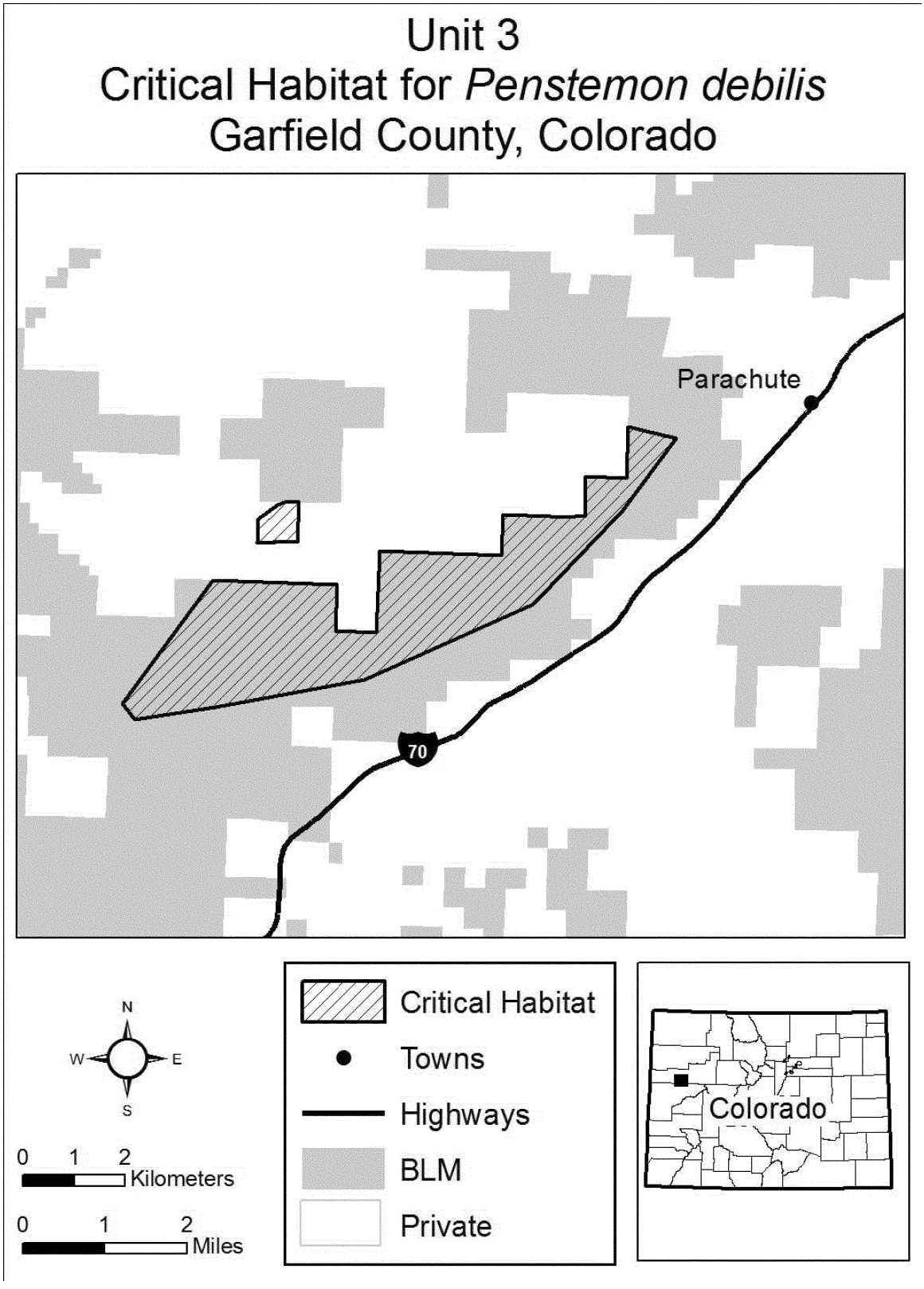


(6) Unit 1: Brush Mountain, Garfield County, Colorado. **Note:** Map of Unit 1 of critical habitat for *Penstemon debilis* is provided at paragraph (7) of this entry.

