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## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

### 7 CFR Part 319

**[Docket No. APHIS–2011–0007]**

**RIN 0579–AD42**

## Importation of Sand Pears From China

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** We are amending the fruits and vegetables regulations to allow the importation of sand pears (*Pyrus pyrifolia*) from China into the United States. As a condition of entry, sand pears from areas in China in which the Oriental fruit fly (*Bactrocera dorsalis*) is not known to exist will have to be produced in accordance with a systems approach that includes requirements for registration of places of production and packinghouses, sourcing of pest-free propagative material, inspection for quarantine pests at set intervals by the national plant protection organization of China, bagging of fruit, safeguarding, labeling, and importation in commercial consignments. Sand pears from areas in China in which Oriental fruit fly is known to exist may be imported into the United States if, in addition to these requirements, the places of production and packinghouses have a monitoring system in place for Oriental fruit fly and the pears are treated with cold treatment. All sand pears from China will also be required to be accompanied by a phytosanitary certificate with an additional declaration stating that all conditions for the importation of the pears have been met and that the consignment of pears has been inspected and found free of quarantine pests. This action will allow for the importation of sand pears from China into the United States while continuing to provide protection against the introduction of quarantine pests.

**DATES:** *Effective Date:* January 18, 2013.

**FOR FURTHER INFORMATION CONTACT:** Dr. Farrell Wise, Supervisory Agriculturist, Regulatory Coordination and Compliance, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737; (301) 851–2280.

**SUPPLEMENTARY INFORMATION:**

### Background

The regulations in ''Subpart—Fruits and Vegetables'' (7 CFR 319.56–1 through 319.56–56, referred to below as the regulations) prohibit or restrict the importation of fruits and vegetables into the United States from certain parts of the world to prevent the introduction and dissemination of plant pests. The regulations currently allow for the importation of both Ya pears (*Pyrus bretschneideri*) and fragrant pears (*Pyrus* sp. nr. *communis*) from China.

The national plant protection organization (NPPO) of China requested that the Animal and Plant Health Inspection Service (APHIS) amend the regulations to allow sand pears [1] (*Pyrus pyrifolia*) from China also to be imported into the United States.

As part of our evaluation of China's request, we prepared a pest risk assessment (PRA), titled ''Importation of Fresh Fruit of Chinese Sand Pear, *Pyrus pyrifolia,* from China, including the Special Administrative Regions of Hong Kong and Macau, into the Entire United States, Including all Territories'' (July 2009). The PRA evaluated the risks associated with the importation of sand pears into the United States from China, and identified 16 pests of quarantine significance present in China that could be introduced into the United States through the importation of sand pears. The PRA presented a number of potential options to mitigate the risks posed by these plant pests. Based on these options, we prepared a risk management document (RMD). The RMD recommended specific measures to mitigate these risks.

Based on the recommendations of the RMD, on December 16, 2011, we published a proposed rule [2] in the **Federal Register** (76 FR 78168–78172, Docket No. APHIS–2011–0007) to authorize the importation of sand pears from China into the United States. We solicited comments concerning the proposed rule for 60 days ending February 14, 2012. We received five comments by that date. They were from the NPPO of China, a State department of agriculture, an organization representing State departments of agriculture, a technical committee representing the U.S. pear industry, and a private citizen. The comments we received are discussed below, by topic.

*Comments Regarding the Pest Risk Assessment*

The PRA identified the following pests of quarantine significance as being likely to follow the pathway on imported sand pears from China:

- *Acrobasis pyrivorella,* pear fruit moth.
- *Alternaria gaisen* Nagano, the cause of black spot of pear.
- *Amphitetranychus viennensis* (Zacher), Hawthorn spider mite.
- *Aphanostigma iaksuiense* (Kishida), an aphid.
- *Bactrocera dorsalis,* Oriental fruit fly.
- *Caleptrimerus neimongolensis* Kuang and Geng, a mite.
- *Carposina sasakii* Matsumora, peach fruit moth.
- *Ceroplastes japonicus* Green, Japanese wax scale.
- *Ceroplastes rubens* Maskell, red wax scale.
- *Congothes punctiferalis* (Guenée), yellow peach moth.
- *Grapholita inopinata,* Manchurian fruit moth.
- *Guignardia pyricola* (Nose) W. Yamamoto, a phytopathogenic fungus.
- *Monilinia fructigena* Honey in Whetzel, the cause of brown rot.
- *Phenacoccus pergandei* Cockerell, a mealybug.
- *Planococcus kraunhiae* (Kuwana), a mealybug.
- *Venturia nashicola* Tanaka & Yamamoto, pear scab fungus.

One commenter stated that recent research conducted on diseases of *Malus* spp. has discovered that the

[1] We previously referred to *Pyrus pyrifolia* as ''Chinese sand pear.'' However, we have discovered that the accepted international nomenclature for *Pyrus pyrifolia* is simply ''sand pear.'' Hence, throughout this document, we refer to *Pyrus pyrifolia* as sand pear.

[2] To view the proposed rule, supporting documents, and the comments we received, go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2011-0007.*

causal agent of apple and pear ring spot, which had long been considered to be *G. pyricola* (Nose) W. Yamamoto, is in fact *Botryosphaeria dothidea.* The commenter pointed out that *B. dothidea* is widely prevalent in the United States, and stated that it thus should not be considered a pest of quarantine significance. The commenter also stated that, based on this research, *G. pyricola* should not be considered a pest of quarantine significance for sand pears from China. The commenter cited a peer-reviewed article [3] (referred to below as Tang *et al.*) detailing the research that had been conducted.

We agree that Tang *et al.* provides evidence in support of *B. dothidea* being a causal agent of apple ring spot. However, we do not consider this evidence sufficient to remove *G. pyricola* from the list of pests of quarantine significance for sand pears from China. The research detailed in Tang *et al.* appears to have focused primarily on *Malus* spp. Researchers included only a few fungi of *Pyrus* spp. for evaluation, and the discussion section of Tang *et al.* refers exclusively to fungi isolated from *Malus* spp. It is even unclear whether *B. dothidea* was the only *Botryosphaeria* species that researchers isolated from *Pyrus* spp.

The scope and nature of the research conducted on *Pyrus* spp. is unclear in Tang *et al.* In order for us to consider removing *G. pyricola* from the list of pests of quarantine significance for sand pears from China, Tang *et al.* would have to specify that the research conducted on *Malus* spp. is directly applicable to *Pyrus* spp. It does not do so; hence we continue to consider *G. pyricola* a pest of quarantine significance for sand pears from China.

Another commenter stated that the list of pests of quarantine significance for sand pears from China should be expanded to include two additional pests, *Alternaria yaliinficiens,* a phytopathogenic fungus, and *Monilia polystroma,* the cause of Asiatic brown rot. The commenter pointed out that *A. yaliinficiens* is frequently detected on Ya pears in China, and *M. polystroma,* a well-documented pest of sand pears, is known to exist in China.

We have been able to find no evidence suggesting that sand pears are a host of *A. yaliinficiens,* and the commenter did not provide any references on this subject. Ya pears are *Pyrus bretschneideri,* a separate species from sand pears.

We agree that *M. polystroma* is known to exist in China, and sand pears are a known host of this pest. However, to date, *M. polystroma* has only been detected in Heilongjiang province. This province does not produce sand pears for export and is geographically isolated from the provinces in China that account for the bulk of pear exports from China, Hebei and Shandong. There is, moreover, no evidence of artificial spread of *M. polystroma* within China. For these reasons, at this time, we do not consider *M. polystroma* likely to follow the pathway of sand pears imported from China. We will, however, continue to monitor the presence of *M. polystroma* in China and, if necessary, take appropriate action to prevent its introduction.

A commenter asked that the PRA be updated to include a list of all pests of quarantine significance that have been detected on sand pears from China exported to other countries.

Foreign countries are free to designate plant pests as being of quarantine significance, without reference to the designations of other countries. Thus, there is no guarantee that a foreign country's pest list for sand pears is equivalent to our own. Moreover, foreign countries' conditions for importation of fruits and vegetables often vary significantly from those of the United States. Accordingly, a foreign country's pest interception data for a particular commodity should not be considered a reliable predictor of possible pest interceptions for that same commodity at ports of entry within the United States. We are therefore not amending the PRA in the manner requested by the commenter.

The same commenter pointed out that the PRA contained a list of pest interceptions on Ya and fragrant pears from China imported into the United States between 1995 and 2009, but this list did not include information for 2010 or 2011. The commenter also pointed out that the list did not group detections based on the port of entry at which the pest was detected. The commenter asked that the list be updated to include information through 2011 and to sort this information by port of entry.

We do not consider such updates to be necessary. Interceptions in 2010 and 2011 do not disclose any additional pests of quarantine significance that had not previously been detected on the pears. Moreover, the list was provided in order to illustrate the starting point from which we conducted our evaluation of the pests of quarantine significance that could follow the pathway on sand pears from China imported into the United States. Hence, changing the scope of the list or its presentation would not alter the results of our evaluation.

*Comments Regarding the Proposed Rule*

One commenter stated that, based on the number of pests of quarantine significance likely to follow the pathway on sand pears imported into the United States from China, the plant pest risk associated with the importation of sand pears from China was significant, and we should therefore not authorize such importation.

Similarly, two commenters stated that the proposed conditions for importation of sand pears from China in the proposed rule did not take into consideration the unique climate of Florida, which the commenters asserted is more conducive to the establishment of fruit flies than that of other States. The commenters pointed out that imported fruit containing dead fruit fly larvae had been discovered in Florida, and stated that these detections call into question the efficacy of APHIS' systems approaches for these pests.

We agree that there are many pests on the pest list for sand pears from China, and one of these, *B. dorsalis,* could become established in Florida, if introduced. However, for the reasons described in the RMD that accompanied the proposed rule, we have determined that the measures specified in the proposed rule will effectively mitigate the risk associated with the importation of sand pears from China into any area of the United States. The commenters did not provide any evidence suggesting that the mitigations are not effective.

To that end, we note that the discovery of dead larvae in imported fruit does not call into question the efficacy of the systems approaches under which the fruit has been imported. Rather, it suggests the systems approaches have been effective in neutralizing the larvae.

A commenter asked whether the proposed rule had provisions that would address the risk that *V. nashicola* or *M. fructigena* would follow the pathway on sand pears from China.

As detailed in the RMD that accompanied the proposed rule, there are several provisions of the proposed rule that address the risk posed by phytopathogenic fungi such as *V. nashicola* and *M. fructigena.* These include: Registration of places of production and packinghouses with the NPPO of China, inspections for quarantine pests at set intervals, bagging of fruit, safeguarding, labeling, and importation in commercial consignments.

[3] Tang *et al.,* ''Phylogenetic and pathogenic analyses show that the causal agent of apple ring rot in China is *Botryosphaeria dothidea,*'' *Plant Disease* 4 (April 2012), 486–497.

One commenter stated that fertility management, that is, the use of nutrient-rich soil composed primarily of decaying organic matter, has been demonstrated to be effective in reducing population densities of certain plant pests on host plants. The commenter suggested that fertility management be explored as an alternative to the systems approach of the proposed rule, or, at least, certain provisions of that approach.

APHIS will continue to monitor the efficacy of this and other possible mitigation measures for sand pears from China. If we determine alternate measures to be effective in reducing the risk associated with the importation of sand pears from China, we may initiate rulemaking to add them to the regulations.

In the proposed rule, we proposed to require all sand pears imported into the United States from China to be grown at places of production that are registered with the NPPO of China. We also proposed that the NPPO of China would have to inspect registered places of production prior to harvest for signs of infestations and allow APHIS to monitor the inspections. Finally, we proposed that, if any of the pests of quarantine significance likely to follow the pathway on sand pears from China were detected at a registered place of production, we could reject individual consignments from that place of production or prohibit the importation of sand pears from the place of production for the remainder of the season.

The NPPO of China stated that it had entered into a memorandum of understanding (MOU) with APHIS regarding inspections of sand pears that would take place at ports of entry in the United States if the proposed rule was finalized. The NPPO stated that it was their understanding that these port-of-entry inspections obviated pre-harvest inspections of registered places of production. Accordingly, the NPPO asked that we modify the proposed rule to remove references to such pre-harvest inspections.

We are making no change in response to this comment. The MOU referenced by the NPPO pertains to general inspections of imported fruits and vegetables that APHIS conducts in accordance with § 319.56–3 of the regulations. As specified in the MOU, such inspections are meant to complement, rather than supplant, the provisions of the proposed rule, including pre-harvest inspections of registered places of production. Moreover, we note that such pre-harvest inspections are necessary not only to prevent infested fruit from being imported to the United States, but also so that APHIS has assurances that places of production have implemented and are maintaining all provisions of the proposed rule that pertain to them, such as bagging of sand pears destined for export to the United States.

**Miscellaneous**

In our December 2011 proposed rule, proposed paragraph (f)(1) of § 319.56–55 contained minimum requirements for the trapping systems that places of production and packinghouses would need to have in place for *B. dorsalis* in order to export sand pears from areas in China south of the 33rd parallel to the United States. Additionally, proposed paragraph (f)(4) proposed to require pears from such areas to be treated in accordance with 7 CFR part 305, which contains our requirements governing approved treatments of imported commodities.

Since the proposed rule was issued, we have adopted a general Agency policy of adding minimum trapping requirements to operational workplans. Among other reasons, this allows us to change the frequency and distance at which traps must be placed in response to changes in population densities for *B. dorsalis* in an exporting region. We have also begun to add standards for application of treatments to operational workplans; among other reasons, this allows us to prescribe in greater detail best practices for the application of various treatments.

Hence, in this final rule, we are amending paragraph (f)(1) to specify that the trapping systems must meet the requirements of the operational workplan, and (f)(3) to specify the treatments must be applied in accordance with not only 7 CFR part 305 but also the operational workplan.

In the proposed rule, we proposed to add the conditions governing the importation of sand pears from China as § 319.56–55. In this final rule, they are added as § 319.56–57.

Therefore, for the reasons given in the proposed rule and in this document, we are adopting the proposed rule as a final rule, with the change discussed in this document.

**Executive Order 12866 and Regulatory Flexibility Act**

This final rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

In accordance with 5 U.S.C. 604, we have performed a final regulatory flexibility analysis, which is summarized below, regarding the economic effects of this rule on small entities. Copies of the full analysis are available on the Regulations.gov Web site (see footnote 2 in this document for a link to Regulations.gov) or by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

This rule will amend the regulations to allow, under certain conditions, the importation into the United States of sand pear from China. This fruit is produced in the United States in limited quantities, primarily in Illinois, Virginia, West Virginia, and Maryland.

Farms producing pears are classified within the North American Industry Classification System under Other Noncitrus Fruit Farming. The average 2007 market value of crops sold by farms classified within the industry Fruit and Tree Nut Farming (which includes Other Noncitrus Fruit Farming) was less than $188,000, an amount well below the Small Business Administration's small-entity standard of annual receipts of not more than $750,000. We infer that the majority of farms producing pears, including sand pears, are small entities.

China is expecting to export 24,000 metric tons of sand pear annually to the United States. This amount is less than 5 percent of average annual production of all varieties of pear produced in the United States. We do not know the quantity or value of sand pear produced in the United States, or the quantity or value of sand pear imported from other countries. Nor do we know the substitutability of sand pear for other types of pears produced domestically. While the United States is a net exporter of pears overall, it is likely that the U.S. supply of sand pear is largely imported. Without information on the domestic and foreign quantities supplied and the substitutability of sand pear for other pear varieties, we are unable to evaluate potential effects of the rule for U.S. producers.

**Executive Order 12988**

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

**Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this rule have been approved by the

Office of Management and Budget (OMB) under OMB control number 0579–0390.

**E-Government Act Compliance**

The Animal and Plant Health Inspection Service is committed to compliance with the EGovernment Act 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. For information pertinent to E-Government Act compliance related to this rule, please contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

**Lists of Subjects in 7 CFR Part 319**

Coffee, Cotton, Fruits, Imports, Logs, Nursery stock, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Rice, Vegetables.

Accordingly, we are amending 7 CFR part 319 as follows:

## PART 319—FOREIGN QUARANTINE NOTICES

■ 1. The authority citation for part 319 continues to read as follows:

**Authority:** 7 U.S.C. 450, 7701–7772, and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

■ 2. A new § 319.56–57 is added to read as follows:

### § 319.56–57 Sand pears from China.

Fresh sand pears (*Pyrus pyrifolia*) from China may be imported into the United States from China only under the conditions described in this section. These conditions are designed to prevent the introduction of the following quarantine pests: *Acrobasis pyrivorella,* pear fruit moth; *Alternaria gaisen* Nagano, the cause of black spot of sand pear; *Amphitetranychus viennensis* (Zacher), Hawthorn spider mite; *Aphanostigma iaksuiense* (Kishida), an aphid; *Bactrocera dorsalis,* Oriental fruit fly; *Caleptrimerus neimongolensis* Kuang and Geng, a mite; *Carposina sasakii* Matsumora, peach fruit moth; *Ceroplastes japonicus* Green, Japanese wax scale; *Ceroplastes rubens* Maskell, red wax scale; *Conogothes punctiferalis* (Guenée), yellow peach moth; *Grapholita inopinata,* Manchurian fruit moth; *Guignardia* pyricola (Nose) W. Yamamoto, a phytopathogenic fungus; *Monilinia fructigena* Honey in Whetzel, the cause of brown fruit rot; *Phenacoccus pergandei* Cockerell, a mealybug; *Planococcus kraunhiae* (Kuwana), a mealybug; and *Venturia nashicola* Tanaka and Yamamoto, pear scab fungus. The conditions for importation of all fresh sand pears from China are found in paragraphs (a) through (e) of this section; additional conditions for sand pears imported from areas of China south of the 33rd parallel are found in paragraph (f) of this section.

(a) *General requirements.* (1) The national plant protection organization (NPPO) of China must provide an operational workplan to APHIS that details the activities that the NPPO of China will, subject to APHIS' approval of the workplan, carry out to meet the requirements of this section.

(2) The pears must be grown at places of production that are registered with the NPPO of China.

(3) The pears must be packed for export to the United States in pest-exclusionary packinghouses that are registered with the NPPO of China.

(4) Sand pears from China may be imported in commercial consignments only.

(b) *Place of production requirements.* (1) All propagative material entering a registered place of production must be tested and certified by the NPPO of China as being free of quarantine pests.

(2) The place of production must carry out any phytosanitary measures specified for the place of production under the operational workplan.

(3) When any sand pears destined for export to the United States are still on the tree and are no more than 2.5 centimeters in diameter, double-layered paper bags must be placed wholly over the pears. The bags must remain intact and on the pears until the pears arrive at the packinghouse.

(4) The NPPO of China must visit and inspect registered places of production prior to harvest for signs of infestations and allow APHIS to monitor the inspections. The NPPO must provide records of pest detections and pest detection practices to APHIS, and APHIS must approve these practices.

(5) If any of the quarantine pests listed in the introductory text of this section is detected at a registered place of production, APHIS may reject the consignment or prohibit the importation into the United States of sand pears from the place of production for the remainder of the season. The exportation to the United States of sand pears from the place of production may resume in the next growing season if an investigation is conducted and APHIS and the NPPO conclude that appropriate remedial action has been taken.

(c) *Packinghouse requirements.* (1) During the time registered packinghouses are in use for packing sand pears for export to the United States, the packinghouses may only accept sand pears that are from registered places of production and that are produced in accordance with the requirements of this section.

(2) Packinghouses must have a tracking system in place to readily identify all sand pears that enter the packinghouse destined for export to the United States back to their place of production.

(3) The NPPO of China or officials authorized by the NPPO must inspect the pears for signs of pest infestation and allow APHIS to monitor the inspections. If any of the quarantine pests listed in the introductory text of this section is detected in a consignment at the packinghouse, APHIS may reject the consignment.

(4) Following the inspection, the packinghouse must follow a handling procedure for the pears that is mutually agreed upon by APHIS and the NPPO of China.

(5) The pears must be packed in cartons that are labeled with the identity of the place of production and the packinghouse.

(6) The cartons must be placed in insect-proof containers, and the containers sealed. The containers of sand pears must be safeguarded during transport to the United States in a manner that will prevent pest infestation.

(d) *Shipping requirements.* Sealed containers of sand pears destined for export to the United States must be held in a cold storage facility while awaiting export.

(e) *Phytosanitary certificate.* Each consignment of sand pears imported from China into the United States must be accompanied by a phytosanitary certificate issued by the NPPO of China with an additional declaration stating that the requirements of this section have been met and the consignment has been inspected and found free of quarantine pests.

(f) *Additional conditions for sand pears from areas of China south of the 33rd parallel.* In addition to the conditions in paragraphs (a) through (e) of this section, sand pears from areas of China south of the 33rd parallel must meet the following conditions for importation into the United States:

(1) The place of production of the pears and the packinghouse in which they are packed must have a trapping system in place for *B. dorsalis.* At a minimum, the trapping system must meet the requirements of the operational work plan.

(2) The place of production or the packinghouse must retain data regarding the number and location of the traps, as

well as any pests other than *B. dorsalis* that have been caught, and make this information available to APHIS upon request.

(3)(i) The place of production or packinghouse must notify the NPPO of China, and the NPPO of China must notify APHIS, regarding the detection of a single *B. dorsalis* in a place of production, packinghouse, or surrounding area within 48 hours of the detection.

(ii) If a single *B. dorsalis* is detected in a registered place of production, APHIS will prohibit the importation into the United States of sand pears from the place of production until any mitigation measures determined by APHIS to be necessary to prevent future infestations are taken.

(iii) If a single *B. dorsalis* is detected in a registered packinghouse, the packinghouse may not be used to pack sand pears for export to the United States until any mitigation measures determined by APHIS to be necessary to prevent future infestations are taken.

(4) The pears must be treated in accordance with 7 CFR part 305 and the operational workplan.

(Approved by the Office of Management and Budget under control number 0579–0390.)