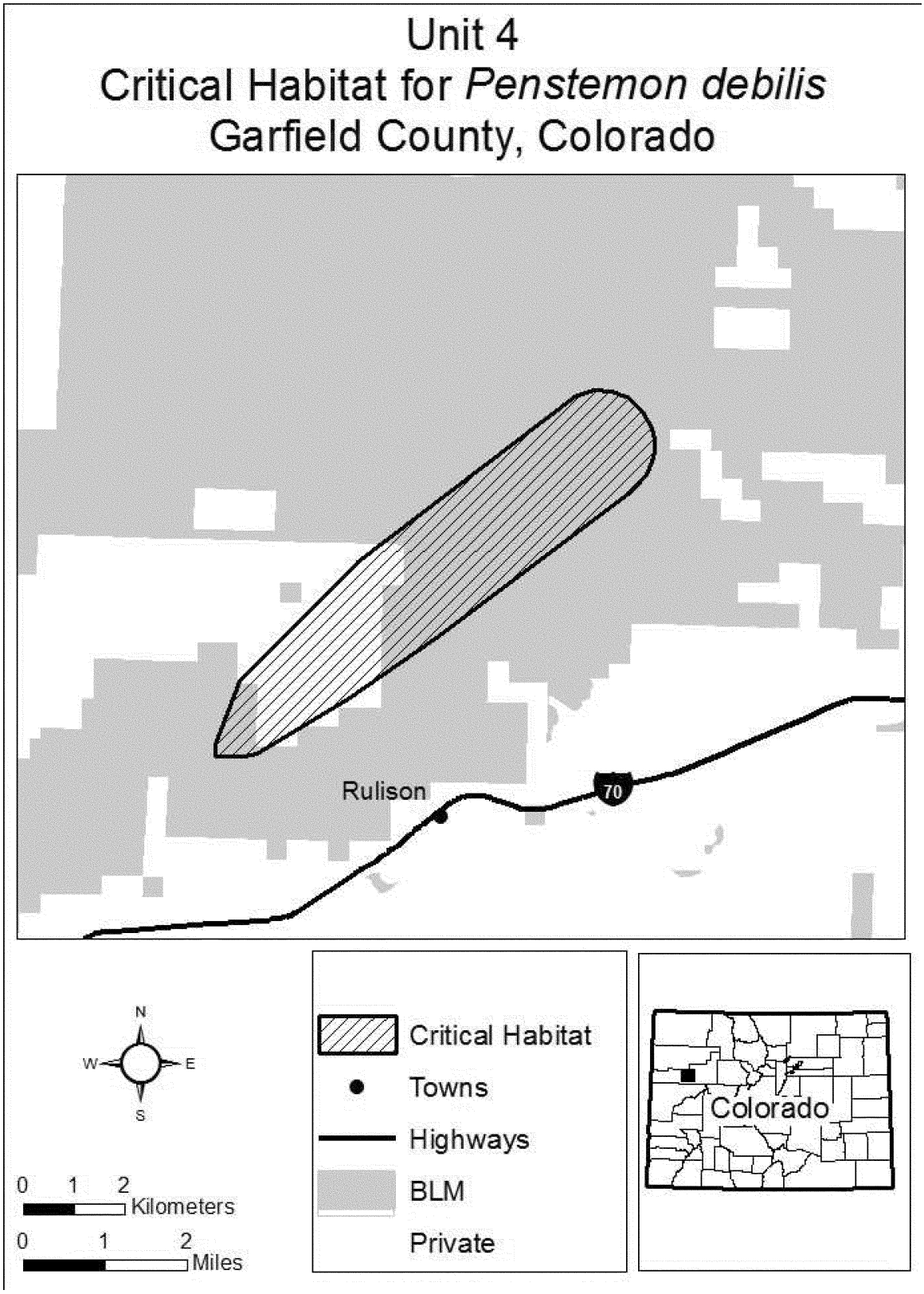
(7) Unit 2: Cow Ridge, Garfield County, Colorado. **Note:** Map of Units 1 and 2 of critical habitat for *Penstemon debilis* follows:



(8) Unit 3: Mount Callahan, Garfield County, Colorado. **Note:** Map of Unit 3 of critical habitat for *Penstemon debilis* follows:



(9) Unit 4: Anvil Points, Garfield County, Colorado. **Note:** Map of Unit 4 of critical habitat for *Penstemon debilis* follows:


Unit 4
Critical Habitat for *Penstemon debilis*
Garfield County, Colorado
Rulison
70
N
W
E
S
0 1 2
Kilometers
0 1 2
Miles
Critical Habitat
Towns
Highways
BLM
Private
Colorado

* * * * *

Family Polemoniaceae: *Ipomopsis polyantha* (Pagosa skyrocket)

(1) Critical habitat units are designated for Archuleta County, Colorado.

(2) The primary constituent elements of the physical and biological features essential to the conservation of *Ipomopsis polyantha* consist of five components:

(i) *Mancos shale soils.*

(ii) *Elevation and climate.* Elevations from 6,400 to 8,100 ft (1,950 to 2,475 m) and current climatic conditions similar to those that historically occurred around Pagosa Springs, Colorado. Climatic conditions include suitable precipitation; cold, dry springs; and winter snow.

(iii) *Plant community.*

(A) Suitable native plant communities (as described in paragraph (2)(iii)(B) of this entry) with small (less than 100 ft^2 (10 m^2)) or larger (several hectares or acres) barren areas with less than 20 percent plant cover in the actual barren areas.

(B) Appropriate native plant communities, preferably with plant communities reflective of historical community composition, or altered habitats which still contain components of native plant communities. These plant communities include:

(1) Barren shales;

(2) Open montane grassland (primarily Arizona fescue) understory at the edges of open Ponderosa pine; or

(3) Clearings within the ponderosa pine/Rocky Mountain juniper and Utah juniper/oak communities.

(iv) *Habitat for pollinators.*

(A) Pollinator ground and twig nesting areas. Nesting and foraging habitats suitable for a wide array of pollinators and their life-history and nesting requirements. A mosaic of native plant communities and habitat types generally would provide for this diversity.

(B) Connectivity between areas allowing pollinators to move from one site to the next within each plant population.

(C) Availability of other floral resources, such as other flowering plant species that provide nectar and pollen for pollinators. Grass species do not provide resources for pollinators.

(D) A 3,280-ft (1,000-m) area beyond occupied habitat to conserve the pollinators essential for plant reproduction.

(v) *Appropriate disturbance regime.*

(A) Appropriate disturbance levels—Light to moderate, or intermittent or discontinuous disturbances.