Done in Washington, DC, this 13th day of December 2012.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2012–30532 Filed 12–18–12; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF COMMERCE

### Bureau of Industry and Security

### 15 CFR Part 748

**[Docket No. 110331231–2684–01]**

**RIN 0694–AF19**

## Revisions to Authorization Validated End-User Provisions: Requirement for Notice of Export, Reexport or Transfer (In-Country) and Clarification Regarding Termination of Conditions on VEU Authorizations

**AGENCY:** Bureau of Industry and Security, Commerce.

**ACTION:** Final rule.

**SUMMARY:** In this rule, the Bureau of Industry and Security (BIS) amends the Export Administration Regulations (EAR) by adding a requirement for persons shipping under Authorization Validated End-User (VEU) to send written notice of such shipments to the recipient VEU. BIS further amends the EAR to clarify that when items subject to item-specific conditions under Authorization VEU no longer require a license for export or reexport or become eligible for shipment under a license exception, as set forth in the EAR, VEUs are no longer bound by the conditions associated with the original receipt of such items. On April 17, 2012, BIS published a proposed rule and requested public comments on these topics (77 FR 22689). The comment period closed June 18, 2012. BIS has addressed the public comments received in response to the proposed rule in this final rule.

**DATES:** This rule is effective January 18, 2013.

**FOR FURTHER INFORMATION CONTACT:** Karen H. Nies-Vogel, Chair, End-User Review Committee, Bureau of Industry and Security, U.S. Department of Commerce, 14th St. and Pennsylvania Avenue NW., Washington, DC 20230; by telephone: (202) 482–5991, fax: (202) 482–3911, or email: *ERC@bis.doc.gov.*

**SUPPLEMENTARY INFORMATION:**

### Background

*Authorization Validated End-User (VEU)*

Validated end-users (VEUs) are those entities located in eligible destinations to which eligible items may be exported, reexported, or transferred (in-country) under a general authorization instead of a license. VEUs and their respective eligible destinations and eligible items are identified in Supplement No. 7 to Part 748 of the EAR. VEUs may obtain eligible items without having to wait for their suppliers to obtain export licenses from BIS.

VEUs are reviewed and approved by the U.S. Government in accordance with the provisions of Section 748.15 and Supplement Nos. 8 and 9 to Part 748 of the EAR. The End-User Review Committee (ERC), composed of representatives from the Departments of State, Defense, Energy and Commerce, and other agencies, as appropriate, is responsible for administering the VEU program.

On April 17, 2012, BIS published a rule soliciting public comments on two proposed amendments to Section 748.15 of the EAR (Authorization Validated End-User (VEU)) (77 FR 22689). BIS proposed requiring persons exporting, reexporting, or transferring (in-country) under Authorization VEU to send written notification to the recipient VEU with details about their shipment within seven days of the shipment. In addition, BIS proposed explicitly clarifying in the EAR that VEUs that are subject to item-specific conditions and have received items subject to such conditions under Authorization VEU would no longer be bound by the conditions associated with the items if the items no longer require a license for export or reexport to the VEU's location or become eligible for shipment under a license exception to the destination. BIS received comments from two entities, which are summarized and responded to below.

### Comments and Responses

*Comment 1:* Both commenters indicated their overall support for the proposed changes and the VEU authorization as a whole. One commenter specifically noted that Authorization VEU had benefited a VEU and its supplier by allowing the purchase and supply of equipment to proceed without the additional lead-time issues often caused by potentially lengthy government approvals.

*Response:* BIS appreciates this input regarding the VEU program, particularly in light of BIS's efforts to improve the program and make it more effective for U.S. exporters.

*Comment 2:* Both commenters explained that individual shipments may include items shipped under ''multiple authorizations'' including Authorization VEU. They asked BIS to clarify that proposed paragraph (g) of Section 748.15 would only require that shippers notify VEUs of items shipped under Authorization VEU and not of items shipped under other authorizations in the same shipment as VEU items. Specifically, one commenter recommended that notification be required to include ''a list of the VEU authorized contents and a list of their respective ECCNs.''

*Response:* BIS recognizes that individual shipments may include items authorized for shipment or transfer under Authorization VEU as well as items being shipped under other EAR authorizations, such as licenses or license exceptions. BIS intends that the notification be required only for items shipped under Authorization VEU and not for any other items shipped with the VEU-authorized items. BIS has amended the text of Section 748.15(g) to specify that the notification requirement applies only to the ''VEU-authorized'' items in a shipment and to specify that the list suggested by the commenter be included as part of the notification.

*Comment 3:* Both commenters asked BIS to review its approach to the timing and frequency of notifications under Section 748.15(g). Both commenters recommended that BIS permit consolidated notifications under Authorization VEU, rather than require

separate notifications for each shipment under Authorization VEU. Specifically, one commenter provided a semiconductor industry-specific example of the multiple transfers of an integrated circuit's layout or design that may be necessary between a semiconductor foundry and its customer to correct design flaws prior to production. The commenter suggested that the exporter should be required to provide only a single notification for such shipments. In addition, both commenters asked that BIS clarify that notification may be made before shipment occurs. One of the commenters specifically suggested that the timing be modified to ''no later than seven days after shipment or as mutually agreed in writing by both parties.'' This commenter further suggested that BIS could require that the terms of VEU notification be included in Section 748.15(e), which requires that exporters and reexporters obtain from VEUs certifications regarding end use and compliance with VEU requirements. The commenter expressed that this approach would maximize benefits and minimize burdens associated with notification, and would ensure transparency and help to verify compliance.

*Response:* BIS has reviewed the timing and frequency of notifications and agrees that exporters, reexporters and transferors (in-country) should have the option to consolidate notifications to VEUs when multiple shipments are made under Authorization VEU. BIS therefore has included this as an option in Section 748.15(g). Further, as the timeframe for notification that is appropriate for one VEU and shipper may be inappropriate for others, BIS agrees with the commenter who suggested that notification be within a timeframe that is mutually agreed to in writing by both parties. That mutual agreement must, however, be reached prior to the shipment or transfer. With reference to the comment proposing that BIS require the notification to be included in the certification required under Section 748.15(e) of the EAR, BIS notes that the 748.15(e) certification is required under the EAR only in advance of the first shipment by a supplier to a VEU under Authorization VEU and at no other time thereafter and that while provision of the 748.15(e) certification is the sole responsibility of the VEU, advance agreement on the notification schedule is the responsibility of both the VEU and the shipper. Although a VEU and a shipper may agree to include the notification schedule in the certification, BIS will not require that the schedule be included in the certification. BIS has revised Section 748.15(g) by providing that notifications should be made within a timeframe agreed to in writing by the VEU and the shipper in advance of the initial shipment and has removed the reference to ''within seven calendar days'' of the shipment. With this modification, BIS clarifies its original intent to permit notification in advance of shipment.

*Comment 4:* One commenter expressed concern regarding BIS's explanation in the proposed rule that, ''BIS intends to improve the ability of VEUs to determine which authorization their suppliers utilized. This will enable VEUs to better determine which set of conditions governs their use of the received item(s) more efficiently, thereby increasing the VEUs' compliance.'' The commenter asked that BIS modify this explanation to make clear that the notification requirement's purpose is not to require that companies be able to distinguish between identical items sent under a VEU authorization and other types of authorization. The commenter noted that when identical parts and materials shipped or transferred under different authorizations are commingled within inventories, some VEUs ensure compliance with U.S. law by meeting the requirements of the most restrictive conditions associated with a particular stock-keeping unit (SKU) and keep track of the total quantity of items received under a specific authorization through first-in-first-out (FIFO) and other standard inventory accounting methods.

*Response:* The use of Authorization VEU requires VEUs to track items received under Authorization VEU, but does not require VEUs to distinguish between identical items sent under Authorization VEU and other types of shipping authorizations. BIS understands that, as a practical matter, individual items in inventory may not be easily or efficiently tracked, and that there are VEUs that fulfill their requirements under Authorization VEU by meeting the most restrictive conditions associated with a particular SKU and tracking the total quantity of items received under a specific authorization through the standard inventory accounting methods described by the commenter.

*Comment 5:* One commenter encouraged BIS to consider expanding the scope of Authorization VEU by implementing the VEU program in countries other than China and India.

*Response:* BIS is taking this comment under advisement and is not responding to it here as it is outside the scope of BIS's proposed rule.

**Amendments to Section 748.15 of the EAR**

*Prior Notification Requirement*

In this rule, BIS adopts the amendment to the EAR proposed on April 17, 2012 (77 FR 22689) with some changes. In the April rule, BIS proposed amending Section 748.15 by adding paragraph (g) to require persons exporting, reexporting, or transferring (in-country) under Authorization VEU to send written notification to the recipient VEU with details about their shipment within seven days of the shipment. The April proposal also specified that the notification must include a list of the VEU-authorized contents of the shipment and the quantity of such items that are being, have been, or will be shipped to the respective VEUs, as well as a list of the applicable Export Control Classification Numbers (ECCNs) for VEU-authorized items included in the shipment. This final rule adopts the notification requirement in § 748.15 while making a change from the proposed rule by providing that notification must be made within a timeframe agreed to in writing by the VEU and the persons exporting, reexporting or transferring (in-country), rather than within seven days of the shipment as proposed in the April rule. This final rule also adds that the VEU and the persons exporting, reexporting or transferring (in-country) must agree to the notification timeframe in advance of shipment under Authorization VEU.

As discussed in the proposed rule, the purpose of this new requirement is to enhance the ability of VEUs to comply with the requirements of the VEU program. This amendment to the EAR is not the result of non-compliance with VEU requirements by existing VEUs. With this amendment to the EAR, BIS intends to improve the ability of VEUs to determine which shipments are made to them under Authorization VEU. The use of Authorization VEU requires VEUs to track items received under Authorization VEU, but does not require VEUs to distinguish between identical items sent under Authorization VEU and other types of shipping authorizations. Accordingly, this amendment will enable VEUs to better determine which set of conditions governs their use of the received item(s) more efficiently, thereby better enabling the VEUs' compliance with the EAR.

With this rule, BIS is not requiring a specific form of communication (*e.g.,* fax, email, letter) for the notification, but does require that it be in a written format. Similarly, the VEU and the shipper may determine if notifications

need to be made for each Authorization VEU shipment or whether multiple shipments may be the subject of a consolidated notification. As noted above, the notification must be conveyed to the VEU within the time period agreed to in writing by the VEU and the persons exporting, reexporting or transferring (in-country) the VEU items in advance of the initial shipment. VEUs are required to maintain the notifications they receive and exporters and reexporters are required to maintain the notifications they send pursuant to their recordkeeping requirements.

*Clarification Regarding Termination of Conditions on VEU Authorizations*

In the proposed rule, BIS also proposed amending Section 748.15(h) to clarify that VEUs that are subject to item-specific conditions and have received items subject to such conditions under Authorization VEU are no longer bound by the conditions associated with the items if the items no longer require a license for export or reexport to the VEU's authorized location or become eligible for shipment under a license exception to the destination. This amendment is the same, in effect, as existing Section 750.7(i) (Terminating license conditions), which generally applies to exporters and reexporters who have shipped under license. No public comments were received on this proposal, and the proposed regulatory text is being adopted with minimal changes, described below.

To supplement the proposed regulatory text, BIS is adding phrasing in paragraph (h) to clarify that when the EAR are amended such that items previously exported, reexported or transferred (in-country) to a VEU under Authorization VEU would be eligible for shipment to the VEU under a License Exception, the items received under Authorization VEU become subject to the terms and conditions of the applicable License Exception and not the original conditions associated with export, reexport or transfer under Authorization VEU. In addition, when the EAR are amended such that items previously exported, reexported or transferred (in-country) to a VEU under Authorization VEU would remain subject to the EAR but become eligible for export without a license under the EAR, the items received under Authorization VEU may only be exported, reexported, transferred (in-country) or disposed of in accordance with the EAR. These two statements are not substantive and were added only in the interest of clarifying the scope of new paragraph (h) on requirements under the EAR. These new sentences also parallel existing Section 750.7(i) (Terminating license conditions).

*Records Review*

In the proposed rule, BIS further proposed adding new paragraph (i) is to Section 748.15 to remind exporters that records requirements for shipments that were made under Authorization VEU prior to the removal of a license requirement or the availability of a license exception remain subject to the review requirements of paragraph (f)(2) of section 748.15 on and after the date that the license requirement was removed or the license exception became applicable. No public comments were received on this provision, and BIS is adopting paragraph (i) as proposed.

Since August 21, 2001, the Export Administration Act has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp., p. 783 (2002)), as extended most recently by the Notice of August 15, 2012 (77 FR 49699, August 16, 2012), has continued the EAR in effect under the International Emergency Economic Powers Act. BIS continues to carry out the provisions of the Export Administration Act, as appropriate and to the extent permitted by law, pursuant to Executive Order 13222.

**Rulemaking Requirements**

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been determined to be not significant for purposes of Executive Order 12866.

2. Notwithstanding any other provisions of law, no person is required to respond to nor be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This final rule involves information collections previously approved by the OMB under control number 0694–0088, ''Multi-Purpose Application'', which carries a burden hour estimate of 45.8 minutes to prepare and submit form BIS–748, which involves requirements in connection with Authorization VEU. BIS revised the burden hour estimate shown for the 0694–0088 collection by two minutes to include the notification requirement proposed in this rule. This revision does not represent a significant increase in burden hours for submitting information under the collection.

3. This rule does not contain policies with Federalism implications as that term is defined under Executive Order 13132.

4. The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this rule would not have a significant economic impact on a substantial number of small entities. The basis for the certification was published in the preamble to the proposed rule and is not repeated here. BIS received no comments or new information regarding the certification. Therefore, a final regulatory flexibility analysis is not required and none has been prepared.

**List of Subjects in 15 CFR Part 748**

Administrative practice and procedure, Exports, Reporting and recordkeeping requirements.

Accordingly, part 748 of the Export Administration Regulations (15 CFR parts 730–774) is amended as follows:

## PART 748—[AMENDED]

■ 1. The authority citation for 15 CFR part 748 continues to read as follows:

**Authority:** 50 U.S.C. app. 2401 *et seq;* 50 U.S.C. 1701 *et seq.;* E.O. 13026,61 FR 58767,3 CFR, 1996 Comp., p. 228; E.O. 13222,66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 15, 2012 (77 FR 49699 (August 16, 2012)).

■ 2. Section 748.15 is amended by adding paragraphs (g), (h) and (i) to read as follows:

**§ 748.15 Authorization Validated End-User (VEU).**

* * * * *

(g) *Notification requirement.* Exporters and reexporters shipping under Authorization VEU and persons transferring (in-country) under Authorization VEU are required to provide the VEUs to which they are shipping or transferring notice of the shipment or transfer. Such notification must be conveyed to the VEU in writing and must include a list of the VEU-authorized contents of the shipment or transfer and a list of the ECCNs under which the VEU-authorized items in the shipment or transfer are classified, as

well as a statement that the items are being, will be, or were shipped or transferred pursuant to Authorization VEU. Notification of the export, reexport or transfer (in-country) to the VEU must be made within a timeframe agreed to in writing by the VEU and the person exporting, reexporting or transferring (in-country). The VEU and the person exporting, reexporting or transferring (in-country) must agree to the notification timeframe prior to the initial shipment or transfer under Authorization VEU. Depending on the agreement between the VEU and the person exporting, reeexporting or transferring (in-country), a notification may be for individual shipments or for multiple shipments. Exporters, reexporters and VEUs are required to maintain the notifications they send or receive in accordance with their recordkeeping requirements.

(h) *Termination of Conditions on VEU Authorizations.* VEUs that are subject to item-specific conditions and have received items subject to such conditions under Authorization VEU are no longer bound by the conditions associated with the items if the items no longer require a license for export or reexport to the PRC or India, as applicable, or become eligible for shipment under a license exception to the destination. Items that become eligible for a License Exception are subject to the terms and conditions of the applicable License Exception and the restrictions in § 740.2 of the EAR. Items that become eligible for export without a license and that remain subject to the EAR may only be exported, reexported, transferred (in-country) or disposed of in accordance with the requirements of the EAR. Termination of VEU conditions does not relieve a validated end-user of its responsibility for violations that occurred prior to the availability of a license exception or prior to the removal of license requirements.

(i) *Records.* Records of items that were shipped under Authorization VEU prior to the removal of a license requirement or the availability of a license exception remain subject to the review requirements of paragraph (f)(2) of this section on and after the date that the license requirement was removed or the license exception became applicable.

Dated: December 12, 2012.

**Kevin J. Wolf,**

*Assistant Secretary for Export Administration.*

[FR Doc. 2012–30482 Filed 12–18–12; 8:45 am]

BILLING CODE 3510–33–P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 15 CFR Part 950

**[Docket No 121205685–2685–01]**

**RIN 0648–BC83**

## Schedule of Fees for Access to NOAA Environmental Data, Information, and Related Products and Services

**AGENCY:** National Environmental Satellite, Data and Information Service (NESDIS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

**ACTION:** Final rule.

**SUMMARY:** In this final rule, NESDIS establishes a new schedule of fees for the sale of its data, information, and related products and services to users. NESDIS is revising the fee schedule that has been in effect since 2011 to ensure that the fees accurately reflect the costs of providing access to the environmental data, information, and related products and services. NESDIS is authorized under 15 U.S.C. 1534 to assess fees, up to fair market value, for access to environmental data, information, and products derived from, collected, and/or archived by NOAA. Other than depreciation, costs to upgrade computer hardware and software systems will not be included in the fees charged to users. NESDIS is updating its schedule of fees for access to NOAA Environmental Data, Information, and Related Products and Services as costs of providing access have changed since 2011.

**DATES:** *Effective Date:* January 31, 2013.

**FOR FURTHER INFORMATION CONTACT:** Sherida Wright, (301) 713–922 .

**SUPPLEMENTARY INFORMATION:**

### Background

NESDIS operates NOAA's National Data Centers for Climate, Geophysics, Oceans, and Coasts. Through these Data Centers, NESDIS provides and ensures timely access to global environmental data from satellites and other sources, provides information services, and develops science products.

NESDIS maintains some 1,300 data bases containing over 2,400 environmental variables at three National Data Centers and seven World Data Centers. These centers respond to over 2,000,000 requests for these data and products annually from over 70 countries. This collection of environmental data and products is growing rapidly, both in size and sophistication, and as a result the associated costs have increased.

Users have the ability to access the data offline, online and through the NESDIS *e-Commerce System (NeS) online store.* Our ability to provide these data, information, products and services depends on user fees.

### New Fee Schedule

The new fee schedule lists both the current fee charged for each item and the new fee to be charged to users that will take effect beginning January 31, 2013. The schedule applies to the listed services provided by NESDIS on or after this date, except for products and services covered by a subscription agreement in effect as of this date that extends beyond this date. In those cases, the increased fees will apply upon renewal of the subscription agreement or at the earliest amendment date provided by the agreement.

NESDIS will continue to review the user fees periodically, and will revise such fees as necessary. Any future changes in the user fees and their effective date will be announced through notice in the **Federal Register**.

### Classification

This rule has been determined to be not significant for purposes of E.O. 12866. The provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking and the opportunity for public participation are inapplicable because this rule falls within the public property exception of subparagraph (a)(2) of section 553, as it is limited only to the assessment of fees, per 15 U.S.C. 1534, that accurately reflect the costs of providing access to publicly available environmental data, information, and related products. Further, no other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this rule. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 5 U.S.C. 553 or by any other law, the requirements of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) are not applicable. Accordingly, no Regulatory Flexibility Analysis is required and none has been prepared.

### List of Subjects in 15 CFR Part 950

Organization and functions (Government agencies).

**Michael H. Abreu,**

*Chief, Financial Officer (CFO/CAO).*

For the reasons set forth above, 15 CFR part 950 is amended as follows:

## PART 950—ENVIRONMENTAL DATA AND INFORMATION

■ 1. The authority citation for part 950 continues to read as follows:

**Authority:** (5 U.S.C. 552, 553). Reorganization Plan No. 4 of 1970.

■ 2. Appendix A to part 950 is revised to read as follows:

### Appendix A to Part 950—Schedule of User Fees for Access to NOAA Environmental Data

| Name of product/data/publication/information/service | Current fee | New fee |
|---|---|---|
| NOAA National Data Centers Standard User Fees: | | |
| Department of Commerce Certification | $91.00 | $86.00 |
| General Certification | 74.00 | 72.00 |
| Paper Copy | 2.00 | 2.00 |
| Online In-Situ Digital Data | 6.00 | (*) |
| Data Poster | 18.00 | 18.00 |
| Shipping Service | | |
| for orders totaling less than $50.00 | 3.00 | 4.00 |
| for orders totaling $50.00 or more | 3.00 | 4.00 |
| Rush Order Fee | 60.00 | 60.00 |
| Super Rush Order Fee | 100.00 | 100.00 |
| Foreign Handling Fee | | |
| for orders totaling less than $100.00 | 39.00 | 67.00 |
| for orders totaling $100.00 or more | 39.00 | 67.00 |
| Additional National Climatic Data Center (NCDC) User Fees: | | |
| NEXRAD Doppler Radar Color Prints | 17.00 | 14.00 |
| Paper Copy from Electronic Media | 6.00 | 6.00 |
| Offline In-Situ Digital Data | 156.00 | 124.00 |
| Microfilm Copy (roll to paper) per frame from existing film | 14.00 | 14.00 |
| Satellite Image Product | 83.00 | 73.00 |
| Offline Satellite Digital Data (average unit size is 1.2 gigabytes) | | |
| Offline Radar Digital Data (Level II) (average unit size is 4 gigabytes) | | |
| Offline Satellite, Radar, and Model Digital Data (average unit size is 1 terabyte) | 984.00 | 615.00 |
| Conventional CD–ROM/DVD | 69.00 | 60.00 |
| Specialized CD–ROM/DVD | 158.00 | 131.00 |
| CD–ROM/DVD Copy, Offline | 35.00 | 30.00 |
| CD–ROM/DVD Copy, Online Store | 17.00 | 15.00 |
| Facsimile Service | 80.00 | 78.00 |
| Order Handling | 9.00 | 8.00 |
| Non-Digital Order Consultation | 7.00 | 6.00 |
| Digital Order Consultation | 22.00 | 18.00 |
| Additional National Oceanographic Data Center (NODC) User Fees: | | |
| NODC Non-Serial Publications | 22.00 | 27.00 |
| NODC Non-Standard Data; Select/Copy to CD, DVD or Electronic Transfer, Specialized, Offline | 49.00 | 59.00 |
| NODC Non-Standard Data; 1–1 Direct Copy to CD, DVD, or Electronic Transfer, Specialized, Offline | 19.00 | (*) |
| NODC Digital and Non-Digital Off-the-Shelf Products, Online | 7.00 | 9.00 |
| NODC Digital and Non-Digital Off-the-Shelf Products, Offline | 9.00 | 11.00 |
| NODC Order Consultation Fee | 2.00 | 2.00 |
| NODC Handling and Packing Fee | 7.00 | 8.00 |
| World Ocean Database-World Ocean Atlas 2009 DVDs | 11.00 | 11.00 |
| Additional National Geophysical Data Center (NGDC) User Fees: | | |
| Mini Poster | 1.00 | 1.00 |
| Icosahedron Globe | .50 | 1.00 |
| Convert Data to Standard Image | 5.00 | 6.00 |
| Single Orbit OLS | 16.00 | 18.00 |
| Single Orbit OLS, Additional Orbits | 5.00 | 5.00 |
| Single Orbit OLS—Subset | 16.00 | 18.00 |
| Single Orbit OLS, Subset- Additional Orbits | 5.00 | 5.00 |
| Geolocated Data | 45.00 | 47.00 |
| Subset of Pre-existing Geolocated Data | 27.00 | 28.00 |
| Global DMSP–OLS Nighttime Lights Annual Composite from One Satellite | 73,614.00 | 74,032.00 |
| Most Recent DMSP–OLS Thermal Band/Cloud Cover Mosaics from Multiple Satellites | 250.00 | 259.00 |
| Nightly DMSP–OLS Mosaics, Visible and Thermal Band Data from One Satellite | 235.00 | 241.00 |
| Global DMSP–OLS Nighttime Lights Lunar Cycle Composite from One Satellite | 6,307.00 | 6,531.00 |
| Radiance Calibrated Global DMSP–OLS Nighttime Lights Annual Composite from One Satellite | 81,047.00 | 82,975.00 |
| Research Data Series CD–ROM/DVD | 25.00 | 25.00 |
| Custom Analog Plotter Prints | 60.00 | 60.00 |
| NOS Bathymetric Maps and Miscellaneous Archived Publication Inventory | 7.00 | 7.00 |
| Global DMSP–OLS Annual Composite of Persistent Nighttime Lights on Monthly Increments from One Satellite | 8,032.00 | 8,305.00 |
| Data Poster | 18.00 | (*) |
| High Definition Geomagnetic Model | 19,997.00 | 20,060.00 |

* Reflects a product no longer offered.