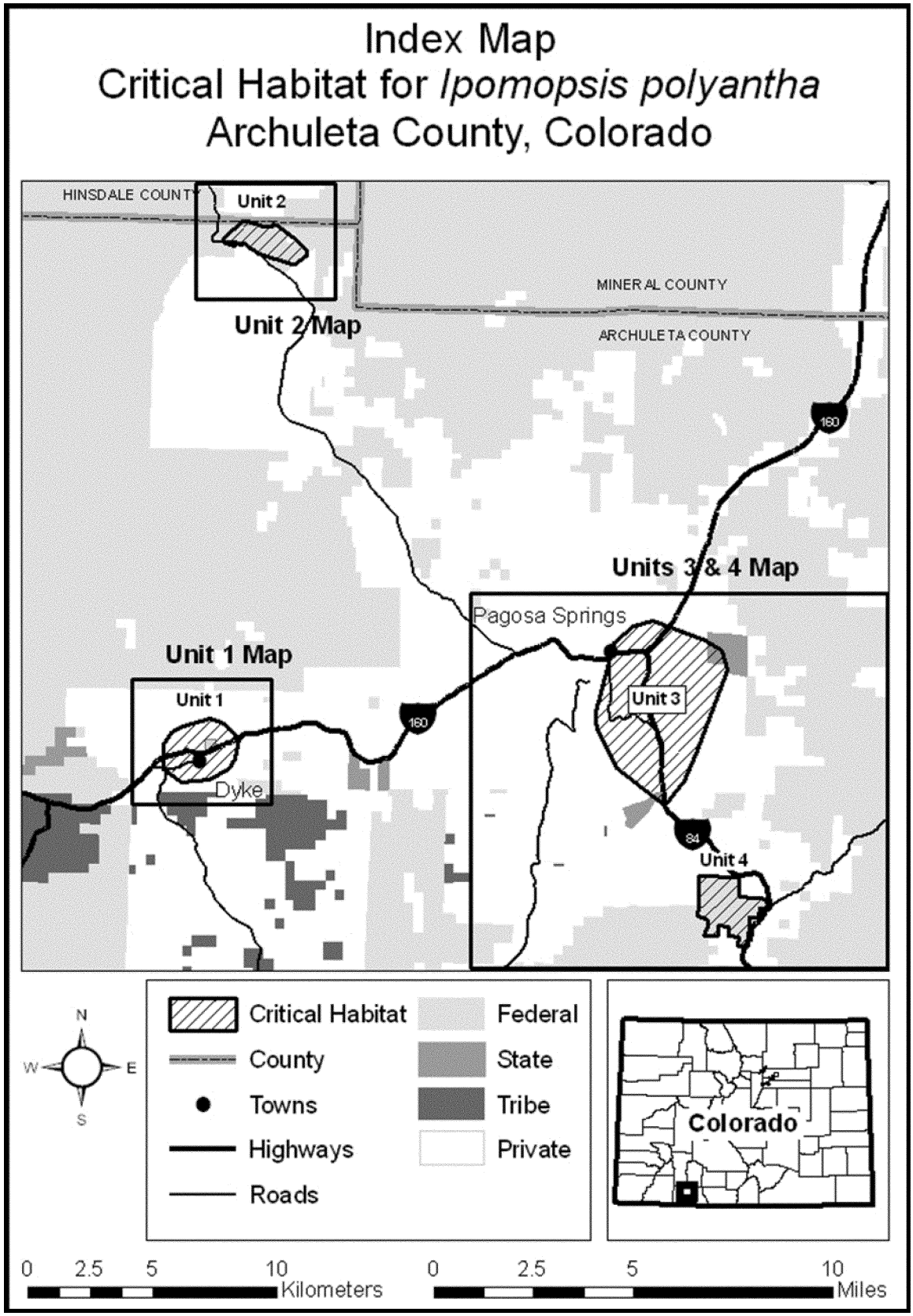
(B) Naturally maintained disturbances through soil erosion or human-maintained disturbances that can include light grazing, occasional ground clearing, and other disturbances that are not severe or continual.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on September 12, 2012. However, because *Ipomopsis polyantha* is found along the edges of roads and buildings, the edges of roads and edges of structures are included in the designation.

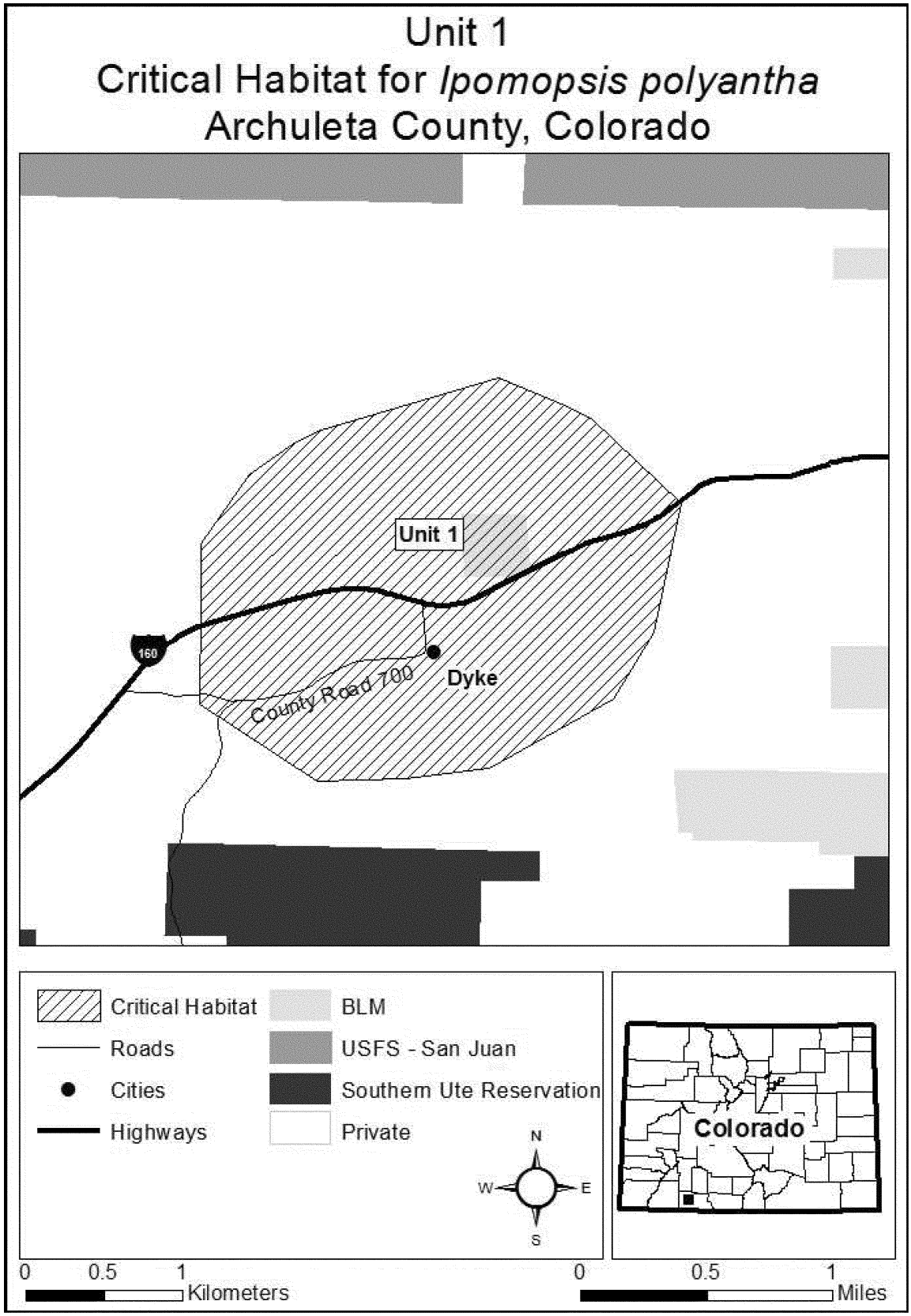
(4) *Critical habitat map units.* Data layers defining map units were created on a base of both aerial imagery (NAIP 2009) as well as USGS geospatial quadrangle maps and were mapped using NAD 83 Universal Transverse Mercator (UTM), zone 13N coordinates. Location information came from a wide array of sources. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public on *http://regulations.gov* at Docket No. FWS–R6–ES–2011–0040, on our Internet site (*http://www.fws.gov/mountain-prairie/species/plants/3ColoradoPlants/index.html*), and at the Western Colorado Ecological Services Office, 764 Horizon Drive, Suite B, Grand Junction, CO 81506–3946.

(5) **Note:** Index map of critical habitat for *Ipomopsis polyantha* follows:

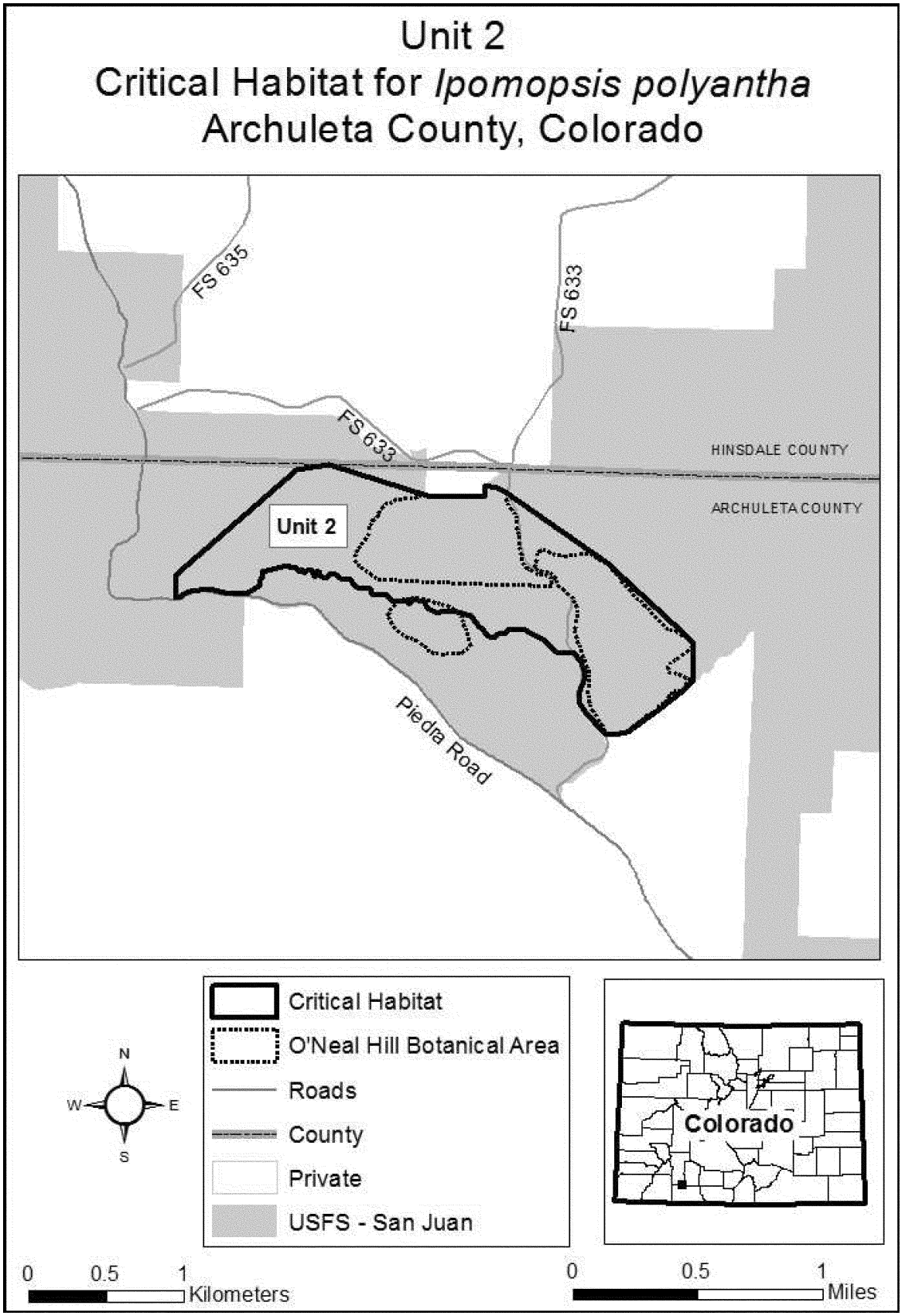
BILLING CODE 4310–55–P



(6) Unit 1: Dyke, Archuleta County, Colorado. **Note:** Map of Unit 1 of critical habitat for *Ipomopsis polyantha* follows:

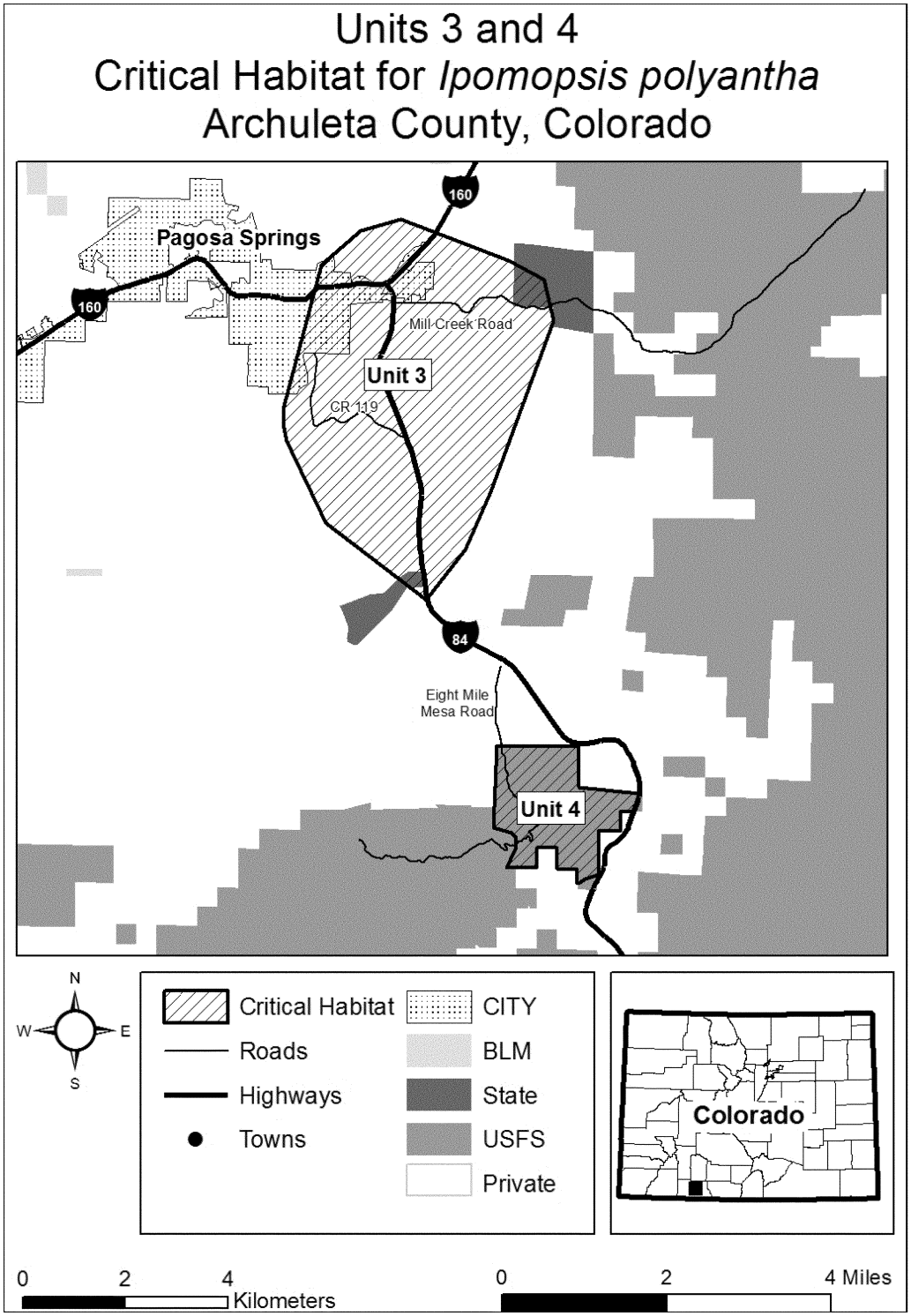


(7) Unit 2: O'Neal Hill Special Botanical Unit, Archuleta County, Colorado. **Note:** Map of Unit 2 of critical habitat for *Ipomopsis polyantha* follows:



(8) Unit 3: Pagosa Springs, Archuleta County, Colorado. **Note:** Map of Unit 3 of critical habitat for *Ipomopsis polyantha* is provided at paragraph (9) of this entry.

(9) Unit 4: Eight Mile Mesa, Archuleta County, Colorado. **Note:** Map of Units 3 and 4 of critical habitat for *Ipomopsis polyantha* follows:



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Dated: July 24, 2012.

Rachel Jacobson,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2012–18833 Filed 8–10–12; 8:45 am]

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