[FR Doc. 2012–30519 Filed 12–18–12; 8:45 am]
BILLING CODE 3510–22–P

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### 26 CFR Part 1

**[TD 9564]**

**RIN 1545–BJ93**

## Guidance Regarding Deduction and Capitalization of Expenditures Related to Tangible Property

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Correcting amendments.

**SUMMARY:** This document contains correcting amendments to the temporary regulations (TD 9564), which were published in the **Federal Register** on Tuesday, December 27, 2011, relating to guidance regarding deduction and capitalization of expenditures related to tangible property. These amendments revise the general asset account regulations to provide the time and manner of making a general asset account election. The amendatory instructions of TD 9564 inadvertently redesignated paragraphs (m)(2) and (m)(3) for the general asset account regulations as in effect before TD 9564 as paragraphs (l)(2) and (l)(3) for the general asset account regulations as amended by TD 9564. These correcting amendments will affect all taxpayers that make a general asset account election.

**DATES:** These amendments are effective December 19, 2012.

**FOR FURTHER INFORMATION CONTACT:** Kathleen Reed or Patrick Clinton, Office Associate Chief Counsel (Income Tax & Accounting), (202) 622–4930 (not a toll-free call).

**SUPPLEMENTARY INFORMATION:**

### Background

The regulations that are the subject of these corrections are under section 168 of the Internal Revenue Code.

### Need for Correction

As published on December 27, 2011 (76 FR 81060), TD 9564 contains errors which may prove to be misleading and are in need of clarification.

### List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

### Correction of Publication

Accordingly, 26 CFR part 1 is amended by making the following correcting amendments.

## PART 1—INCOME TAXES

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

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

Section 1.168(i)–1 also issued under 26 U.S.C. 168(i)(4). * * *

■ **Par. 2.** Section 1.168(i)–0 is amended by revising the entry in the table of contents for paragraph (m) of § 1.168(i)–1 to read as follows:

**§ 1.168(i)–0 Table of contents for the general asset account rules.**

* * * * *

**§ 1.168(i)–1 General asset accounts.**

* * * * *

(m) [Reserved]. For further guidance, see the entry for § 1.168(i)–1T(m).

■ **Par. 3.** Section 1.168(i)–1 is amended by revising paragraphs (l)(2) and (l)(3) to read as follows:

**§ 1.168(i)–1 General asset accounts.**

* * * * *

(1) * * *

(2) *Time for making election.* The election to apply this section shall be made on the taxpayer's timely filed (including extensions) income tax return for the taxable year in which the assets included in the general asset account are placed in service by the taxpayer.

(3) *Manner of making election.* In the year of election, a taxpayer makes the election under this section by typing or legibly printing at the top of the Form 4562, ''GENERAL ASSET ACCOUNT ELECTION MADE UNDER SECTION 168(i)(4),'' or in the manner provided for on Form 4562 and its instructions. The taxpayer shall maintain records (for example, ''General Asset Account #1—all 1995 additions in asset class 00.11 for Salt Lake City, Utah facility'') that identify the assets included in each general asset account, that establish the unadjusted depreciable basis and depreciation reserve of the general asset account, and that reflect the amount realized during the taxable year upon dispositions from each general asset account. (But see section 179(c) and § 1.179–5 for the recordkeeping requirements for section 179 property.) The taxpayer's recordkeeping practices should be consistently applied to the general asset accounts. If Form 4562 is revised or renumbered, any reference in this section to that form shall be treated as a reference to the revised or renumbered form.

* * * * *

**Guy R. Traynor,**

*Federal Register Liaison, Publication & Regulations Branch, Legal Processing Division, Associate Chief Counsel, Procedure & Administration.*

[FR Doc. 2012–30490 Filed 12–18–12; 8:45 am]
BILLING CODE 4830–01–P

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 165

**[Docket No. USCG–2012–0642]**

**RIN 1625–AA00**

## Safety Zone: Gilmerton Bridge Center Span Float-in, Elizabeth River; Norfolk, Portsmouth, and Chesapeake, VA—Correction

**AGENCY:** Coast Guard, DHS.

**ACTION:** Interim temporary final rule; correction.

**SUMMARY:** On December 11, 2012, the Coast Guard published in the **Federal Register** an interim temporary final rule establishing a safety zone around the Gilmerton Bridge center span barge. Inadvertently, this rule included an error in the inclement weather date of the safety zone. This document corrects that error.

**DATES:** This rule will be effective from January 7, 2013 through January 16, 2013. The rule is scheduled to be enforced from 6:00 a.m. on January 7, 2013 through January 11, 2013, with inclement weather dates of January 12, 2013 through January 16, 2013.

**ADDRESSES:** Documents indicated in this preamble as being available in the docket are part of docket USCG–2012–0642 and are available online by going to *http://www.regulations.gov,* inserting USCG–2012–0642 in the ''Search'' box, and then clicking ''Search.'' They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this temporary rule, call or email LCDR Hector Cintron, Waterways Management Division Chief, Sector Hampton Roads, Coast Guard; telephone 757–668–5581, email

*Hector.L.Cintron@uscg.mil.* If you have questions on viewing the docket, call Docket Operations, telephone 202–366–9826.

**SUPPLEMENTARY INFORMATION:** On December 11, 2012, the Coast Guard published in the **Federal Register** an interim temporary final rule establishing a safety zone around the Gilmerton Bridge center span barge (77 FR 73541). Inadvertently, this rule included an error in the enforcement dates of the safety zone.

As stated in the **Federal Register** publication of the interim temporary final rule, the rule is effective from January 7 through January 16, 2013. That publication listed the enforcement dates of the rule beginning at 6:00 a.m. on January 7, 2013 through January 11, 2013, with inclement weather dates of January 12, 2013 through January 16, 2013. However, due to a clerical error, the regulatory text of the rule stated that the regulation will be enforced starting at 6 a.m. on January 3, 2012 through January 7, 2013 with inclement weather dates of January 8, 2013 through January 12, 2013.

Upon publication of the temporary interim final rule in the **Federal Register**, the Coast Guard became aware of the errors in the text relating to the enforcement period. This notice corrects those errors by restoring the correct enforcement dates.

### List of Subjects in 33 CFR Part 165

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

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

## PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

**Authority:** 33 U.S.C. 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Revise paragraph (d) of § 165.T05–0642 to read as follows:

**165.T05–0642 Safety Zone; Gilmerton Bridge Center Span Float-in, Elizabeth River; Norfolk, Portsmouth, and Chesapeake, Virginia.**

* * * * *

(d) *Enforcement Period.* This regulation will be enforced starting at 6 a.m. on January 7, 2013 through January 11, 2013 with inclement weather dates of January 12, 2013 through January 16, 2013.

Dated: December 12, 2012.

**Kathryn Sinniger,**

*Chief, Office of Regulations and Administrative Law, U.S. Coast Guard.*

[FR Doc. 2012–30507 Filed 12–18–12; 8:45 am]

BILLING CODE 9110–04–P

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## DEPARTMENT OF HOMELAND SECURITY

## Coast Guard

## 33 CFR Part 165

**[Docket Number USCG–2012–1038]**

**RIN 1625–AA87**

## Security Zone; On the Waters in Kailua Bay, Oahu, HI

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing a temporary security zone on the waters south of Kapoho Point and a nearby channel in Kailua Bay within the Honolulu Captain of the Port (COTP) Zone. This security zone is necessary to ensure the safety of the President of the United States and his family members.

**DATES:** This rule is effective from 6 a.m. (HST) on December 17, 2012, through 10 p.m. (HST) on January 6, 2013.

**ADDRESSES:** Documents indicated in this preamble as being available in the docket USCG–2012–1038 are available online by going to *http://www.regulations.gov,* inserting USCG–2012–1038 in the ''Keyword'' box, and then clicking ''Search''. They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this temporary rule, call or email Lieutenant Commander Scott O. Whaley, Waterways Management Division, U.S. Coast Guard Sector Honolulu; telephone (808) 522–8264 (ext. 352), email *Scott.O.Whaley@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

**SUPPLEMENTARY INFORMATION:**

### Regulatory Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency, for good cause, finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(d)(3), the Coast Guard finds good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. The details of the President's intended travel to Hawaii were not made available to the Coast Guard in sufficient time to issue a notice of proposed rulemaking. Due to the need for immediate action, the restriction of vessel traffic is necessary to protect the President and his family members; therefore, a 30-day notice period is impracticable. Delaying the effective date would be contrary to the security zone's intended objectives of protecting high-ranking officials, mitigating potential terroristic acts and enhancing public and maritime safety and security. Publishing a Notice of Proposed Rulemaking (NPRM) and delaying the effective date would be contrary to the public interest since the occasion would occur before a notice-and-comment rulemaking could be completed, thereby jeopardizing the safety of the President of the United States, members of his family members, and other senior government officials. The COTP finds that this temporary security zone needs to be effective by December 17, 2012, to ensure the safety of the President of the United States and members of his official party visiting the Kailua Bay area on the eastern coast of Oahu, Hawaii.

### Background and Purpose

From December 17, 2012, through January 6, 2013, the President of the United States and his family members plan to visit near the Kailua Bay shoreline on Oahu, Hawaii. This position is located adjacent to U.S. navigable waters in the Honolulu Captain of the Port Zone. The Coast Guard is establishing this security zone to ensure the safety of the President of the United States and his family members.

### Discussion of Temporary Final Rule

This temporary final rule is effective from 6 a.m. HST on December 17, 2012 through 10 p.m. HST on January 6, 2013. The security zone area is located

within the Honolulu Captain of the Port Zone (See 33 CFR 3.70–10) and covers all U.S. navigable waters in the Kailua Bay on the west side of a line connecting Kapoho Point and continuing at a bearing of 240° (true) to the southwestern corner of Kailuana Loop; as well as the nearby channel from its entrance at Kapoho Point to a point 150-yards to the southwest of the N. Kalaheo Avenue Road Bridge. This zone extends from the surface of the water to the ocean floor. This zone will include the navigable waters of the channel beginning at point 21°24′56″ N, 157°44′58″ W, then extending to 21°25′26″ N, 157°44′21″ W (Kapoho Point) including all the waters to the west of a straight line to 21°25′11″ N, 157°43′34″ W (Kailuana Loop), and then extending back to the original point 21°24′56″ N, 157°44′58″ W.

Two (2) yellow buoys and a shore-side marker will be placed in proximity of the security zone along the security zone boundary and one (1) orange boom will be placed at the channel boundary southwest of the N. Kalaheo Avenue Road Bridge as visual aids for mariners and the public to approximate the zone. An illustration of the security zone will be made available on *www.regulations.gov* in docket for this rulemaking, USCG–2012–1038.

In accordance with the general regulations in 33 CFR part 165, Subpart D, no person or vessel will be permitted to transit into or remain in the zone except for authorized support vessels, aircraft and support personnel, or other vessels authorized by the Captain of the Port. Any Coast Guard commissioned, warrant, or petty officer, and any other Captain of the Port representative permitted by law, may enforce the zone. Vessels, aircraft, or persons in violation of this rule would be subject to the penalties set forth in 33 U.S.C. 1232 and 50 U.S.C. 192.

**Regulatory Analyses**

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

*1. Regulatory Planning and Review*

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. The Coast Guard expects the economic impact of this rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary. This expectation is based on the limited duration of the zone, the limited geographic area affected by it, and the lack of commercial vessel traffic affected by the zone.

*2. Impact on Small Entities*

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule will have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. This rule will affect the following entities, all of which are small entities: the owners or operators of six jet-ski and para-sailing companies. These companies will only be affected during the arrival and departure of the President of the United States through Honolulu International Airport. Notice to enforce the security zone is not provided to the Coast Guard more than 12 hours before the President arrives or departs.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on small entities. This security zone would not have a significant economic impact on these small entities for the following reasons: this security zone will be activated, and thus subject to enforcement, for six hours for the President's arrival and for six hours for his departure. Once the Coast Guard is notified of the need to enforce the security zone, all six of the affected jet-ski and para-sailing companies will be contacted and made aware of the security zone enforcement. Additionally, marine advisories will be issued to notify mariners of the enforcement of the security zone. If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule will have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule will economically affect it.

*3. Assistance for Small Entities*

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

If the rule will affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact LCDR Scott O. Whaley at (808) 522–8264 ext. 352. The Coast Guard will not retaliate against small entities that question or complain about this temporary final rule or any policy or action of the Coast Guard.

*4. Collection of Information*

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

*5. Federalism*

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and determined that this rule does not have implications for federalism.

*6. Protest Activities*

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

*7. Unfunded Mandates Reform Act*

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

*8. Taking of Private Property*

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

*9. Civil Justice Reform*

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to

minimize litigation, eliminate ambiguity, and reduce burden.

*10. Protection of Children*

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

*11. Indian Tribal Governments*

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

*12. Energy Effects*

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

*13. Technical Standards*

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

*14. Environment*

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a determination that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction. This regulation establishes one security zone. A final ''Environmental Analysis Check List'' and a final ''Categorical Exclusion Determination'' are available in the docket where indicated under **ADDRESSES**.

**List of Subjects in 33 CFR Part 165**

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

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

## PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

**Authority:** 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T14–215 to read as follows:

**§ 165.T14–215 Security Zone; On the Waters in Kailua Bay, Oahu, HI.**

(a) *Location.* The following area, within the Honolulu Captain of the Port Zone (See 33 CFR 3.70–10), from the surface of the water to the ocean floor is a temporary security zone: All waters in Kailua Bay to the west of a line beginning at Kapoho Point and thence southwestward at a bearing of 240° (true) to the shoreline at the southeastern corner of Kailuana Loop; as well as the nearby channel from its entrance at Kapoho Point to a point 150-yards to the southwest of the N. Kalaheo Avenue Road Bridge. This zone extends from the surface of the water to the ocean floor. This zone will include the navigable waters of the channel beginning at point 21°24′56″ N, 157°44′58″ W, then extending to 21°25′26″ N, 157°44′21″ W (Kapoho Point) including all the waters to the west of a straight line to 21°25′11″ N, 157°43′34″ W (Kailuana Loop), and then extending back to the original point 21°24′56″ N, 157°44′58″ W.

(b) *Effective period.* This section is effective from 6 a.m. HST on December 17, 2012, through 10 p.m. HST on January 6, 2013.

(c) *Regulations.* The general regulations governing security zones contained in 33 CFR 165.33, subpart D, apply to the security zone created by this temporary final rule.

(1) All persons are required to comply with the general regulations governing security zones found in 33 CFR part 165.

(2) Entry into or remaining in this zone is prohibited unless authorized by the Coast Guard Captain of the Port Honolulu.

(3) Persons desiring to transit the security zones identified in paragraph (a) of this section may contact the Captain of the Port at Command Center telephone number (808) 842–2600 and (808) 842–2601, fax (808) 842–2624 or on VHF channel 16 (156.8 Mhz) to seek permission to transit the zones. If permission is granted, all persons and vessels must comply with the instructions of the Captain of the Port Honolulu or his designated representative and proceed at the minimum speed necessary to maintain a safe course while within the zone.

(4) The U.S. Coast Guard may be assisted in the patrol and enforcement of the zones by Federal, State, and local agencies.

(d) *Notice of enforcement.* The Captain of the Port Honolulu will cause notice of the enforcement of the security zone described in this section to be made by verbal broadcasts and written notice to mariners and the general public.

(e) *Definitions.* As used in this section, *designated representative* means any Coast Guard commissioned, warrant, or petty officer who has been authorized by the Captain of the Port Honolulu to assist in enforcing the security zones described in paragraph (a) of this section.

Dated: November 29, 2012.

**J.M. Nunan,**

*Captain, U.S. Coast Guard, Captain of the Port, Honolulu.*

[FR Doc. 2012–30628 Filed 12–18–12; 8:45 am]

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## DEPARTMENT OF COMMERCE

### Patent and Trademark Office

### 37 CFR Part 1

**[Docket No.: PTO–P–2011–0016]**

**RIN 0651–AC78**

## Changes To Implement Micro Entity Status for Paying Patent Fees

**AGENCY:** United States Patent and Trademark Office, Commerce.

**ACTION:** Final rule.

**SUMMARY:** The United States Patent and Trademark Office (Office) is revising the rules of practice in patent cases to implement the micro entity provision of the Leahy-Smith America Invents Act (AIA). Certain patent fees set or adjusted under the fee setting authority in the AIA will be reduced by seventy-five percent for micro entities. The Office is

revising the rules of practice to set out the procedures pertaining to claiming micro entity status, paying patent fees as a micro entity, notification of loss of micro entity status, and correction of payments of patent fees paid erroneously in the micro entity amount. In a separate rulemaking, the Office is in the process of proposing to set or adjust patent fees under the Leahy-Smith America Invents Act, including setting fees for micro entities with a seventy-five percent reduction. The Office has sought to address the concerns of its stakeholders as expressed in the public comment, and plans to seek additional public comment on the micro entity provisions after the Office and the public have gained experience with the micro entity procedures in operation. The Office will pursue further improvements to the micro entity procedures in light of the public comment and its experience with the micro entity procedures.

**DATES:** Effective March 19, 2013.

**FOR FURTHER INFORMATION CONTACT:** James Engel, Senior Legal Advisor ((571) 272–7725), Office of Patent Legal Administration, Office of the Deputy Commissioner for Patent Examination Policy.

**SUPPLEMENTARY INFORMATION:**

*Executive Summary: Purpose:* The AIA provides that: (1) The Office may set or adjust any patent fee, provided that the aggregate revenue generated by patent fees recovers only the aggregate estimated costs to the Office for processing, activities, services, and materials relating to patents (including administrative costs); and (2) most fees set or adjusted under this authority are reduced by fifty percent for small entities and by seventy-five percent for micro entities. The AIA also adds a new section to Title 35 of the United States Code that defines a ''micro entity.'' The rules of practice currently have provisions pertaining to small entity status, as the patent laws provided a small entity discount prior to the Leahy-Smith America Invents Act. This final rule revises the rules of practice to implement the ''micro entity'' provisions added by the Leahy-Smith America Invents Act.

*Summary of Major Provisions:* The Office is adding a provision to the rules of practice pertaining to micro entity status. The provision sets out the requirements to qualify as a micro entity tracking the statutory requirements for a micro entity set forth in section 10 of the Leahy-Smith America Invents Act. The provision also sets out procedures relating to micro entity status that largely track the regulatory requirements and procedures in 37 CFR 1.27 for small entity status. These new procedures pertain to claiming micro entity status, paying patent fees as a micro entity, notifying the Office of loss of micro entity status, and correcting payments of patent fees paid erroneously in the micro entity amount. The procedures for claiming micro entity status require the filing of a certification of entitlement to micro entity status. The Office is developing forms (paper and electronic) for use by members of the public to provide a certification of micro entity status. The procedures for paying fees as a micro entity provide that a micro entity certification need only be filed once in an application or patent, but that a fee may be paid in the micro entity amount only if the applicant or patentee is still entitled to micro entity status on the date the fee is paid. The procedures pertaining to notifying the Office of loss of micro entity status and correcting payments of patent fees paid erroneously in the micro entity amount track the corresponding small entity provisions for notifying the Office of loss of small entity status and correcting payments of patent fees paid erroneously in the small entity amount.

*Costs and Benefits:* This rulemaking is not economically significant as that term is defined in Executive Order 12866 (Sept. 30, 1993).

*Background:* The AIA was enacted into law on September 16, 2011. *See* Public Law 112–29, 125 Stat. 283 (2011). Section 10(a) of the AIA provides that the Office may set or adjust by rule any patent fee established, authorized, or charged under title 35, United States Code, provided that aggregate patent fees recover only the aggregate estimated costs to the Office for processing, activities, services, and materials relating to patents (including administrative costs). *See* 125 Stat. at 316. Section 10(b) of the AIA provides that ''the fees set or adjusted under [section 10(a)] for filing, searching, examining, issuing, appealing, and maintaining patent applications and patents shall be reduced by 50 percent with respect to the application of such fees to any small entity that qualifies for reduced fees under [35 U.S.C.] 41(h)(1) * * *, and shall be reduced by 75 percent with respect to the application of such fees to any micro entity as defined in [35 U.S.C.] 123.'' *See* 125 Stat. at 316–17. The patent laws provided in 35 U.S.C. 41(h) for small entities prior to the Leahy-Smith America Invents Act. Section 10(g) of the AIA adds a new 35 U.S.C. 123 to define a ''micro entity.'' *See* 125 Stat. at 318–19.

35 U.S.C. 123(a) provides one basis under which an applicant may establish micro entity status. 35 U.S.C. 123(d) provides another basis under which an applicant may establish micro entity status. Each will be discussed in turn.

35 U.S.C. 123(a) provides that the term ''micro entity'' means an applicant who makes a certification that the applicant: (1) Qualifies as a small entity as defined in 37 CFR 1.27; (2) has not been named as an inventor on more than four previously filed patent applications, other than applications filed in another country, provisional applications under 35 U.S.C. 111(b), or international applications for which the basic national fee under 35 U.S.C. 41(a) was not paid; (3) did not, in the calendar year preceding the calendar year in which the applicable fee is being paid, have a gross income, as defined in section 61(a) of the Internal Revenue Code of 1986 (26 U.S.C. 61(a)), exceeding three times the median household income for that preceding calendar year, as most recently reported by the Bureau of the Census; and (4) has not assigned, granted, or conveyed, and is not under an obligation by contract or law to assign, grant, or convey, a license or other ownership interest in the application concerned to an entity that, in the calendar year preceding the calendar year in which the applicable fee is being paid, had a gross income, as defined in section 61(a) of the Internal Revenue Code of 1986, exceeding three times the median household income for that preceding calendar year, as most recently reported by the Bureau of the Census. *See* 125 Stat. at 318. 35 U.S.C. 123(a) provides one basis under which an applicant may establish micro entity status.

The Office will indicate the income level that is three times the median household income for the calendar year most recently reported by the Bureau of the Census (the income threshold set forth in 35 U.S.C. 123(a)(3) and (a)(4)) on its Internet Web site, with its Independent Inventor resource information, and on the Office's certification of micro entity status (gross income basis) form (Form PTO/SB/15A). The Office will also make available resources to micro entities to help navigate the new micro entity procedures.

35 U.S.C. 123(b) provides that an applicant is not considered to be named on a previously filed application for purposes of 35 U.S.C. 123(a)(2) if the applicant has assigned, or is under an obligation by contract or law to assign, all ownership rights in the application as the result of the applicant's previous employment. *See id.*

35 U.S.C. 123(c) provides that if an applicant's or entity's gross income in the preceding calendar year is not in United States dollars, the average currency exchange rate, as reported by the Internal Revenue Service, during that calendar year shall be used to determine whether the applicant's or entity's gross income exceeds the threshold specified in 35 U.S.C. 123(a)(3) or (4). *See* 125 Stat. at 319.

35 U.S.C. 123(d) provides that a micro entity shall also include an applicant who certifies that: (1) The applicant's employer, from which the applicant obtains the majority of the applicant's income, is an institution of higher education as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)); or (2) the applicant has assigned, granted, conveyed, or is under an obligation by contract or law, to assign, grant, or convey, a license or other ownership interest in the particular application to such an institution of higher education. *See id.* As explained earlier, 35 U.S.C. 123(a) provides one basis under which an applicant may establish micro entity status, and 35 U.S.C. 123(d) provides another basis under which an applicant may establish micro entity status.

35 U.S.C. 123(e) provides that in addition to the limits imposed by this section, the Director has the discretion to impose income limits, annual filing limits, or other limits on who may qualify as a micro entity pursuant to this section if the Director determines that such additional limits are reasonably necessary to avoid an undue impact on other patent applicants or owners or are otherwise reasonably necessary and appropriate. 35 U.S.C. 123(e) also provides that at least three months before any limits proposed to be implemented pursuant to 35 U.S.C. 123(e) take effect, the Director shall inform the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate of any such proposed limits. *See id.*

The micro entity provisions of 35 U.S.C. 123 are currently in effect. However, no patent fee is currently eligible for the seventy-five percent micro entity reduction as no patent fee has yet been set or adjusted under section 10 of the Leahy-Smith America Invents Act. The Office is in the process of proposing to set or adjust patent fees under section 10 of the AIA in a separate rulemaking. *See Setting and Adjusting Patent Fees,* 77 FR 55028 (Sept. 6, 2012). The fees set or adjusted by the Office under section 10 of the AIA for filing, searching, examining, issuing, appealing, and maintaining a patent application and patent will be reduced by: (1) Fifty percent for an applicant or patentee who establishes small (but not micro) entity status in the patent application or patent; and (2) seventy-five percent for an applicant or patentee who establishes micro entity status in the patent application or patent.

The Office plans to rely upon the applicant's certification of micro entity status (except where it conflicts with the information contained in the Office's records, such as where Office records indicate that the applicant is named as an inventor on more than four previously filed and unassigned nonprovisional patent applications) and will not require any additional documents from the applicant concerning the applicant's entitlement to claim micro entity status. This practice is similar to small entity practice where the Office generally does not question a claim of entitlement to small entity status. *See* 37 CFR 1.27(f); *see also Manual of Patent Examining Procedure* § 509.03 (8th ed. 2001) (Rev. 9, Aug. 2012) (MPEP).

The Office does not plan to provide advisory opinions on whether a particular entity is entitled to claim micro entity status. *See* MPEP § 509.03. The Office, however, is providing the following information concerning procedures for micro entity status under 35 U.S.C. 123:

35 U.S.C. 123 uses the term ''applicant'' throughout, which was virtually synonymous with ''inventor'' on September 16, 2011 (the date of enactment of the AIA as well as the effective date of 35 U.S.C. 123). 35 U.S.C. 118, however, as amended effective on September 16, 2012, by Section 4 of the AIA, now permits an application to be made by a person to whom the inventor has assigned or is under an obligation to assign the invention. In addition, a person who otherwise shows sufficient proprietary interest in the matter may make an application for patent on behalf of and as agent for the inventor. Thus, 35 U.S.C. 118 now allows a person other than the inventor to file an application as the applicant if the inventor has assigned or is under an obligation to assign the invention to the person or if the person shows sufficient proprietary interest in the matter. Note also that as of March 16, 2013, 35 U.S.C. 100 will be amended to provide new and specific definitions of the terms ''inventor,'' ''joint inventor,'' and ''coinventor.''

35 U.S.C. 123 does not explicitly preclude an assignee-applicant under 35 U.S.C. 118 from claiming micro entity status under 35 U.S.C. 123(a) or (d), although some provisions of 35 U.S.C. 123(a) and (d) refer to an applicant who is a natural person inventor rather than a juristic entity. *See* 35 U.S.C. 123(a)(2) (provides that a micro entity applicant under 35 U.S.C. 123(a) must not have ''been named as an inventor on more than 4 previously filed patent applications'') and 123(d)(1) (provides that the term micro entity includes an applicant who certifies that ''the applicant's employer, from which the applicant obtains the majority of the applicant's income, is an institution of higher education'' as defined by section 101(a) of the Higher Education Act of 1965). In addition, 35 U.S.C. 123(a), (b) and (d) specifically refer to a situation in which the applicant has assigned rights in the invention to an assignee. *See* 35 U.S.C. 123(a)(4) (provides that a micro entity applicant under 35 U.S.C. 123(a) must not have ''assigned, granted, or conveyed, and is not under an obligation by contract or law to assign, grant, or convey, a license or other ownership interest in the application concerned to an entity'' exceeding a specified gross income); 35 U.S.C. 123(b) (provides that an applicant is not considered to be named on a previously filed application for purposes of 35 U.S.C. 123(a)(2) if ''the applicant has assigned, or is under an obligation by contract or law to assign, all ownership rights in the application as the result of the applicant's previous employment''); and 35 U.S.C. 123(d)(2) (provides that the term micro entity includes an ''applicant [who] has assigned, granted, conveyed, or is under an obligation by contract or law, to assign, grant, or convey, a license or other ownership interest in the particular applications'' to an institution of higher education as defined by section 101(a) of the Higher Education Act of 1965). Finally, the legislative history of 35 U.S.C. 123 includes a reference to micro entities as inventors and not the assignees of inventors. *See* H.R. Rep 112–98 at 50 (2011) (describing micro entities as ''a group of inventors'' and ''truly independent inventors''). Nevertheless, 35 U.S.C. 123 does not explicitly preclude an assignee-applicant under 35 U.S.C. 118 from claiming micro entity status for an application under 35 U.S.C. 123(a) or 123(d), provided there is compliance with the applicable micro entity criteria. Each applicant must qualify for micro entity status, and any other party holding rights in the application must qualify for small entity status. *See* 37 CFR 1.29 (h). Note that a party who qualifies for micro entity status necessarily qualifies for small entity status, as under 37 CFR 1.29 a

micro entity must first qualify as a small entity under 37 CFR 1.27.

An ''institution of higher education,'' as that term is used in 35 U.S.C. 123(d), is defined in the Higher Education Act of 1965 (20 U.S.C. 1001(a)). Section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001) provides that: ''For purposes of this chapter, other than subchapter IV, the term 'institution of higher education' means an educational institution in any State that—(1) Admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate, or persons who meet the requirements of section 1091(d)(3) of this title; (2) is legally authorized within such State to provide a program of education beyond secondary education; (3) provides an educational program for which the institution awards a bachelor's degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree, or awards a degree that is acceptable for admission to a graduate or professional degree program, subject to review and approval by the Secretary; (4) is a public or other nonprofit institution; and (5) is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted pre-accreditation status by such an agency or association that has been recognized by the Secretary for the granting of pre-accreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.'' Section 103 of the Higher Education Act of 1965 (20 U.S.C. 1003) provides ''the term 'State' includes, in addition to the several States of the United States, the Commonwealth of Puerto Rico, the District of Columbia, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Mariana Islands, and the Freely Associated States'' and that the Freely Associated States means the ''Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau.''

The Office is setting out in the rules of practice the requirements for micro entity status and procedures for claiming micro entity status, paying patent fees as a micro entity, notifying the Office of loss of micro entity status, and correcting payments of patent fees paid erroneously in the micro entity amount. The Office is also developing forms for use by members of the public to provide a certification of micro entity status. The procedures track the corresponding provisions in 37 CFR 1.27 and 1.28 for small entities, except where the small entity procedure is not appropriate for micro entity status under the provisions of 35 U.S.C. 123. For example, 35 U.S.C. 123 requires a certification as a condition for an applicant to be considered a micro entity. Thus, the process in 37 CFR 1.27(c)(3) for establishing small entity status by payment of certain fees in the small entity amount cannot be made applicable to establishing micro entity status, and the process in 37 CFR 1.28(a) for a refund based upon subsequent establishment of small entity status is not applicable where there is subsequent establishment of micro entity status. In addition, 35 U.S.C. 123(a)(3) and (a)(4) require that the income level be met for the calendar year preceding the calendar year in which the applicable fee is paid. Thus, the provision in 37 CFR 1.27(g)(1) that the applicant need only determine continued eligibility for small entity status for issue and maintenance fee payments, but can pay intervening fees at small entity rate without determining whether still entitled to small entity status, cannot be made applicable to payment of patent fees as a micro entity.

**Discussion of Specific Rules**

The following is a discussion of the amendments to Title 37 of the Code of Federal Regulations, Part 1.

*Section 1.29:* Section 1.29 is added to implement procedures for claiming micro entity status.

Since 35 U.S.C. 123(a) through (d) specify the requirements to qualify as a micro entity, the provisions in §§ 1.29(a) through (d) generally track the provisions of 35 U.S.C. 123(a) through (d).

Section 1.29(a) implements the provisions of 35 U.S.C. 123(a), and includes reference to inventors or joint inventors where appropriate. Section 1.29(a) provides that an applicant claiming micro entity status under 35 U.S.C. 123(a) must certify that: (1) The applicant qualifies as a small entity as defined in § 1.27; (2) neither the applicant nor the inventor nor a joint inventor has been named as the inventor or a joint inventor (see 35 U.S.C. 100) on more than four previously filed patent applications, other than applications filed in another country, provisional applications under 35 U.S.C. 111(b), or international applications for which the basic national fee under 35 U.S.C. 41(a) was not paid; (3) neither the applicant nor the inventor nor a joint inventor, in the calendar year preceding the calendar year in which the applicable fee is being paid, had a gross income, as defined in section 61(a) of the Internal Revenue Code of 1986 (26 U.S.C. 61(a)), exceeding three times the median household income for that preceding calendar year, as most recently reported by the Bureau of the Census; and (4) neither the applicant nor the inventor nor a joint inventor has assigned, granted, or conveyed, nor is under an obligation by contract or law to assign, grant, or convey, a license or other ownership interest in the application concerned to an entity that, in the calendar year preceding the calendar year in which the applicable fee is being paid, had a gross income, as defined in section 61(a) of the Internal Revenue Code of 1986, exceeding three times the median household income for that preceding calendar year, as most recently reported by the Bureau of the Census. *See also* § 1.29(h) (each applicant must qualify for micro entity status, and each other party holding rights in the invention must qualify for small entity status).

Section 61(a) of the Internal Revenue Code of 1986 (26 U.S.C. 61(a)) provides that: ''[e]xcept as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items: (1) Compensation for services, including fees, commissions, fringe benefits, and similar items; (2) Gross income derived from business; (3) Gains derived from dealings in property; (4) Interest; (5) Rents; (6) Royalties; (7) Dividends; (8) Alimony and separate maintenance payments; (9) Annuities; (10) Income from life insurance and endowment contracts; (11) Pensions; (12) Income from discharge of indebtedness; (13) Distributive share of partnership gross income; (14) Income in respect of a decedent; and (15) Income from an interest in an estate or trust.'' The median household income for calendar year 2011 (the year most recently reported by the Bureau of the Census) was $50,054. *See Income, Poverty, and Health Insurance Coverage in the United States in 2011* at pages 5 and 31 (Table A–1) (Sept. 2012). Thus, the income level specified in §§ 1.29(a)(3) and (a)(4) (three times the median household income) is $150,162 for calendar year 2011 (the year most recently reported by the Bureau of the Census).

If an application names more than one applicant or inventor, each applicant and each inventor must meet the requirements of § 1.29(a) for the applicants to file a micro entity certification under § 1.29(a) in the application. It would not be appropriate

to file a micro entity certification under § 1.29(a) for the application if there were more than one applicant or inventor and not all of the applicants and inventors qualified as micro entities under 35 U.S.C. 123(a): *e.g.,* (1) an applicant or inventor exceeded the gross income levels; (2) an applicant or inventor had more than four other nonprovisional applications; or (3) an applicant or inventor had assigned, granted, or conveyed the application or was under an obligation to do so, to an entity that exceeds the gross income levels. Additionally, the income level requirement in 35 U.S.C. 123(a)(3) applies to each applicant's and inventor's income separately (*i.e.,* the combined gross income of all of the applicants and inventors need not be below the income level in 35 U.S.C. 123(a)(3)). Further, the assignment requirement in § 1.29(a)(4) applies to each applicant and inventor (*i.e.,* if an applicant or inventor assigns or is obligated to assign the invention to more than one assignee (*e.g.,* half interest in the invention to two assignees), each of the assignees must meet the income limit specified in § 1.29(a)(4)). Note also that in this context an inventor ordinarily should qualify as a small entity under §§ 1.29(a)(1) and 1.27(a)(1). Under § 1.27(a)(1), an inventor generally is a small entity and retains such status even if the inventor assigns some rights to another small entity. Similarly, to obtain micro entity status, § 1.29(h) requires that any non-applicant assignee be a small entity.

Section 1.29(b) implements the provisions of 35 U.S.C. 123(b). Section 1.29(b) provides that an applicant, inventor, or joint inventor is not considered to be named on a previously filed application for purposes of § 1.29(a)(2) if the applicant, inventor, or joint inventor has assigned, or is under an obligation by contract or law to assign, all ownership rights in the application as the result of the applicant's, inventor's, or joint inventors previous employment.

Section 1.29(c) implements the provisions of 35 U.S.C. 123(c). Section 1.29(c) provides that if an applicant's, inventor's, joint inventor's, or entity's gross income in the preceding calendar year is not in United States dollars, the average currency exchange rate, as reported by the Internal Revenue Service, during that calendar year shall be used to determine whether the applicant's, inventor's, joint inventor's, or entity's gross income exceeds the threshold specified in § 1.29(a)(3) or (a)(4). The Internal Revenue Service reports the average currency exchange rate (Yearly Average Currency Exchange Rates) on its Internet Web site (*http://www.irs.gov/businesses/small/international/article/0,,id=206089,00.html*).

Section 1.29(d) implements the provisions of 35 U.S.C. 123(d). Section 1.29(d) provides that an applicant claiming micro entity status under 35 U.S.C. 123(d) must certify that: (1) The applicant qualifies as a small entity as defined in § 1.27; and (2)(i) the applicant's employer, from which the applicant obtains the majority of the applicant's income, is an institution of higher education as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)); or (ii) the applicant has assigned, granted, conveyed, or is under an obligation by contract or law, to assign, grant, or convey, a license or other ownership interest in the particular application to such an institution of higher education. To the extent that 35 U.S.C. 123(d) (unlike 35 U.S.C. 123(a)) does not expressly require that an applicant qualify as a small entity under § 1.27, the Office is invoking its authority under 35 U.S.C. 123(e) to expressly require that a party claiming micro entity status via 35 U.S.C. 123(d) qualify as a small entity under § 1.27. The legislative history of 35 U.S.C. 123 refers to micro entities as a subset of small entities, namely, ''truly independent inventors.'' *See* H.R. Rep 112–98 at 50 (''[t]he Committee was made aware, however, that there is likely a benefit to describing—and then accommodating—a group of inventors who are even smaller [than small entities], in order to ensure that the USPTO can tailor its requirements, and its assistance, to the people with very little capital, and just a few inventions, as they are starting out. This section of the Act defines this even smaller group—the micro-entity—that includes only truly independent inventors''). Thus, permitting an applicant who does not qualify as a small entity to take advantage of the benefits of micro entity status via 35 U.S.C. 123(d) would be inconsistent with the purposes of micro entity provisions of 35 U.S.C. 123. The statute and its legislative history do not, for example, contemplate a for-profit, large entity applicant becoming a ''micro entity'' (and thus obtaining a 75 percent discount) merely by licensing or assigning some interest (even merely a nominal or miniscule interest) to an institution of higher education. Accordingly, the Office has determined that requiring all micro entities to qualify as small entities is reasonably necessary and appropriate to ensure that applicants who do not qualify as a small entity do not inappropriately attempt to take advantage of micro entity status. *See also* § 1.29(h) (each applicant must qualify for micro entity status, and each other party holding rights in the invention must qualify for small entity status).

Section 1.29(e) provides that micro entity status must be established in an application in by filing a certification in writing that complies with either § 1.29(a) or § 1.29(d) and that is signed in compliance with § 1.33(b). Section 1.29(e) also contains provisions for a micro entity that correspond to the provisions of § 1.27(c)(4) for a small entity. Section 1.29(e) provides that: (1) Status as a micro entity must be specifically established by an assertion in each related, continuing, and reissue application in which status is appropriate and desired; (2) status as a small or micro entity in one application or patent does not affect the status of any other application or patent, regardless of the relationship of the applications or patents; and (3) the refiling of an application under § 1.53 as a continuation, divisional, or continuation-in-part application (including a continued prosecution application under § 1.53(d)), or the filing of a reissue application, requires a new certification of entitlement to micro entity status for the continuing or reissue application.

Section 1.29(f) contains provisions for a micro entity that correspond to the provisions of § 1.27(d) for a small entity. Section 1.29(f) provides that a fee may be paid in the micro entity amount only if it is submitted with, or subsequent to, the submission of a certification of entitlement to micro entity status.

Section 1.29(g) contains provisions for a micro entity that correspond to the provisions of § 1.27(e) for a small entity. Section 1.29(g) provides that a certification of entitlement to micro entity status need only be filed once in an application or patent, and that micro entity status, once established, remains in effect until changed pursuant to § 1.29(i). However, a fee may be paid in the micro entity amount only if status as a micro entity as defined in § 1.29(a) or (d) is appropriate (which requires that status as a small entity is also appropriate) on the date the fee is being paid. Thus, while an applicant is not required to provide a certification of entitlement to micro entity status with each fee payment once micro entity status has been established in an application, the applicant must still be entitled to micro entity status to pay a fee in the micro entity amount at the

time of all payments of fees in the micro entity amount.

For micro entity status under 35 U.S.C. 123(a), the applicant must determine that the applicant and each inventor or joint inventor still meet the applicable conditions of 35 U.S.C. 123(a) and § 1.29(a) to claim micro entity status. For example, the applicant must determine that neither the applicant nor inventor nor joint inventor has had a change in gross income that exceeds the gross income threshold in 35 U.S.C. 123(a)(3) (a new determination must be made each year because gross income may change from year to year, and micro entity status is based upon gross income in the calendar year preceding the calendar year in which the applicable fee is being paid). In addition, the applicant must determine that neither the applicant nor inventor nor joint inventor has made, or is obligated by contract or law to make, an assignment, grant, or conveyance to an entity not meeting the gross income threshold in 35 U.S.C. 123(a)(4), and that no new inventor or joint inventor has been named in the application who does not meet the conditions specified in 35 U.S.C. 123(a) and § 1.29(a)). For micro entity status under 35 U.S.C. 123(d), the applicant must determine that each applicant and inventor still complies with 35 U.S.C. 123(d) and § 1.29(d) (*e.g.,* still obtains the majority of his or her income from an institution of higher education as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)). Section 1.29(g) also provides that where an assignment of rights or an obligation to assign rights to other parties who are micro entities occurs subsequent to the filing of a certification of entitlement to micro entity status, a second certification of entitlement to micro entity status is not required.

Section 1.29(h) contains provisions for a micro entity that correspond to the provisions of § 1.27(f) for a small entity. Section 1.29(h) provides that prior to submitting a certification of entitlement to micro entity status in an application, including a related, continuing, or reissue application, a determination of such entitlement should be made pursuant to the requirements of § 1.29(a) or 1.29(d). Section 1.29(h) also indicates that each applicant must qualify for micro entity status under § 1.29(a) or 1.29(d), and that any other party holding rights in the application must qualify for small entity status under § 1.27. As discussed previously, a party who qualifies for micro entity status necessarily qualifies for small entity status, as under § 1.29(a)(1) and (d)(1) a micro entity must first qualify as a small entity under § 1.27. Section 1.29(h) also indicates that the Office will generally not question certification of entitlement to micro entity status that is made in accordance with the requirements of § 1.29.

Section 1.29(i) contains provisions for a micro entity that correspond to the provisions of § 1.27(g)(2) for a small entity. Section 1.29(i) provides that notification of a loss of entitlement to micro entity status must be filed in the application or patent prior to paying, or at the time of paying, any fee after the date on which status as a micro entity as defined in § 1.29(a) or 1.29(d) is no longer appropriate. The notification that micro entity status is no longer appropriate must be signed by a party identified in § 1.33(b). Payment of a fee in other than the micro entity amount is not sufficient notification that micro entity status is no longer appropriate.

Section 1.29(i) further provides that a notification that micro entity status is no longer appropriate will not be treated as a notification that small entity status is also no longer appropriate unless it also contains a notification of loss of entitlement to small entity status under § 1.27(f)(2). Thus, an applicant or patentee who files a notification that micro entity status is no longer appropriate will be treated as a small entity by default unless the notification also contains a notification of loss of entitlement to small entity status under § 1.27(f)(2).

Section 1.29 finally provides that once a notification of a loss of entitlement to micro entity status is filed in the application or patent, a new certification of entitlement to micro entity status is required to again obtain micro entity status.

Section 1.29(j) contains provisions for a micro entity that correspond to the provisions of § 1.27(h) for a small entity. Section 1.29(j) provides that any attempt to fraudulently establish status as a micro entity, or pay fees as a micro entity, shall be considered as a fraud practiced or attempted on the Office, and that establishing status as a micro entity, or paying fees as a micro entity, improperly, and with intent to deceive, shall be considered as a fraud practiced or attempted on the Office.

Section 1.29(k) contains provisions for a micro entity that correspond to the provisions of § 1.28(c) for a small entity. Section 1.28(c) permits an applicant or patentee to correct the erroneous payment of a patent fee in the small entity amount if status as a small entity was established in good faith, and fees as a small entity were paid in good faith. *See DH Tech. Inc.* v. *Synergystex Int'l Inc.,* 154 F.3d 1333 (Fed. Cir. 1998). Section 1.29(k) provides that if: (i) An applicant or patentee establishes micro entity status in an application or patent in good faith; (ii) the applicant or patentee pays fees as a micro entity in the application or patent in good faith; and (iii) applicant or patentee later discovers that such micro entity status either was established in error, or that the Office was not notified of a loss of entitlement to micro entity status as required by § 1.29(i) through error, the error will be excused upon compliance with the separate submission and itemization requirements of § 1.29(k)(1) and the deficiency payment requirement of § 1.29(k)(2).

Section 1.29(k)(1) provides that any paper submitted under § 1.29(k) must be limited to the deficiency payment (all fees paid in error) required for a single application or patent. Section 1.29(k)(1) provides that where more than one application or patent is involved, separate submissions of deficiency payments (*e.g.,* checks) and itemizations are required for each application or patent. Section 1.29(k)(1) also provides that the paper must contain an itemization of the total deficiency payment and include the following information: (1) Each particular type of fee that was erroneously paid as a micro entity, (*e.g.,* basic statutory filing fee, two-month extension of time fee) along with the current fee amount for a small or non-small entity; (2) the micro entity fee actually paid, and the date on which it was paid; (3) the deficiency owed amount (for each fee erroneously paid); and (4) the total deficiency payment owed, which is the sum or total of the individual deficiency owed amounts as set forth in § 1.29(k)(2).

Section 1.29(k)(2) provides that the deficiency owed, resulting from the previous erroneous payment of micro entity fees, must be paid. The deficiency owed for each previous fee erroneously paid as a micro entity is the difference between the current fee amount for a small entity or non-small entity, as applicable, on the date the deficiency is paid in full and the amount of the previous erroneous micro entity fee payment. The total deficiency payment owed is the sum of the individual deficiency owed amounts for each fee amount previously and erroneously paid as a micro entity. This corresponds to the procedure for fee deficiency payments based upon the previous erroneous payment of patent fees in the small entity amount. *See* § 1.28(c)(2)(i) (''[t]he deficiency owed for each previous fee erroneously paid as a small entity is the difference between the current full fee amount (for non-small entity) on the date the deficiency is paid

in full and the amount of the previous erroneous (small entity) fee payment'').

Section 1.29(k)(3) provides that if the requirements of §§ 1.29(k)(1) and (k)(2) are not complied with, such failure will either be treated at the option of the Office as an authorization for the Office to process the deficiency payment and charge the processing fee set forth in § 1.17(i), or result in a requirement for compliance within a one-month non-extendable time period under § 1.136(a) to avoid the return of the fee deficiency payment.

Section 1.29(k)(4) provides that any deficiency payment (based on a previous erroneous payment of a micro entity fee) submitted under § 1.29(k) will be treated as a notification of a loss of entitlement to micro entity status under § 1.29(i).

*Comments and Responses to Comments:* The Office published a notice on May 30, 2012, proposing to change the rules of practice to implement the micro entity provisions of the AIA. *See Changes to Implement Micro Entity Status for Paying Patent Fees,* 77 FR 31806 (May 30, 2012). The Office received twenty-seven written comments (from intellectual property organizations, industry, law firms, individual patent practitioners, and the general public) in response to this notice. There were some comments received that related to practice before the agency but not related to the proposed changes to the rules of practice to implement the micro entity provisions of the AIA, and these comments have been forwarded to the Office of Innovation Development for further consideration. The Office is always interested to hear feedback from the public concerning ways in which it can assist small and independent inventors. The comments germane to the proposed changes to the rules of practice to implement the micro entity provisions of the AIA and the Office's responses to the comments follow:

*Comment 1:* One comment stated that there are several instances in 35 U.S.C. 123 and proposed § 1.29 where the term ''applicant'' is inapplicable to an organization and must really be referring to the inventor(s) (*e.g.,* a certification that ''applicant'' has not been named as an ''inventor'' in more than four previously filed applications, references to applicant's previous employment or employer). One comment indicated that the term ''applicant'' should be used in an interchangeable manner so as to mean either the inventor(s) or a company to which the patent application is assigned (i.e., the rules should refer to ''applicant or inventor'') in view of the AIA's change to 35 U.S.C. 118. That comment further indicated, however, that the ability to vary from the statute ''may be limited.'' One comment similarly indicated that the final rules should replace all instances of ''applicant'' and ''applicant's'' with ''inventor'' and ''inventor's'' in § 1.29(a) (second instance), (b), (c), (d)(1), (d)(2)(i), and (d)(2)(ii) in view of the AIA's change to 35 U.S.C. 118. One comment stated that in the case of university inventions, the university typically is the applicant and this creates anomalies in proposed § 1.29(d), since the institution (university) logically cannot make the certifications required under § 1.29(d)(2)(i) and (d)(2)(ii) (that the employer from which the university obtains the majority of its income is an institution of higher education as defined by section 101(a) of the Higher Education Act of 1965, or that the university itself has assigned, granted, conveyed, or is under an obligation by contract or law, to assign, grant, or convey, a license or other ownership interest in the particular application).

*Response:* The Office specifically invited public comment in the notice of proposed rulemaking on the issue of whether the term ''inventor'' should be used in place of ''applicant'' at any instance in the proposed micro entity rules. *See Changes to Implement Micro Entity Status for Paying Patent Fees,* 77 FR at 31808. The Office agrees that some, though not all, provisions of 35 U.S.C. 123 refer to a situation where an inventor is the applicant. The micro entity provisions of 35 U.S.C. 123 were enacted as part of the AIA, which also revised the patent laws to provide a specific definition of the term ''inventor'' and to change who may be the applicant for a patent. *See* 125 Stat. at 285 (defining ''inventor'') and 293–97 (changing the patent laws to distinguish between who may apply for a patent as the applicant and who must be named as the inventor); *see also* 35 U.S.C. 100; 35 U.S.C. 118. The Office does not consider it appropriate either to amend the language of 35 U.S.C. 123 as incorporated into the corresponding provisions of § 1.29 or to somehow view the terms ''applicant'' and ''inventor'' as interchangeable in all instances under 35 U.S.C. 123. *See Brown* v. *Gardner,* 513 U.S. 115, 118 (1994) (presumption that a given term is used to mean the same thing throughout a statute). As discussed previously, while some of the provisions in 35 U.S.C. 123(a) and (d) refer to an inventor-applicant, 35 U.S.C. 123 does not explicitly preclude an assignee-applicant under 35 U.S.C. 118 from claiming micro entity status under 35 U.S.C. 123(a) or (d), provided there is compliance with the applicable micro entity criteria by each applicant. However, each applicant must qualify for micro entity status, and any other party holding rights in the application must qualify for small entity status. *See* 37 CFR 1.29(h).

*Comment 2:* One comment stated that it is possible that the legislative intent of 35 U.S.C. 123(a)(2) was that an applicant should satisfy this criterion so long as the applicant has fewer than four previously filed applications in which micro entity fees were paid. One comment stated that the four application limit under 35 U.S.C. 123(a)(2) should apply only to applications filed within the past twenty years or so. One comment stated that it would make sense for the term ''inventor'' in § 1.29(a)(2) to refer to an applicant who has had the opportunity to claim micro entity status in four previously filed patent applications. One comment indicated that § 1.29(a)(2) should be amended to provide that if an application is entitled to micro entity status, then continuation and divisional applications of that parent application should normally be entitled to micro entity status without counting the parent application or any parallel filed continuing or divisional patent applications in the same patent family toward the four application limit.

*Response:* Section 1.29(a)(2) tracks the provisions of 35 U.S.C. 123(a)(2) with the clarification to reference non-applicant inventors and joint inventors. 35 U.S.C. 123(a)(2) provides a certification that the applicant, *inter alia,* ''has not been named as an inventor on more than 4 previously filed patent applications, other than applications filed in another country, provisional applications under 35 U.S.C. 111(b), or international applications * * * for which the basic national fee under 35 U.S.C. 41(a) was not paid.'' This provision refers to when an inventor-applicant has been named as an inventor in a previous application, including as one in a group of joint inventors. *See* 35 U.S.C. 100. An applicant that is not an inventor would plainly not violate this criteria. Moreover, this provision has been clarified to refer to an inventor or joint inventor who is not the applicant. 35 U.S.C. 123(a)(2) by its express terms does not, however, provide for exceptions to this four-application limit suggested by the comments. In addition, while 35 U.S.C. 123(e) authorizes the Office to place additional limits on who may qualify as a micro entity under 35 U.S.C. 123, it does not authorize the

Office to remove limitations contained in 35 U.S.C. 123.

*Comment 3:* One comment suggested expanding the scope of the § 1.29(b) exception to applications counted toward the four application limit in § 1.29(a)(2) by including applications assigned to the inventor's current employer when the invention is outside the current employer's scope of employment with the inventor.

*Response:* Section 1.29(b) tracks the provisions of 35 U.S.C. 123(b) with the clarification to reference non-applicant inventors and joint inventors. 35 U.S.C. 123(b) provides that an applicant is not considered to be named on a previously filed application for purposes of 35 U.S.C. 123(a)(2) if the applicant has assigned, or is under an obligation by contract or law to assign, all ownership rights in the application ''as the result of applicant's previous employment.'' Thus, the exception in 35 U.S.C. 123(b) by its express terms does not apply to applications assigned to a current employer. In addition, as discussed previously, while 35 U.S.C. 123(e) authorizes the Office to place additional limits on who may qualify as a micro entity under 35 U.S.C. 123, it does not authorize the Office to remove limitations contained in 35 U.S.C. 123.

*Comment 4:* One comment noted that the Office has indicated that it will publish the income level that is three times the median household income for the calendar year most recently reported by the Bureau of the Census, but that 35 U.S.C. 123(a) (and § 1.29(a)) require that applicants use the median household income data for ''the calendar year preceding the calendar year in which the applicable fee is being paid.'' The comment expressed concern that median household income data for a given year is not reported by the Bureau of the Census until the succeeding year. One comment suggested that § 1.29(a)(3) be amended to provide that an applicant may rely on his or her most recently filed income tax return regardless of whether the most recently filed tax return accounted for the previous calendar year's gross income.

*Response:* Section 1.29(a)(3) tracks the provisions of 35 U.S.C. 123(a)(3) with the clarification to reference non-applicant inventors and joint inventors. 35 U.S.C. 123(a)(3) provides that each inventor's gross income ''in the calendar year preceding the calendar year in which the applicable fee is being paid'' must not exceed ''three times the median household income for that preceding calendar year as most recently reported by the Bureau of the Census.'' 35 U.S.C. 123(a)(3) does not provide for an applicant to simply rely on his or her most recently filed income tax return if the most recently filed tax return does not pertain to the calendar year preceding the calendar year in which the applicable fee is being paid. The Office will post on its Internet Web site the U.S. dollar amount that equals three times the median household income as most recently reported by the Bureau of the Census. Thus, the Office's Internet Web site will contain the U.S. dollar amount that equals three times the median household income as most recently reported by the Bureau of the Census as provided for in § 1.29(a)(3) and 35 U.S.C. 123(a)(3).

*Comment 5:* One comment requested guidance as to what effect marital status has on ''gross income'' in terms of § 1.29(a)(3), and whether the inventor's tax return is filed jointly or separately changes the amount of ''gross income'' for purposes of meeting the requirement of proposed § 1.29(a)(3). The comment also indicated that in community property states, the law may be construed such that the inventor/applicant has assigned his or her rights in part to the spouse, as a matter of law. Another comment stated that marital status of an individual applicant may have an impact on the assignment or ownership rights in an invention and the gross income of the applicant, and that it may require an opinion from an accountant or tax attorney with respect to the applicant's income.

*Response:* The Office reads the ''gross income'' requirement contained in 35 U.S.C. 123(a)(3) and § 1.29(a)(3) with respect to a married person as applying to the amount of income the person would have reported as gross income if that person were filing a separate tax return (which includes properly accounting for that person's portion of interest, dividends, and capital gains from joint bank or brokerage accounts), regardless of whether the person actually filed a joint return or a separate return for the relevant calendar year. Additionally, the Office does not consider a spouse's ownership interest in a patent application or patent arising by operation of residence in a community property state as falling within the ambit of 35 U.S.C. 123(a)(4) and § 1.29(a)(4) because the spouse's ownership interest arises by operation of state law, rather than an assignment, grant, conveyance, or obligation to assign, grant, or convey.

*Comment 6:* One comment questioned the situation where the applicant's income is not in U.S. dollars and the applicable currency exchange rate is applied to determine the applicant's gross income in U.S. dollars in accordance with § 1.29(c), whether the applicant's gross income in terms of U.S. dollars should be compared to three times the median household income for the preceding calendar year in the United States, or should be compared to the median household income for the preceding calendar year in the country in which the applicant obtained income.

*Response:* In all cases, the inventor's gross income in the previous calendar year must be compared to the U.S. dollar amount equaling three times the median household income as most recently reported by the Bureau of the Census (which will be posted on the Office's Internet Web site) at the time the applicable fee is being paid in order to meet the gross income requirement of § 1.29(a)(3).

*Comment 7:* One comment suggested that the language ''that calendar year'' in proposed § 1.29(c) should be changed to ''the preceding calendar year'' to clarify that applicants whose income is not in U.S. dollars must apply the currency exchange rate from the preceding calendar year when calculating income in U.S. dollars in order to determine whether the proposed § 1.29(a)(3) ''gross income'' requirement is met.

*Response:* Section 1.29(c) tracks the provisions of 35 U.S.C. 123(c) with the clarification to reference non-applicant inventors and joint inventors. The phrase ''that calendar year'' in 35 U.S.C. 123(c) and § 1.29(c) means ''the preceding calendar year'' as previously recited in 35 U.S.C. 123(c) and § 1.29(c).

*Comment 8:* One comment indicated that foreign applicants should be directed to make a ''good faith attempt'' to estimate their gross income in terms of U.S. tax law.

*Response:* 35 U.S.C. 123(c) provides that if an applicant's or entity's gross income in the preceding calendar year is not in United States dollars, the average currency exchange rate, as reported by the Internal Revenue Service, during that calendar year shall be used to determine whether the applicant's or entity's gross income exceeds the threshold specified in 35 U.S.C. 123(a)(3) or (4). 35 U.S.C. 123 does not provide any alternative basis, such as a good faith estimation as suggested by the comment, for determining whether an applicant or entity meets the gross income requirement of 35 U.S.C. 123(a)(3). For an applicant or entity whose previous calendar year's gross income was received partially in U.S. dollars and partially in non-United States currency, the gross income amount in non-United States currency must be converted into U.S. dollars in accordance with § 1.29(c) and then added to the gross income

amount in U.S. dollars to determine whether the applicant or entity meets the gross income requirement of § 1.29(a)(3).

*Comment 9:* One comment suggested that the definition of micro entity status should be broadened to benefit even more small inventors than those who meet the requirements of 35 U.S.C. 123(a).

*Response:* The legislative history includes a statement that Congress developed the micro entity provision to benefit truly independent inventors, people with very little capital and just a few inventions, who are just starting out. *See* H.R. Rep 112–98 at 50. Small entity inventors who do not meet the micro entity requirements of 35 U.S.C. 123 may still claim small entity status and receive the fifty percent small entity fee reduction. In any event, as discussed previously, while 35 U.S.C. 123(e) authorizes the Office to place additional limits on who may qualify as a micro entity under 35 U.S.C. 123, it does not authorize the Office to remove limitations contained in 35 U.S.C. 123 or expand the scope of 35 U.S.C. 123 to include more small entities.

*Comment 10:* Several comments objected to the requirement under § 1.29(d)(1) that in order to qualify for micro entity status under § 1.29(d), the applicant must qualify as a small entity as defined in § 1.27 in addition to meeting one of the requirements under § 1.29(d)(2)(i) or (d)(2)(ii).

*Response:* 35 U.S.C. 123(e) provides that in addition to the limits imposed by 35 U.S.C. 123, the Director may, in the Director's discretion, impose income limits, annual filing limits, or other limits on who may qualify as a micro entity pursuant to this section if the Director determines that such additional limits are reasonably necessary to avoid an undue impact on other patent applicants or owners or are otherwise reasonably necessary and appropriate. The Office has determined that requiring all micro entities to qualify as small entities (§ 1.29(d)(1)) is reasonably necessary and appropriate to ensure that applicants who do not qualify as a small entity do not inappropriately attempt to take advantage of micro entity status. As discussed in the notice of proposed rulemaking, the legislative history of 35 U.S.C. 123 includes a statement that micro entity status is directed to a subset of small entities, namely, ''truly independent inventors.'' *See* H.R. Rep 112–98 at 50.

*Comment 11:* Several comments indicated that § 1.29(d)(2)(ii) should provide that the rights transferred or owed to an institution of higher education should be substantial. The comments indicated that institutions of higher education are generally non-practicing entities or that applicants could engage in sham transfers of a de minimus interest to an institution of higher education, and suggested the Office use its authority under 35 U.S.C. 123(e) to ensure the transfer of rights is for a substantial purpose. One comment indicated that micro entity status by a grant of rights to an institution of higher education under § 1.29(d)(2)(ii) should not be available to an institution of higher education and that without such a limitation, institutions of higher education could simply grant rights to each other and thereby qualify their patent for micro entity status.

*Response:* As discussed previously, the Office is requiring that all micro entities qualify as small entities (§ 1.29(d)(1)) to ensure that applicants who do not qualify as a small entity do not inappropriately attempt to take advantage of micro entity status. This requires that any person or entity claiming micro entity status not have assigned, granted, conveyed, or licensed, and be under no obligation under contract or law to assign, grant, convey, or license, any rights in the invention to any person, concern, or organization which would not qualify for small entity status as a person, small business concern, or nonprofit organization. *See* § 1.27(a). The Office plans to closely monitor the percentage of applicants claiming small entity status under 35 U.S.C. 123(d) and will propose additional limits under the authority provided in 35 U.S.C. 123(e) if it appears that a substantial number of applicants are engaging in sham transactions with institutions of higher education to obtain micro entity status.

*Comment 12:* One comment indicated that 35 U.S.C. 123(d) is unclear as to whether it was intended to cover a separate non-profit corporation, research foundation, or other institution that is legally separate from an institution of higher education but whose stated mission is to represent that institution of higher education, to act on its behalf, and/or commercialize the intellectual property of that institution of higher education. The comment suggested that a research foundation should be treated as a qualifying institution of higher education for purposes of micro entity status if the research foundation is acting on behalf of a university which is an institution of higher education as defined in section 101(a) of the Higher Education Act of 1965. Another comment suggested that the Office consider expanding the scope of § 1.29(d) to include technology transfer organizations whose primary purpose is to facilitate the commercialization of technologies developed by one or more institutions of higher education as defined by section 101(a) of the Higher Education Act of 1965. Another comment suggested that micro entity status be made available to applicants whose inventions are co-owned with Federal Government research laboratories and that patent applications on inventions made solely or jointly by Federal laboratory personnel should be considered in the same manner as applications made solely by personnel at academic research laboratories. Another comment suggested amending § 1.29(d) to extend the definition of ''institution of higher education'' to include certain nonprofit scientific or educational organizations that are not institutions of higher education ''as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a))'' as required by 35 U.S.C. 123(d). Another comment suggested that the Office interpret ''institution of higher education as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a))'' as it appears in 35 U.S.C. 123(d) to include institutions of higher education set forth in subsection (b) of 20 U.S.C. 1001, thus making micro entity status available to institutions that grant only graduate degrees if they otherwise qualify as institutions of higher education under 20 U.S.C. 1001(a).

*Response:* 35 U.S.C. 123(d) provides that a micro entity shall also include an applicant who certifies that: (1) The applicant's employer, from which the applicant obtains the majority of the applicant's income, is an institution of higher education as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)); or (2) the applicant has assigned, granted, conveyed, or is under an obligation by contract or law, to assign, grant, or convey, a license or other ownership interest in the particular applications to such an institution of higher education. Consistent with the discussion above and in the notice of proposed rulemaking about the statutory terms ''applicant'' and ''inventor,'' note that the statutory criteria in 35 U.S.C. 123(d) ordinarily would not be met by an institution of higher education that is itself an assignee-applicant. Also, while 35 U.S.C. 123(e) authorizes the Office to place additional limits on who may qualify as a micro entity under 35 U.S.C. 123, it does not authorize the Office to remove limitations contained in 35 U.S.C. 123 such as to expand the scope of 35 U.S.C. 123(d) to include a

separate, non-profit corporation, research foundation, technology transfer organization, Federal Government research laboratory, other non-profit scientific or educational organization, institution of higher education as defined in section 101(b) of the Higher Education Act of 1965, or other institution that is legally separate from an institution of higher education as defined in section 101(a) of the Higher Education Act of 1965 as suggested by the comments. An entity or institution must meet the definition of an institution of higher education as defined in section 101(a) of the Higher Education Act of 1965 for an applicant employed by, or who has assigned or is under an obligation to assignee to, the entity or institution, to be eligible for micro entity status under 35 U.S.C. 123(d).

*Comment 13:* Several comments indicated that the proposed rules show a bias in favor of institutions of higher education and against independent inventors because an independent inventor has to meet certain criteria to be entitled to micro entity status.

*Response:* Both independent inventors under 35 U.S.C. 123(a) and those employed by or under a legal or contractual obligation to assign, grant, or convey an interest in an application to an institution of higher education as defined in section 101(a) of the Higher Education Act of 1965 under 35 U.S.C. 123(d), must meet certain criteria to be eligible for micro entity status. Specifically, the applicant must qualify as a small entity as defined in § 1.27. In addition, as to 35 U.S.C. 123(d) either the applicant's employer, from which the applicant obtains the majority of the applicant's income, must be an institution of higher education as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)), or the applicant must have assigned, granted, conveyed, or be under an obligation by contract or law, to assign, grant, or convey, a license or other ownership interest in the particular application to such an institution of higher education. The income and application filing criteria specified in § 1.29(a) tracks the criteria in 35 U.S.C. 123(a).

*Comment 14:* One comment questioned whether micro entity status will be available to foreign applicants.

*Response:* Micro entity status is available to any applicant (foreign or domestic alike) who meets the requirements of 35 U.S.C. 123 and § 1.29. Notably, 35 U.S.C. 123(d) provides that an institution must meet the definition of an institution of higher education as defined in section 101(a) of the Higher Education Act of 1965 for micro entity status to be obtained based upon the applicant's employment at or the applicant's assignment or obligation to the institution. One criteria of the definition of ''institution of higher education'' set forth in section 101(a) of the Higher Education Act of 1965 is that the institution must be located in a ''State.'' Section 103 of the Higher Education Act of 1965 provides that the term ''State'' as used in section 101(a) ''includes the several States of the United States, the Commonwealth of Puerto Rico, the District of Columbia, Guam, American Samoa, the United States Virgin Islands, and the Freely Associated States'' and that the Freely Associated States means the ''Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau.''

*Comment 15:* Several comments urged deletion of the requirement in § 1.29(e) that micro entity status be specifically established by a new certification in each related continuing and reissue application. One comment indicated that unless the Office removes the provision in proposed § 1.29(g) that a fee may be paid in the micro entity amount only if status as a micro entity is appropriate on the date the fee is paid, the Office should remove the requirement in proposed § 1.29(e) that status as a micro entity must be specifically established in each related, continuing and reissue application in which status is appropriate and desired. One comment stated that § 1.29(e) contains an error in that contrary to its language, status as a micro entity in one application does affect the status of other applications. The commenter, however, suggests retaining language in § 1.29(e) stating that micro entity status must be specifically established in each continuing and divisional application in which status is appropriate and desired.

*Response:* The Office shares the concerns of the comments that the small entity and micro entity regulations and procedures be as simple as possible. For this reason, the Office is making the micro entity provisions as consistent with the small entity provisions as possible, including the provisions pertaining to claiming small entity status in related continuing and reissue applications. *See* § 1.27(c)(4). In addition, 35 U.S.C. 123 requires that the applicant make a certification under 35 U.S.C. 123(a) or (d) to qualify for micro entity status. An applicant's ability to meet the requirements in 35 U.S.C. 123(a) or (d) may change over time. For example, from a first application to a related continuing or reissue application, an applicant's gross income (35 U.S.C. 123(a)(3)) and employment (35 U.S.C. 123(d)(1)) may change, and the number of applications naming the applicant as an inventor (35 U.S.C. 123(a)(2)) will change with the filing of a related continuing or reissue application. Therefore, the Office is concerned about permitting micro entity status to automatically carry over into a related continuing or reissue application without the certification required by 35 U.S.C. 123(a) or (d). Finally, while being named as an inventor in other applications may affect an applicant's ability to claim micro entity status in an application, status as a micro entity in one application does not affect the status of other applications. Finally, as discussed previously, the Office plans to seek additional public comment on the micro entity provisions after the Office and the public have gained experience with the micro entity procedures in operation, and will pursue further improvements to the micro entity procedures in light of the public comment and its experience with the micro entity procedures.

*Comment 16:* One comment stated that § 1.29 is unclear as to who must sign the micro entity certification in applications with more than one applicant. The comment suggested that § 1.29 be amended to make clear that each applicant must meet the requirements of 35 U.S.C. 123(a) or (d) for the applicants to file a micro entity certification in the application. Further, the comment suggested that §§ 1.29(a) and (d) be revised to state that ''each applicant so establishing such status must certify that that applicant'' meets all the requirements in order to establish micro entity status. One basis given for this suggestion is that joint applicants will generally not be privy to each other's private financial information, and should not be required to submit a certification as to the qualification of their joint applicants.

*Response:* Section 1.29(e) provides that a micro entity status certification must be signed in compliance with § 1.33(b). Section 1.33(b) requires that amendments and other papers filed in the application be signed by: (1) A patent practitioner of record; (2) a patent practitioner not of record who acts in a representative capacity under the provisions of § 1.34; or (3) the applicant (§ 1.42). Section 1.33(b) further provides that all papers submitted on behalf of a juristic entity must be signed by a patent practitioner unless otherwise specified. If the application names more than one inventor and the joint inventors are the applicant under § 1.42(a), a micro entity status certification must be signed by: (1) A patent practitioner of record; (2) a

patent practitioner not of record who acts in a representative capacity under the provisions of § 1.34; or (3) all of the inventors.

*Comment 17:* One comment suggested amending § 1.29(f) to include language permitting the micro entity certification to be filed in response to a notice of fee deficiency mailed by the Office.

*Response:* Certification of micro entity status can be made at any stage of prosecution, or at any time before or with payment of a maintenance fee after the patent issues. However, a fee may be paid in the micro entity amount only if it is submitted with, or subsequent to, the submission of a certification of entitlement to micro entity status.

*Comment 18:* Several comments argued that there should be no need to recertify small entity status if micro entity status is lost, because the applicant had to certify small entity status to qualify as a micro entity and the applicant should continue to qualify for small entity status after losing micro entity status.

*Response:* Section 1.29(i) as adopted in this final rule provides that a notification that micro entity status is no longer appropriate will not be treated as a notification that small entity status is also no longer appropriate unless it also contains a notification of loss of entitlement to small entity status under § 1.27(f)(2). An applicant or patentee who files a notification that micro entity status is no longer appropriate will be treated as a small entity by default unless the notification also contains a notification of loss of entitlement to small entity status under § 1.27(f)(2), thus minimizing burdens on small entity applicants and patentees. An applicant or patentee who is no longer a micro entity or a small entity must provide both a notification under § 1.29(i) of loss of entitlement to micro entity status and a notification under of § 1.27(f)(2) of loss of entitlement to small entity status.

*Comment 19:* A number of comments indicated that the proposed requirement in § 1.29(g) to determine continued qualification for micro entity status each time a fee is paid was overly burdensome. One comment indicated that this proposed requirement would inevitably lead to additional cost to applicants in prosecuting applications before the Office. Several comments suggested that § 1.29(g) be revised to be similar to small entity practice such that once micro entity status is acquired, fees can continue to be paid in the micro entity amount until the issue fee or any maintenance fee is due, or that micro entity status be permitted to be maintained throughout the calendar year in which micro entity status was established without regard to continued qualification. The comments indicated that an entity that licenses multiple patent applications will need to confirm that each licensee does not have a gross income that exceeds three times the median household income for the preceding calendar year, and that an entity with a patent application naming multiple inventors will need to confirm that each inventor for each application does not have a gross income that exceeds three times the median household income for the preceding calendar year. One comment alternatively suggested that micro entity status be maintained by applicants through the end of a calendar year, even if there has been a change in income status during the calendar year that disqualifies the applicant from a continued claim to micro entity status.

*Response:* 35 U.S.C. 123(a) does not allow for a provision similar to small entity practice under which once micro entity status is acquired, fees can continue to be paid in the micro entity amount until the issue fee or any maintenance fee is due or that micro entity status be maintained throughout the calendar year in which micro entity status was established without regard to continued qualification. 35 U.S.C. 123(a) requires that a micro entity ''not [have] been named as an inventor on more than 4 previously filed patent applications, other than applications filed in another country, provisional applications under 35 U.S.C. 111(b), or international applications for which the basic national fee under 35 U.S.C. 41(a) was not paid'' and ''not, in the calendar year preceding the calendar year in which the applicable fee is being paid, have a gross income, as defined in section 61(a) of the Internal Revenue Code of 1986 (26 U.S.C. 61(a)), exceeding three times the median household income for that preceding calendar year.'' 35 U.S.C. 123(a)(2) and (a)(3). Finally, while applicants with complex licensing arrangements may consider confirming the status of each licensee challenging, this is more a function of the complexity of the licensing arrangement than any complexity in the requirement that a fee may be paid in the micro entity amount only if status as a micro entity as defined in § 1.29(a) or § 1.29(d) is appropriate on the date the fee is being paid.

*Comment 20:* Several comments objected to the statement in proposed § 1.29(h) that ''[i]t should be determined that all parties holding rights in the invention qualify for micro entity status.'' One comment stated that proposed § 1.29(h) appears to require an opinion that all parties holding rights in the invention qualify for micro entity status. One comment indicated that because ''parties'' could include an applicant under 35 U.S.C. 118 not qualifying as a micro entity but filing an application on behalf of an inventor qualifying as a micro entity, the statement should be deleted. Another comment indicated that the sentence cited from § 1.29(h) is redundant and/or inconsistent with the statute as 35 U.S.C. 123(a)(4) expressly includes such a limitation whereas 35 U.S.C. 123(d) does not. The comment also indicated that the sentence cited from § 1.29(h) is inconsistent with § 1.29(d) which would otherwise allow any entity that qualifies for small entity status to obtain the benefits of micro entity status by assigning, granting, or conveying, a license or other ownership interest to a qualified institution of higher education. The comment suggested amending the sentence cited from § 1.29(h) by replacing ''qualify for micro entity status'' with ''qualify for small entity status,'' or alternatively, replacing the phrase ''all parties holding rights to the invention'' with ''all applicants.'' One comment indicated that ''invention'' is not the equivalent of ''application,'' and thus the word ''invention'' in the phrase ''all parties holding rights to the invention'' should be changed to ''application,'' or the Office should provide guidance on the meaning of the expression ''rights in the invention.''

*Response:* The Office is revising this provision to indicate that each applicant must qualify for micro entity status under § 1.29(a) or § 1.29(d), and that each other party holding rights in the application must qualify for small entity status under § 1.27. Note that § 1.27(a)(3) provides for small entity status with respect to nonprofit organizations and is applicable to universities or other institutions of higher education. *See* § 1.27(a)(3)(ii)(A). 35 U.S.C. 123(e) provides that in addition to the limits imposed by 35 U.S.C. 123, the Director may, in the Director's discretion, impose income limits, annual filing limits, or other limits on who may qualify as a micro entity pursuant to this section if the Director determines that such additional limits are reasonably necessary to avoid an undue impact on other patent applicants or owners or are otherwise reasonably necessary and appropriate. As discussed previously, the Office has determined that requiring all micro entities to qualify as small entities and that all other parties holding rights in

the invention qualify for small entity status is reasonably necessary and appropriate to ensure that applicants who do not qualify as a small entity do not inappropriately attempt to take advantage of micro entity status.

*Comment 21:* One comment indicated that § 1.29(h) is an advisory opinion, and not a statement of any requirement, and thus should be deleted.

*Response:* Section 1.29(h) requires that each applicant qualify for micro entity status under § 1.29(a) or § 1.29(d), and that each other party holding rights in the application qualify for small entity status under § 1.27, in order for the applicant to make a certification of entitlement to micro entity status. With respect to the small entity status requirement, § 1.27(a) requires that any person or entity claiming small entity status not have assigned, granted, conveyed, or licensed, and is under no obligation under contract or law to assign, grant, convey, or license, any rights in the invention to any person, concern, or organization which would not qualify for small entity status as a person, small business concern, or nonprofit organization.

*Comment 22:* Several comments indicated that proposed § 1.29(i) is overly burdensome. One comment indicated that proposed § 1.29(i) would require that possible loss of entitlement to micro entity status be evaluated each time a fee is to be paid. One comment stated that the cost of compliance defeats the Congressional purpose of providing for micro entity status and thus proposed § 1.29(i) should be stricken.

*Response:* Section 1.29(i) requires only that a notification of a loss of entitlement to micro entity status must be filed in the application or patent prior to paying, or at the time of paying, any fee after the date on which status as a micro entity as defined in § 1.29(a) or § 1.29(d) is no longer appropriate. As discussed previously, § 1.29(g) provides that a fee may be paid in the micro entity amount only if status as a micro entity as defined in § 1.29(a) or § 1.29(d) is appropriate on the date the fee is being paid. Section 1.29(i) provides a necessary step for documentation of the cessation of micro entity status.

*Comment 23:* One comment suggested that § 1.29(i) be amended to permit payments for entity status other than micro entity as sufficient notification of loss of entitlement to micro entity status, without additional correspondence to the Office.

*Response:* Office experience with small entity payments is that some small entities will occasionally pay patent fees in the full (non-small entity) amounts inadvertently. If mere payment of fees in the full or small entity amount is treated as a notification of loss of entitlement to micro entity status, a micro entity who inadvertently paid a patent fee in the full or small entity amount will thereafter no longer be treated as a micro entity. This could result in increased costs for entities that are entitled to claim micro entity status, and there would be a lack of clear documentation on whether micro entity status has ceased.

*Comment 24:* Several comments indicated that proposed § 1.29(j) is vague because the proposed rule does not define what constitutes fraud. The comments indicated that the Office should amend the rule to make clear what would constitute fraud. One comment stated that fraud is a legal conclusion including proof of mental state. One comment stated that some small entities not qualifying for micro entity status under § 1.29(a) may be tempted to marginally align with a university in order to take benefit under § 1.29(d), and requested that the Office clarify whether such a strategy would be considered a fraud, even if the letter of the rules is met. One comment requested guidance on what penalties the Office anticipates enforcing in the event that a fraudulent certification is made.

*Response:* Section 1.29(j) provides that ''[a]ny attempt to fraudulently establish status as a micro entity, or pay fees as a micro entity, shall be considered as a fraud practiced or attempted on the Office,'' and that ''[i]mproperly, and with intent to deceive, establishing status as a micro entity, or paying fees as a micro entity, shall be considered as a fraud practiced or attempted on the Office.'' The language in § 1.29(j) parallels the corresponding small entity provision in § 1.27(h), and thus terms ''fraudulently'' and ''fraud'' in § 1.29(j) have the same meaning as the terms ''fraudulently'' and ''fraud'' in § 1.27(h). The definition of common law fraud is based on the definition discussed by the U.S. Court of Appeals for the Federal Circuit (Federal Circuit). *See Unitherm Food Systems, Inc.* v. *Swift-Ekrich, Inc.,* 375 F.3d 1341, 1358 (Fed. Cir. 2004); *In re Spalding Sports Worldwide, Inc.,* 203 F.3d 800, 807 (Fed. Cir. 2000). Applicants questioning how to resolve close situations or what penalties may result from a fraudulent certification should consider that: (1) The Federal Circuit has noted that an applicant would be ''foolish'' to claim small entity status if there is the slightest doubt about an applicant's entitlement to claim small entity (*DH Tech.,* 154 F.3d at 1343); (2) depending on future developments in the case law, it is possible that a patent could be held unenforceable as a consequence of a fraud or inequitable conduct relating to a micro entity or small entity certification (this was clearly possible for small entity certifications prior to the Federal Circuit's decision in *Therasense, Inc.* v. *Becton, Dickinson and Co.,* 649 F.3d 1276 (Fed. Cir. 2011) (*see, e.g., Nilssen* v. *Osram Sylvania, Inc.,* 504 F.3d 1223 (2007), and *Ulead Systems, Inc.* v. *Lex Computer Management Corp.,* 351 F.3d 1120 (Fed. Cir. 2003)), but the Federal Circuit has not yet decided the question of whether a false declaration of small entity status could constitute inequitable conduct under the *Therasense* standard (*see Outside the Box Innovations, LLC* v. *Travel Caddy, Inc.,* 695 F.3d 1285, 1294 (Fed. Cir. 2012); *see also Therasense,* 649 F.3d at 1299, n.6 (O'Malley, J., concurring in part and dissenting in part)); and (3) there can be further significant penalties for fraud (*e.g.,* 35 U.S.C. 257(e) (provides that the matter shall be referred to the Attorney General if the Director becomes aware that a material fraud on the Office may have been committed in connection with a patent that is the subject of a supplemental examination).

*Comment 25:* One comment stated that with respect to the provisions relating to fraudulent certification (§§ 1.29(g) through (k)), it would be beneficial to clarify the depth of inquiry which is considered acceptable (*e.g.,* good faith attempt) for a representative of an applicant to obtain in order to sign a certification. The comment indicated that it would be too burdensome on a practitioner to expect more than obtaining verbal affirmation from an applicant that the applicant meets the guidelines for obtaining micro entity status.

*Response:* The depth of inquiry required for any paper presented to the Office, including a micro entity status certification, is specified in § 11.18. Specifically, § 11.18(b) provides that by presenting to the Office or hearing officer in a disciplinary proceeding (whether by signing, filing, submitting, or later advocating) any paper, the party presenting such paper, whether a practitioner or non-practitioner, is making two certifications. The first certification is that all statements made therein of the party's own knowledge are true, all statements made therein on information and belief are believed to be true, and all statements made therein are made with the knowledge that whoever, in any matter within the jurisdiction of the Office, knowingly

and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or knowingly and willfully makes any false, fictitious, or fraudulent statements or representations, or knowingly and willfully makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be subject to the penalties set forth under 18 U.S.C. 1001 and any other applicable criminal statute, and further that violations of the provisions of this section may jeopardize the probative value of the paper. *See* § 11.18(b)(1). The second certification is that to the best of the party's knowledge, information and belief, formed after an inquiry reasonable under the circumstances: (1) The paper is not being presented for any improper purpose, such as to harass someone or to cause unnecessary delay or needless increase in the cost of any proceeding before the Office; (2) the other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence, or if specifically so identified, are reasonably based on a lack of information or belief. *See* § 11.18(b)(2).

*Comment 26:* Several comments suggested eliminating the requirement under proposed § 1.29(k) that any deficiency payment include an itemization and an accounting of the total deficiency payment. One comment indicated that proposed § 1.29(k) should be revised to parallel the rule that applies to an error in paying a small entity fee when the large entity fee should have been paid. The comment alternatively proposed that the rules could be amended to require: (1) One base fee for rectifying the failure to correct micro entity status, and (2) an accounting of when the change of status occurred.

*Response:* The fee deficiency payment provisions of § 1.29(k) track the small entity fee deficiency payment provisions of § 1.28(c). The Office needs the itemization to properly apply the fee deficiency payment so that the Office's records for the application or patent will properly show which fees have been paid for the application or patent and in what amount.

*Comment 27:* One comment suggested the Office establish a database of the various certification types and permit annual updating of applicant status, rather than individual application status. Another comment suggested that § 1.29 be amended to provide for micro entity status certifications contained in patent application assignments recorded under part 3 of 37 CFR.

*Response:* The suggestions are not currently feasible as inventor or assignee names are not always stated consistently from application to application (either in application papers or in assignment cover sheets). The suggestions will be considered if the Office moves to adopt a system under which there are unique inventor and applicant-assignee designations.

*Comment 28:* One comment indicated that many practitioners who have participated in the LegalCORPS Inventor Assistance Program (a pilot patent law pro bono program developed with the support of the Office) have seen first-hand that many inventors qualifying for free legal assistance through the program will not be able to file applications electronically, due in part to being unable to make electronic payments via deposit account or credit card. The comment suggested that the final rule could address this issue by providing for electronic filing of documents along with a written certification by the applicant that any fees associated with that filing are being submitted by check deposited in the U.S. mail on the date of application filing.

*Response:* Electronic filing remains a viable filing option for micro entities, even if the applicant does not have a deposit account at the Office and even if the applicant does not have sufficient access to credit to enable payment by credit card. Fees may be paid by electronic funds transfer (EFT), which requires nothing more than a checking account. However, before making any payments by EFT, an EFT profile must be created at the Office ''Office of Finance On-Line Shopping Page'' at *https://ramps.uspto.gov/eram/.* To begin, click the link titled ''Create or Modify an EFT Profile'' on the ''Office of Finance On-Line Shopping Page.'' It is important that micro entities and other applicants file their applications electronically via EFS-Web in order to avoid the non-electronic filing fee under § 1.10, which is $400 (and $200 for small and micro entities). Additionally, a small or micro entity that files an application in paper (versus electronically via EFS-Web) will not receive the discount (currently $97.00) available only to small entities that file a patent application electronically.

**Rulemaking Considerations**

*A. Regulatory Flexibility Act:* For the reasons set forth herein, the Deputy General Counsel for General Law of the United States Patent and Trademark Office has certified to the Chief Counsel for Advocacy of the Small Business Administration that changes in this final rule will not have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 605(b). The Office did not receive public comments on this certification.

This final rule revises the rules of practice to allow a subset of small entities—*i.e.,* micro entities—to pay further reduced fees, namely, a seventy-five percent discount. This final rule sets out procedures pertaining to claiming micro entity status, paying patent fees as a micro entity, notification of loss of micro entity status, and correction of payments of patent fees paid erroneously in the micro entity amount. This final rule maintains the criteria in 35 U.S.C. 123(a) and (d) for entitlement to file a certification of micro entity status (note also the requirement in 37 CFR 1.29(d)(1) that an applicant claim small entity status in compliance with 37 CFR 1.27 in order to claim micro entity status; see also 37 CFR 1.29(h), 35 U.S.C. 123(e)). This rule also includes clarifications under 37 CFR 1.29(a) to refer to non-applicant inventors and joint inventors. The micro entity procedures in this final rule track to the extent feasible the corresponding small entity procedures under 37 CFR 1.27. Thus, the burden to all entities, including small entities, imposed by this final rule is no greater than those imposed by the pre-existing regulations pertaining to claiming small entity status: paying patent fees as a small entity, notification of loss of small entity status, and correction of payments of patent fees paid erroneously in the small entity amount.

Requiring that an applicant claim small entity status in compliance with 37 CFR 1.27 in order to claim micro entity status under 37 CFR 1.29(d)(1) will not have a significant economic impact on a substantial number of small entities. The Office uses the Small Business Administration business size standard for the purpose of paying reduced patent fees in 13 CFR 121.802 as the size standard when conducting an analysis or making a certification under the Regulatory Flexibility Act for patent-related regulations. *See Business Size Standard for Purposes of United States Patent and Trademark Office Regulatory*

*Flexibility Analysis for Patent-Related Regulations,* 71 FR 67109, 67109 (Nov. 20, 2006). A small entity for purposes of the Regulatory Flexibility Act analysis is a small entity for purposes of paying reduced patent fees. Therefore, requiring in 37 CFR 1.29(d)(1) that an entity claim small entity status in compliance with 37 CFR 1.27 in order to claim micro entity status will preclude only an applicant or patentee who is a large entity (*i.e.,* not a small entity) from claiming micro entity status.

The Office estimates that a minority percentage of small entity applications will be filed by paying micro entity fees under this final rule. Based upon the data in the Office's Patent Application Locating and Monitoring (PALM) system, of the approximately 2,498,000 nonprovisional patent applications (utility, plant, design, and reissue) and requests for continued examination filed in total over the last five fiscal years, small entity fees were paid in approximately 669,000 (26.8 percent). Thus, an average of approximately 500,000 nonprovisional patent applications and requests for continued examination have been filed each year for the last five fiscal years, with small entity fees being paid in approximately 134,000 of the nonprovisional patent applications and requests for continued examination filed each year.

As indicated above, this rule provides a procedure for small entities to attain a 75 percent reduction in fees as a micro entity, as provided by statute. The procedures for micro entity status track the existing procedures for small entity status. While the rule impacts the entire universe of small entity applications and patents, the rule is necessary for implementing a further reduction in fees, which is entirely beneficial, and no other provision has an economic impact on the affected small entities.

*B. Executive Order 12866 (Regulatory Planning and Review):* This rulemaking has been determined to be not significant for purposes of Executive Order 12866 (Sept. 30, 1993).

*C. Executive Order 13563 (Improving Regulation and Regulatory Review):* The Office has complied with Executive Order 13563. Specifically, the Office has, to the extent feasible and applicable: (1) Made a reasoned determination that the benefits justify the costs of the rule; (2) tailored the rule to impose the least burden on society consistent with obtaining the regulatory objectives; (3) selected a regulatory approach that maximizes net benefits; (4) specified performance objectives; (5) identified and assessed available alternatives; (6) involved the public in an open exchange of information and perspectives among experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole, and provided on-line access to the rulemaking docket; (7) attempted to promote coordination, simplification, and harmonization across government agencies and identified goals designed to promote innovation; (8) considered approaches that reduce burdens and maintain flexibility and freedom of choice for the public; and (9) ensured the objectivity of scientific and technological information and processes.

One comment argued that the rulemaking fails to comply with Executive Order 13563 on the grounds that: (1) The Office did not conduct a burden/benefit analysis which includes realistic professional services fees for patent practitioners, the time involved in understanding and complying with the rule, and the sanctions imposed by rule; (2) proposed 37 CFR 1.29 fails to consider the value to society of university inventions, for which 35 U.S.C. 123(d) seeks to provide specific benefits, and which imposes no limits on how a university might seek to exploit its rights; and (3) proposed 37 CFR 1.29 imposes significant burdens for the affected applicants, and is thus not tailored to impose the least burden on society consistent with obtaining the regulatory objectives.

The Office considered costs and benefits to applicants claiming micro entity status (including universities), as well as to all other applicants and the Office in this rulemaking. Executive Order 13563 reaffirms Executive Order 12866. This rulemaking was deemed by OMB as not economically significant as that term is defined in Executive Order 12866 (Sept. 30, 1993). Therefore, the regulatory analysis provided in section 6(a)(3)(C) of Executive Order 12866 and OMB Circular A–4 is inapplicable to this rulemaking. The Office, however, did conduct the regulatory analysis provided in section 6(a)(3)(C) and OMB Circular A–4 for the related rulemaking to set and adjust patent fees under section 10 of the Leahy-Smith America Invents Act. 37 CFR 1.29 does impose the least burden on society consistent with obtaining the regulatory objectives by permitting an applicant to self-certify entitlement to micro entity status, and does not require any further information or certification from the applicant provided that the applicant remains entitled to micro entity status. In addition, having micro entity procedures which track the pre-existing small entity procedures to the extent practicable is less burdensome than fashioning new micro entity procedures. Finally, while having no requirements would arguably impose the least burden on an entity seeking the benefit of micro (or small) entity status, it would not impose the least burden on society overall and would not obtain the regulatory objectives of creating the beneficial option of micro entity status with a seventy-five percent fee reduction as provided by statute.

Revising the regulations as suggested by the comment would expand the scope of micro entity status beyond what the statute allows. It also would not meet the regulatory objectives of ensuring that a for-profit, large entity applicant not become a ''micro entity'' (and thus obtaining a seventy-five percent discount) merely by licensing or assigning some interest (nominal or otherwise) to an institution of higher education. The Office received comments (including in response to the section 10 rulemaking) in support of the Office imposing additional requirements under 35 U.S.C. 123(e) to avoid sham licensing agreements for the purpose of improperly claiming micro entity status (as improper micro entity claims would result in higher fees for other applicants). Thus, the narrow requirements imposed by the Office under 35 U.S.C. 123(e) are necessary to avoid abuses of micro entity status, and simply eliminating them in the name of reducing burden would not impose the least burden on society overall and would not obtain the regulatory objectives.

*D. Executive Order 13132 (Federalism):* This rulemaking does not contain policies with federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132 (Aug. 4, 1999).

*E. Executive Order 13175 (Tribal Consultation):* This rulemaking will not: (1) Have substantial direct effects on one or more Indian tribes; (2) impose substantial direct compliance costs on Indian tribal governments; or (3) preempt tribal law. Therefore, a tribal summary impact statement is not required under Executive Order 13175 (Nov. 6, 2000).

*F. Executive Order 13211 (Energy Effects):* This rulemaking is not a significant energy action under Executive Order 13211 because this rulemaking is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required under Executive Order 13211 (May 18, 2001).

*G. Executive Order 12988 (Civil Justice Reform):* This rulemaking meets

applicable standards to minimize litigation, eliminate ambiguity, and reduce burden as set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 (Feb. 5, 1996).

*H. Executive Order 13045 (Protection of Children):* This rulemaking does not concern an environmental risk to health or safety that may disproportionately affect children under Executive Order 13045 (Apr. 21, 1997).

*I. Executive Order 12630 (Taking of Private Property):* This rulemaking will not effect a taking of private property or otherwise have taking implications under Executive Order 12630 (Mar. 15, 1988).

*J. Congressional Review Act:* Under the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*), the United States Patent and Trademark Office will submit a report containing this final rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the Government Accountability Office. In addition, the United States Patent and Trademark Office will inform the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate of any proposed limits under 35 U.S.C. 123(e) at least three months before any limits proposed to be implemented pursuant to 35 U.S.C. 123(e) take effect.

The changes in this final rule are not expected to result in an annual effect on the economy of 100 million dollars or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. Therefore, this final rule is not a ''major rule'' as defined in 5 U.S.C. 804(2).

*K. Unfunded Mandates Reform Act of 1995:* The changes set forth in this rulemaking do not involve a Federal intergovernmental mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, of 100 million dollars (as adjusted) or more in any one year, or a Federal private sector mandate that will result in the expenditure by the private sector of 100 million dollars (as adjusted) or more in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995. *See* 2 U.S.C. 1501 *et seq.*

*L. National Environmental Policy Act:* This rulemaking will not have any effect on the quality of the environment and is thus categorically excluded from review under the National Environmental Policy Act of 1969. *See* 42 U.S.C. 4321 *et seq.*

*M. National Technology Transfer and Advancement Act:* The requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) are not applicable because this rulemaking does not contain provisions which involve the use of technical standards.

*N. Paperwork Reduction Act:* The Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) requires that the USPTO consider the impact of paperwork and other information collection burdens imposed on the public. This final rule makes changes to the rules of practice that would impose new information collection requirements involving fee deficiency statements which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3549). Accordingly, the Office submitted a proposed information collection to OMB for its review and approval when the notice of proposed rulemaking was published. The Office also published the title, description, and respondent description of the information collection, with an estimate of the annual reporting burdens, in the notice of proposed rulemaking (*See Changes to Implement Micro Entity Status for Paying Patent Fees,* 77 FR 31812–13).

The Office received one comment on the proposed information collection indicating that the estimate of 3,000 respondents per year was a significant underestimate as every inventor employed outside of large entities will likely be confronted with the various certifications, and that there may be tens of thousands of university professors or university students on work-study who qualify under 35 U.S.C. 123(d).

The information collection requirements discussed in the notice of proposed rulemaking, however, narrowly pertain to the information required for fee deficiency payments based upon the previous erroneous payment of patent fees in the micro entity amount (*See Changes to Implement Micro Entity Status for Paying Patent Fees,* 77 FR 31812). Based upon the number of applicants and patentees who make fee deficiency payments under existing 37 CFR 1.28(c) (about 2,250 per year), the Office believes that 3,000 respondents per year is a reasonable and conservative estimate of the number of applicants and patentees who make fee deficiency payments under 37 CFR 1.28(c) or 1.29(k).

As discussed in the notice of proposed rulemaking, OMB has determined under 5 CFR 1320.3(h) that the certification of micro entity status (*e.g.,* Form PTO/SB/15A (gross income basis) or Form PTO/SB/15B (institution of higher education basis) does not collect ''information'' within the meaning of the Paperwork Reduction Act of 1995 (*See Changes to Implement Micro Entity Status for Paying Patent Fees,* 77 FR 31812). The changes adopted in this final rule do not require any further change to the proposed information collection.

Accordingly, the Office has resubmitted the proposed information collection to OMB. The proposed information collection is available at the OMB's Information Collection Review Web site (*www.reginfo.gov/public/do/PRAMain*).

Notwithstanding any other provision of law, no person is required to respond to, nor shall a person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act, unless that collection of information displays a currently valid OMB control number.

**List of Subjects in 37 CFR Part 1**

Administrative practice and procedure, Courts, Freedom of information, Inventions and patents, Reporting and recordkeeping requirements, Small businesses.

For the reasons set forth in the preamble, 37 CFR part 1 is amended as follows:

## PART 1—RULES OF PRACTICE IN PATENT CASES

■ 1. The authority citation for 37 CFR part 1 continues to read as follows:

**Authority:** 35 U.S.C. 2(b)(2).

■ 2. Section 1.29 is added to read as follows:

### § 1.29 Micro entity status.

(a) To establish micro entity status under this paragraph, the applicant must certify that:

(1) The applicant qualifies as a small entity as defined in § 1.27;

(2) Neither the applicant nor the inventor nor a joint inventor has been named as the inventor or a joint inventor on more than four previously filed patent applications, other than applications filed in another country, provisional applications under 35 U.S.C. 111(b), or international applications for which the basic

national fee under 35 U.S.C. 41(a) was not paid;

(3) Neither the applicant nor the inventor nor a joint inventor, in the calendar year preceding the calendar year in which the applicable fee is being paid, had a gross income, as defined in section 61(a) of the Internal Revenue Code of 1986 (26 U.S.C. 61(a)), exceeding three times the median household income for that preceding calendar year, as most recently reported by the Bureau of the Census; and

(4) Neither the applicant nor the inventor nor a joint inventor has assigned, granted, or conveyed, nor is under an obligation by contract or law to assign, grant, or convey, a license or other ownership interest in the application concerned to an entity that, in the calendar year preceding the calendar year in which the applicable fee is being paid, had a gross income, as defined in section 61(a) of the Internal Revenue Code of 1986, exceeding three times the median household income for that preceding calendar year, as most recently reported by the Bureau of the Census.

(b) An applicant, inventor, or joint inventor is not considered to be named on a previously filed application for purposes of paragraph (a)(2) of this section if the applicant, inventor, or joint inventor has assigned, or is under an obligation by contract or law to assign, all ownership rights in the application as the result of the applicant's, inventor's, or joint inventor's previous employment.

(c) If an applicant's, inventor's, joint inventor's, or entity's gross income in the preceding calendar year is not in United States dollars, the average currency exchange rate, as reported by the Internal Revenue Service, during that calendar year shall be used to determine whether the applicant's, inventor's, joint inventor's, or entity's gross income exceeds the threshold specified in paragraph (a)(3) or (4) of this section.

(d) To establish micro entity status under this paragraph, the applicant must certify that:

(1) The applicant qualifies as a small entity as defined in § 1.27; and

(2)(i) The applicant's employer, from which the applicant obtains the majority of the applicant's income, is an institution of higher education as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)); or

(ii) The applicant has assigned, granted, conveyed, or is under an obligation by contract or law, to assign, grant, or convey, a license or other ownership interest in the particular application to such an institution of higher education.

(e) Micro entity status is established in an application by filing a micro entity certification in writing complying with the requirements of either paragraph (a) or paragraph (d) of this section and signed in compliance with § 1.33(b). Status as a micro entity must be specifically established in each related, continuing and reissue application in which status is appropriate and desired. Status as a micro entity in one application or patent does not affect the status of any other application or patent, regardless of the relationship of the applications or patents. The refiling of an application under § 1.53 as a continuation, divisional, or continuation-in-part application (including a continued prosecution application under § 1.53(d)), or the filing of a reissue application, requires a new certification of entitlement to micro entity status for the continuing or reissue application.

(f) A fee may be paid in the micro entity amount only if it is submitted with, or subsequent to, the submission of a certification of entitlement to micro entity status.

(g) A certification of entitlement to micro entity status need only be filed once in an application or patent. Micro entity status, once established, remains in effect until changed pursuant to paragraph (i) of this section. However, a fee may be paid in the micro entity amount only if status as a micro entity as defined in paragraph (a) or (d) of this section is appropriate on the date the fee is being paid. Where an assignment of rights or an obligation to assign rights to other parties who are micro entities occurs subsequent to the filing of a certification of entitlement to micro entity status, a second certification of entitlement to micro entity status is not required.

(h) Prior to submitting a certification of entitlement to micro entity status in an application, including a related, continuing, or reissue application, a determination of such entitlement should be made pursuant to the requirements of this section. It should be determined that each applicant qualifies for micro entity status under paragraph (a) or (d) of this section, and that any other party holding rights in the invention qualifies for small entity status under § 1.27. The Office will generally not question certification of entitlement to micro entity status that is made in accordance with the requirements of this section.

(i) Notification of a loss of entitlement to micro entity status must be filed in the application or patent prior to paying, or at the time of paying, any fee after the date on which status as a micro entity as defined in paragraph (a) or (d) of this section is no longer appropriate. The notification that micro entity status is no longer appropriate must be signed by a party identified in § 1.33(b). Payment of a fee in other than the micro entity amount is not sufficient notification that micro entity status is no longer appropriate. A notification that micro entity status is no longer appropriate will not be treated as a notification that small entity status is also no longer appropriate unless it also contains a notification of loss of entitlement to small entity status under § 1.27(f)(2). Once a notification of a loss of entitlement to micro entity status is filed in the application or patent, a new certification of entitlement to micro entity status is required to again obtain micro entity status.

(j) Any attempt to fraudulently establish status as a micro entity, or pay fees as a micro entity, shall be considered as a fraud practiced or attempted on the Office. Improperly, and with intent to deceive, establishing status as a micro entity, or paying fees as a micro entity, shall be considered as a fraud practiced or attempted on the Office.

(k) If status as a micro entity is established in good faith in an application or patent, and fees as a micro entity are paid in good faith in the application or patent, and it is later discovered that such micro entity status either was established in error, or that the Office was not notified of a loss of entitlement to micro entity status as required by paragraph (i) of this section through error, the error will be excused upon compliance with the separate submission and itemization requirements of paragraph (k)(1) of this section and the deficiency payment requirement of paragraph (k)(2) of this section.

(1) Any paper submitted under this paragraph must be limited to the deficiency payment (all fees paid in error) required for a single application or patent. Where more than one application or patent is involved, separate submissions of deficiency payments are required for each application or patent (see § 1.4(b)). The paper must contain an itemization of the total deficiency payment for the single application or patent and include the following information:

(i) Each particular type of fee that was erroneously paid as a micro entity, (*e.g.,* basic statutory filing fee, two-month extension of time fee) along with the current fee amount for a small or non-small entity, as applicable;

(ii) The micro entity fee actually paid, and the date on which it was paid;

(iii) The deficiency owed amount (for each fee erroneously paid); and

(iv) The total deficiency payment owed, which is the sum or total of the individual deficiency owed amounts as set forth in paragraph (k)(2) of this section.

(2) The deficiency owed, resulting from the previous erroneous payment of micro entity fees, must be paid. The deficiency owed for each previous fee erroneously paid as a micro entity is the difference between the current fee amount for a small entity or non-small entity, as applicable, on the date the deficiency is paid in full and the amount of the previous erroneous micro entity fee payment. The total deficiency payment owed is the sum of the individual deficiency owed amounts for each fee amount previously and erroneously paid as a micro entity.

(3) If the requirements of paragraphs (k)(1) and (2) of this section are not complied with, such failure will either be treated at the option of the Office as an authorization for the Office to process the deficiency payment and charge the processing fee set forth in § 1.17(i), or result in a requirement for compliance within a one-month time period that is not extendable under § 1.136(a) to avoid the return of the fee deficiency payment.

(4) Any deficiency payment (based on a previous erroneous payment of a micro entity fee) submitted under this paragraph will be treated as a notification of a loss of entitlement to micro entity status under paragraph (i) of this section, but payment of a deficiency based upon the difference between the current fee amount for a small entity and the amount of the previous erroneous micro entity fee payment will not be treated as an assertion of small entity status under § 1.27(c). Once a deficiency payment is submitted under this paragraph, a written assertion of small entity status under § 1.27(c)(1) is required to obtain small entity status.

Dated: December 14, 2012.

**David J. Kappos,**

*Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.*

[FR Doc. 2012–30674 Filed 12–18–12; 8:45 am]

**BILLING CODE 3510–16–P**

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 52

**[EPA–R04–OAR–2012–0238; FRL–9762–6]**

## Approval and Promulgation of Implementation Plans; South Carolina 110(a)(1) and (2) Infrastructure Requirements for the 1997 and 2006 Fine Particulate Matter National Ambient Air Quality Standards; Correction

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule, correction.

**SUMMARY:** EPA published in the **Federal Register** of August 1, 2012, a final rule approving the State Implementation Plan (SIP) submissions submitted by the State of South Carolina, through the South Carolina Department of Health and Environmental Control (SC DHEC), as demonstrating that the South Carolina SIP met certain requirements of the Clean Air Act (CAA or the Act) for the 1997 annual and 2006 24-hour fine particulate matter ($PM_{2.5}$) national ambient air quality standards (NAAQS). This rulemaking corrects several errors identified in the August 1, 2012, final rule.

**DATES:** Effective on December 19, 2012.

**FOR FURTHER INFORMATION CONTACT:** Sean Lakeman, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9043. Mr. Lakeman can be reached via electronic mail at *lakeman.sean@epa.gov.*

**SUPPLEMENTARY INFORMATION:** This action corrects inadvertent omissions in the August 1, 2012, final rulemaking and its associated regulatory text section. Specifically, EPA is correcting the final rule to expressly indicate that the South Carolina Code Annotated Sections described in the June 6, 2012, proposed rule are being incorporated into the South Carolina SIP.[1] *See* 77 FR 33386. The August 1, 2012, final rule also failed to list these code sections in the regulatory text. Accordingly, this rulemaking corrects that inadvertent omission by adding S.C. Code Ann. Sections 8–13–100(31), 8–13–700(A) and (B), and 8–13–730 to the regulatory text of the August 1, 2012, final rule.

In addition, EPA is correcting the footnote on page 45492 of the final rule which inadvertently listed ''April 13, 2012,'' as the date of South Carolina's SIP revision. The correct date for South Carolina's SIP revision is April 3, 2012. Through today's notice, EPA is hereby correcting the footnote on page 45492 of the August 1, 2012, final rule to reflect the correct date.

Finally, EPA is correcting the statement on page 45493 of the August 1, 2012, final rule that stated ''[t]oday's action is not approving any specific rule, but rather making a determination that South Carolina's already approved SIP meets certain CAA requirements.'' Today's rule removes this sentence from the August 1, 2012, final rule and replaces it with a sentence that reads: ''EPA is making a determination that South Carolina's SIP meets certain CAA requirements.'' *See* 77 FR 45492.

EPA has determined that today's action falls under the ''good cause'' exemption in section 553(b)(3)(B) of the Administrative Procedure Act (APA) which, upon finding ''good cause,'' authorizes agencies to dispense with public participation where public notice and comment procedures are impracticable, unnecessary, or contrary to the public interest. Public notice and comment for this action is unnecessary because today's action to correct an inadvertent regulatory text omission included with EPA's August 1, 2012, final rule is consistent with the substantive revisions to the South Carolina SIP described in the proposal to approve certain state statues into the South Carolina SIP as addressing the section 110(a)(2)(E)(ii) state board requirements for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS. In addition, EPA can identify no particular reason why the public would be interested in being notified of the correction, or in having the opportunity to comment on the correction prior to this action being finalized, since this correction action does not change the meaning of EPA's analysis or action to approve certain state statues as addressing the state board requirements for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS into the South Carolina SIP. EPA also finds that there is good cause under APA section 553(d)(3) for this correction to become effective on the date of publication of this action. Section 553(d)(3) of the APA allows an effective date less than 30 days after publication ''as otherwise provided by

[1] The sections adopted into the SIP are S.C. Code Ann. Sections 8–13–100(31); 8–13–700(A) and (B); and 8–13–730. These sections were adopted into the SIP to satisfy CAA section 128 state board requirements made applicable to South Carolina's infrastructure SIP by section 110(a)(2)(E)(ii) of the CAA. See EPA's June 6, 2012, proposed rulemaking for more information as to how these statutes meet the applicable CAA section 128 requirements. 77 FR 33380, 33386.

the agency for good cause found and published with the rule.'' 5 U.S.C. 553(d)(3). The purpose of the 30-day waiting period prescribed in APA section 553(d)(3) is to give affected parties a reasonable time to adjust their behavior and prepare before the final rule takes effect. Today's rule, however, does not create any new regulatory requirements such that affected parties would need time to prepare before the rule takes effect. Rather, today's action merely corrects an inadvertent omission for the regulatory text of a prior rulemaking by listing these state statues in the regulatory text for the South Carolina SIP. For these reasons, EPA finds good cause under APA section 553(d)(3) for this correction to become effective on the date of publication of this action.

**Statutory and Executive Order Reviews**

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely corrects an inadvertent omission for the regulatory text of EPA's August 1, 2012, final rule to approve certain state statues as addressing the state board requirements for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS into the South Carolina SIP, and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule merely corrects an inadvertent omission for the regulatory text of EPA's August 1, 2012, final rule to approve certain state statues as addressing the state board requirements for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS into the South Carolina SIP, and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This rule also does not have Federalism implications because it does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This rule merely corrects an inadvertent omission for the regulatory text of EPA's August 1, 2012, final rule to approve certain state statues as addressing the state board requirements for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS into the South Carolina SIP, and does not alter the relationship or the distribution of power and responsibilities established in the CAA. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant. In addition, this rule does not involve technical standards, thus the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule also does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. section 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by *February 19, 2013.*

Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* CAA section 307(b)(2).

Dated: December 7, 2012.

**A. Stanley Meiburg,**

*Acting Regional Administrator, Region 4.*

40 CFR part 52 is amended as follows:

## PART 52—[AMENDED]

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

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

## Subpart PP—South Carolina

■ 2. Section 52.2120(c), is amended by adding by adding in numerical order a new entry for ''Ethics Reform Act'' at the end of the table to read as follows:

**§ 52.2120 Identification of plan.**

* * * * *

(c) * * *

AIR POLLUTION CONTROL REGULATIONS FOR SOUTH CAROLINA

| State citation | Title/subject | State effective date | EPA approval date | **Federal Register** notice |
|---|---|---|---|---|
| * * | * * * | | * | * |
| S.C. Code Ann. | Ethics Reform Act | | | |
| Section 8–13–100(31) | Definitions | 1/1/1992 | 8/1/2012 | 77 FR 45492 |
| Section 8–13–700(A) and (B) | Use of official position or office for financial gain; disclosure of potential conflict of interest. | 1/1/1992 | 8/1/2012 | 77 FR 45492 |

AIR POLLUTION CONTROL REGULATIONS FOR SOUTH CAROLINA—Continued

| State citation | Title/subject | State effective date | EPA approval date | Federal Register notice |
|---|---|---|---|---|
| Section 8–13–730 | Membership on or employment by regulatory agency of person associated with regulated business. | 1/1/1992 | 8/1/2012 | 77 FR 45492 |

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[FR Doc. 2012–30437 Filed 12–18–12; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 180

**[EPA–HQ–OPP–2012–0441; FRL–9372–9]**

## Difenzoquat; Data Call-in Order for Pesticide Tolerances

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final order.

**SUMMARY:** This order requires the submission of various data to support the continuation of the tolerances for the pesticide, difenzoquat. Pesticide tolerances are established under the Federal Food, Drug, and Cosmetic Act (FFDCA). Following publication of this order, persons who are interested in the continuation of the difenzoquat tolerances must notify the Agency by completing and submitting the required section 408(f) Order Response Form (available in the docket) within 90 days. If the Agency does not receive within 90 days after publication of the final order a section 408(f) Response Form identifying a person who agrees to submit the required data, EPA will revoke the difenzoquat tolerances.

**DATES:** This final order is effective December 19, 2012. A section 408(f) Order Response Form must be received on or before March 19, 2013.

**ADDRESSES:** EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2012–0441. All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, e.g., 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 materials are available in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in the Environmental Protection Agency Docket Center (EPA/DC), EPA West Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

Submit your section 408(f) Order Response Form, identified by docket identification (ID) number EPA–HQ–OPP–2012–0441, by one of the following methods:

- *Federal eRulemaking Portal:* Follow the on-line instructions for submitting comments.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.htm.*

**FOR FURTHER INFORMATION CONTACT:** Christina Scheltema, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 308–2201; email address: *scheltema.christina@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this action apply to me?*

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

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

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

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

You may access a frequently updated electronic version of 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.* To access the harmonized test guidelines referenced in this document electronically, please go to *http://www.epa.gov/ocspp* and select ''Test Methods and Guidelines,'' which is listed under ''Documents related to our mission.''

### II. Background

*A. What action is the agency taking?*

In this document EPA is issuing an order requiring the submission of various data to support the continuation of the difenzoquat tolerances at 40 CFR 180.369, under section 408 of FFDCA, 21 U.S.C. 346a. Difenzoquat is not currently registered under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.* The last FIFRA registration for difenzoquat was canceled in 2010. However, 25 FFDCA tolerances remain for residues of difenzoquat on the following commodities: Barley, cattle, goat, hog, horse, poultry, sheep, and wheat (40 CFR 180.369). Because there are currently no domestic registrations for difenzoquat, these tolerances are referred to as ''import tolerances.'' It is these tolerances that are addressed by the Data Call-In order.

*B. What is the agency's authority for taking this action?*

Under section 408(f) of the FFDCA, EPA is authorized to require, by order, submission of data ''reasonably required to support the continuation of a tolerance'' when such data cannot be obtained under the Data Call-In authority of FIFRA section 3(c)(2)(B), or section 4 of the Toxic Substances Control Act (''TSCA''), 15 U.S.C. 2603. A FFDCA section 408 Data Call-In order may only be issued following publication of notice of the order and a 60-day public comment provision.

A section 408(f) Data Call-In order must contain the following elements:

1. A requirement that one or more persons submit to EPA a notice identifying the person(s) who commit to submit the data required in the order.

2. A description of the required data and the required reports connected to such data;

3. An explanation of why the required data could not be obtained under section 3(c)(2)(B) of FIFRA or section 4 of TSCA.

4. The required submission date for the notice identifying one or more interested persons who commit to submit the required data and the required submission dates for all the data and reports required in the order (21 U.S.C. 346a(f)(1)(C)).

EPA may by order modify or revoke the affected tolerances if any one of the following submissions is not made in a timely manner:

1. A notice identifying the one or more interested persons who commit to submit the data.

2. The data itself.

3. The reports required under a section 408(f) order are not submitted by the date specified in the order (21 U.S.C. 346a(f)(2)).

*C. What preliminary steps were taken by EPA prior to issuing this final order?*

On July 6, 2012 (77 FR 44181) (FRL–9352–9), EPA issued a proposed Data Call-In order for the pesticide difenzoquat in connection with tolerances for that pesticide under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a. The proposed Data Call-In order included the following studies:

- Neurotoxicity Screening Battery (870.6200).
- Immunotoxicity Study (870.7800).
- Crop Field Trials (860.1500)—(wheat hay, wheat forage, and barley hay).

## III. Summary of Public Comments Received and Agency Response to Comments

EPA received no comments in response to the July 6, 2012, **Federal Register** notice announcing the Agency's proposed Data Call-In order for difenzoquat. In addition, the Agency has not received any of the data identified in the proposed order as needed to support the difenzoquat tolerances.

## IV. Final Data Call-in Order

Because no comments were submitted on the proposal and the data deficiencies identified in the proposed order remain, EPA is issuing this final Data Call-In order under FFDCA section 408(f)(1)(C) for difenzoquat in the same form as the proposed order and for the reasons set forth in that proposed order. Specifically, this order:

1. *Requires notice of intent to submit data.* A notice identifying the person or persons who commit to submit the data and reports in accordance with Unit IV.2. must be submitted to EPA if any person wishes to support the difenzoquat tolerances. The notice must be submitted on a section 408(f) Order Response Form which is available in the electronic docket, *http://www.regulations.gov,* under docket ID number EPA–HQ–OPP–2012–0441.

2. *Establishes a deadline for submission of notice identifying data submitters.* The notice described in Unit IV.1., identifying data submitters, must be submitted to and received by EPA on or before March 19, 2013. Instructions on methods for responding to this order (referred to in this order as a ''section 408(f) Order Response Form'') are set out under the **ADDRESSES** section above.

3. *Describes data and reports required to support continuation of the difenzoquat tolerances, requires submission of those data and reports, and establishes deadlines for submission.* The table in this Unit describes the data and reports required to be submitted on difenzoquat under this order and the deadlines for the submission of each study and report. The required submission date is calculated from March 19, 2013. Thus, for example, if EPA generally allows 12 months to complete a study, the required submission date for such a study under this order would be 15 months from the date of publication of the order in the **Federal Register**. Studies, study protocols, and reports should be submitted to the person listed under **FOR FURTHER INFORMATION CONTACT**.

TABLE—DATA AND REPORTS REQUIRED TO BE SUBMITTED ON DIFENZOQUAT

| OCSPP harmonized guideline No. | Study title | Timeframe for protocol report submission | Timeframe for data submission |
|---|---|---|---|
| 870.6200 | Neurotoxicity Screening Battery | Not Required | March 19, 2015. |
| 870.7800 | Immunotoxicity Study | 6 months | March 19, 2014. |
| 860.1500 | Crop Field Trials (wheat hay, wheat forage, and barley hay). | Not Required | March 19, 2015. |

EPA provided a description of why the required data could not be obtained under section 3(c)(2)(B) of FIFRA or section 4 of TSCA in the proposed order and relies on that description in this final order.

## V. Failure to Submit Notice of Intent to Submit Data or Data and Reports

If, by March 19, 2013 the Agency does not receive a section 408(f) Order Response Form identifying a person who agrees to submit the required data, EPA will revoke the difenzoquat tolerances at 40 CFR 180.369. Such revocation is subject to the objection and hearing procedure in FFDCA section 408(g)(2) but the only material issue in such a procedure is whether a submission required by the order was made in a timely fashion.

Additional events that may be the basis for modification or revocation of difenzoquat tolerances include, but are not limited to the following:

1. No person submits on the required schedule an acceptable protocol report when such report is required to be submitted to the Agency for review.

2. No person submits on the required schedule acceptable data as required by the final order.

## VI. Statutory and Executive Order Reviews

This action, which requires the submission of data in support of tolerances in accordance with FFDCA section 408, is in the form of an order and not a rule (21 U.S.C. 346a(f)(1)(C)). Under the Administrative Procedures Act (APA), orders are expressly excluded from the definition of a rule (5 U.S.C. 551(4)). Accordingly, the regulatory assessment requirements imposed on a rulemaking do not apply to this action, as explained further in the following discussion.

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

Because this order is not a ''regulatory action'' as that term is defined in Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not subject to review by the Office of Management and Budget (OMB) under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

*B. Paperwork Reduction Act*

This action does not impose additional burdens that require approval by OMB under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*). The information collection activities associated with the order requesting data from any party interested in supporting certain tolerances are already approved by OMB under OMB Control No. 2070–0174, and are identified by EPA ICR No. 2288.01. Burden is defined at 5 CFR 1320.3(b). Under the PRA, an Agency may not conduct or sponsor, and a person is not required to respond to a collection of information that requires OMB approval under PRA, unless it has been approved by OMB and displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register**, are listed in 40 CFR part 9, and included on the related collection instrument, or form, if applicable.

*C. Regulatory Flexibility Act*

Since this order is not a rule under the APA (5 U.S.C. 551(4)), and does not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

*D. Unfunded Mandates Reform Act; Executive Order 13132: Federalism; and Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

This order requests data from any party interested in supporting certain tolerances and does not impose obligations on any person or entity including States or tribes; nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132 (64 FR 43255, August 10, 1999) and Executive Order 13175 (65 FR 67249, November 9, 2000) do not apply to this order. In addition, this order does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1531–1538).

*E. Executive Orders 13045: Protection of Children From Environmental Health Risks and Safety Risks; Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use, and Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low Income Populations*

As indicated previously, this action is not a ''regulatory action'' as defined by Executive Order 12866. As a result, this action is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) and Executive Order 13211 (66 FR 28355, May 22, 2001). In addition, this order also does not require any special considerations under Executive Order 12898 (59 FR 7629, February 16, 1994).

*F. National Technology Transfer and Advancement Act*

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

## VII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.* does not apply because this action is not a rule as that term is defined in 5 U.S.C. 804(3).

## List of Subjects in 40 CFR Part 180

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

Dated: December 12, 2012.

**Richard P. Keigwin, Jr.,**

*Director, Pesticide Re-evaluation Division, Office of Pesticide Programs.*

[FR Doc. 2012–30617 Filed 12–18–12; 8:45 am]

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## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 180

**[EPA–HQ–OPP–2011–0772; FRL–9369–5]**

## Propiconazole; Pesticide Tolerances

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** This regulation establishes tolerances for residues of propiconazole in or on sugarcane, cane. Syngenta Crop Protection, LLC requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

**DATES:** This regulation is effective December 19, 2012. Objections and requests for hearings must be received on or before February 19, 2013, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

**ADDRESSES:** The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2011–0772, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), EPA West Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

**FOR FURTHER INFORMATION CONTACT:** Erin Malone, Registration Division (7505P),

Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 347–0253; email address: *malone.erin@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. General Information

### *A. Does this action apply to me?*

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

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

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

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

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

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2011–0772 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before February 19, 2013. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any CBI) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2011–0772, by one of the following methods:

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

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

## II. Summary of Petitioned-for Tolerance

In the **Federal Register** of November 9, 2011 (Volume 76, FR 69690) (FRL–9325–1), EPA issued a notice pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 1F7892) by Syngenta Crop Protection, LLC, P.O. Box 18300 Greensboro, NC 27419–8300. The petition requested that 40 CFR 180.434 be amended by establishing tolerances for residues of the fungicide propiconazole, 1H-1,2,4-Triazole, 1-{[2-(2,4-dichlorophenyl)-4-propyl-1,3-dioxolan-2-yl]methyl}-, and its metabolites determined as 2,4-dichlorobenzoic acid and expressed as parent compound in or on sugarcane, cane at 1.0 parts per million (ppm). That notice referenced a summary of the petition prepared by Syngenta Crop Protection, LLC, the registrant, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA has proposed a different tolerance level for the reasons explained in Unit IV.D.

## III. Aggregate Risk Assessment and Determination of Safety

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

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

### *A. Toxicological Profile*

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

The toxicology database for propiconazole is adequate for evaluating and characterizing toxicity and selecting endpoints for purposes of this risk assessment. The primary target organ for propiconazole toxicity in animals is the liver. Increased liver weights were seen in mice after subchronic or chronic oral exposures to propiconazole. Liver lesions such as vacuolation of hepatocytes, ballooned liver cells, foci of enlarged hepatocytes, hypertrophy and necrosis are characteristic of propiconazole toxicity in rats and mice. Decreased body weight gain was also seen in subchronic, chronic, developmental and reproductive studies in animal studies. Dogs appeared to be more sensitive to the localized toxicity of propiconazole as manifested by stomach irritations at 6 mg/kg/day and above.

In rabbits, developmental toxicity occurred at a higher dose than the maternally toxic dose, while in rats, developmental toxicity occurred at

lower doses than maternal toxic doses. Increased incidences of rudimentary ribs occurred in rat and rabbit fetuses. Increased cleft palate malformations were noted in two studies in rats. In one published study in rats, developmental effects (malformations of the lung and kidneys, incomplete ossification of the skull, caudal vertebrae and digits, extra rib (14th rib) and missing sternbrae) were reported at doses that were not maternally toxic.

In the two generation reproduction study in rats, offspring toxicity occurred at a higher dose than the parental toxic dose suggesting lower susceptibility of the offspring to the toxic doses of propiconazole.

Propiconazole was negative for mutagenicity in the *in vitro* BALB/3T3 cell transformation assay, bacterial reverse mutation assay, Chinese hamster bone marrow chromosomal aberration assay, unscheduled DNA synthesis studies in human fibroblasts and primary rat hepatocytes, mitotic gene conversion assay and the dominant lethal assay in mice. It caused proliferative changes in the rat liver with or without pretreatment with an initiator, like phenobarbital, a known liver tumor promoter. Liver enzyme induction studies with propiconazole in mice demonstrated that propiconazole is a strong phenobarbital type inducer of xenobiotic metabolizing enzymes. Hepatocellular proliferation studies in mice suggest that propiconazole induces cell proliferation followed by treatment-related hypertrophy in a manner similar to the known hypertrophic agent phenobarbital. Propiconazole was carcinogenic to male mice. Propiconazole was not carcinogenic to rats or to female mice. The Agency has classified propiconazole as possible human carcinogen used the reference dose (RfD) approach for quantification of human risk. Propiconazole is not genotoxic and this fact, together with special mechanistic studies, indicates that propiconazole is a threshold carcinogen. Propiconazole produced liver tumors in male mice only at a high dose that was toxic to the liver. At doses below the RfD, liver toxicity is not expected; therefore, tumors are also not expected.

Propiconazole has low to moderate toxicity in experimental animals by the oral (Category III), dermal (Category III) and inhalation routes (Category IV), is moderately irritating to the eyes (Category III), minimally irritating to the skin (Category IV) and is a dermal sensitizer.

Specific information on the studies received and the nature of the adverse effects caused by propiconazole as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in the document titled ''Propiconazole Human Health Risk Assessment for an Amended Section 3 Registration on Sugarcane'' on pages 12–18 in docket ID number EPA–HQ–OPP–2011–0772.

*B. Toxicological Points of Departure/Levels of Concern*

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

A summary of the toxicological endpoints for propiconazole used for human risk assessment is discussed in Unit B of the final rule published in the **Federal Register** of Wednesday, May 11, 2011 (76 FR 27261) (FRL–8873–2).

*C. Exposure Assessment*

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to propiconazole, EPA considered exposure under the petitioned-for tolerances as well as all existing propiconazole tolerances in 40 CFR 180.434. EPA assessed dietary exposures from propiconazole in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure. Such effects were identified for propiconazole. In estimating acute dietary exposure, EPA used food consumption information from the United States Department of Agriculture (USDA) National Health and Nutrition Examination Survey, What We Eat in America, (NHANES/WWEIA). This dietary survey was conducted from 2003 to 2008. As to residue levels in food, EPA conducted an acute dietary analysis for propiconazole residues of concern using tolerance levels and 100% crop treated for all existing and proposed uses.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA's National Health and Nutrition Examination Survey, What We Eat in America, (NHANES/WWEIA). This dietary survey was conducted from 2003 to 2008. As to residue levels in food, EPA conducted a chronic dietary analysis for propiconazole residues of concern using tolerance levels for some commodities, average field trial residues for the remaining commodities, and 100% crop treated for all existing and proposed uses.

iii. *Cancer.* EPA determines whether quantitative cancer exposure and risk assessments are appropriate for a food-use pesticide based on the weight of the evidence from cancer studies and other relevant data. Cancer risk is quantified using a linear or nonlinear approach. If sufficient information on the carcinogenic mode of action is available, a threshold or nonlinear approach is used and a cancer RfD is calculated based on an earlier noncancer key event. If carcinogenic mode of action data is not available, or if the mode of action data determines a mutagenic mode of action, a default linear cancer slope factor approach is utilized. Based on the data summarized in Unit III.A., EPA has concluded that a nonlinear RfD approach is appropriate for assessing cancer risk to propiconazole. Cancer risk was assessed using the same exposure estimates as discussed in Unit III.C.1.ii., *Chronic exposure.*

iv. *Anticipated residue and percent crop treated (PCT) information.* Section 408(b)(2)(E) of FFDCA authorizes EPA to use available data and information on the anticipated residue levels of pesticide residues in food and the actual levels of pesticide residues that have been measured in food. If EPA relies on such information, EPA must require pursuant to FFDCA section 408(f)(1) that data be provided 5 years after the tolerance is established, modified, or left in effect, demonstrating that the

levels in food are not above the levels anticipated. For the present action, EPA will issue such data call-ins as are required by FFDCA section 408(b)(2)(E) and authorized under FFDCA section 408(f)(1). Data will be required to be submitted no later than 5 years from the date of issuance of these tolerances.

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for propiconazole in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of propiconazole. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm.*

Based on the Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM/EXAMS) and Screening Concentration in Ground Water (SCI–GROW) model, the estimated drinking water concentrations (EDWCs) of propiconazole for acute exposures are estimated to be 55.78 parts per billion (ppb) for surface water and 0.64 ppb for ground water. For chronic exposures for non-cancer assessments EDWCs are 21.61 ppb for surface water and 0.64 ppb for ground water. For chronic exposures for cancer assessment EDWCs are 13.24 ppb for surface water and 0.64 ppb for groundwater.

3. *From non-dietary exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). Propiconazole is currently registered for the following uses that could result in residential exposures: Turf, ornamentals and in paint.

EPA assessed residential exposure using the following assumptions: Short-term risk to toddlers was assessed for incidental oral and dermal exposure. The highest incidental oral and dermal exposure scenarios are expected from residential use on turf. Short-term risk to adults was assessed for dermal and inhalation residential handler exposure as well as from post-application dermal exposure. Adult handlers have some inhalation exposure; however, based on the low vapor pressure of propiconazole, negligible post application inhalation exposure is anticipated to occur. The highest post application exposure from residential use on turf was used to assess risk to short-term aggregate exposures.

The only residential use scenario that will result in potential intermediate-term exposure to propiconazole is dermal and incidental oral post application exposure to children from wood treatment (antimicrobial use).

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

Propiconazole is a member of the triazole-containing class of pesticides. Although conazoles act similarly in plants (fungi) by inhibiting ergosterol biosynthesis, there is not necessarily a relationship between their pesticidal activity and their mechanism of toxicity in mammals. Structural similarities do not constitute a common mechanism of toxicity. Evidence is needed to establish that the chemicals operate by the same, or essentially the same, sequence of major biochemical events (EPA, 2002). In conazoles, however, a variable pattern of toxicological responses is found; some are hepatotoxic and hepatocarcinogenic in mice. Some induce thyroid tumors in rats. Some induce developmental, reproductive, and neurological effects in rodents. Furthermore, the conazoles produce a diverse range of biochemical events including altered cholesterol levels, stress responses, and altered DNA methylation. It is not clearly understood whether these biochemical events are directly connected to their toxicological outcomes. Thus, there is currently no evidence to indicate that conazoles share common mechanisms of toxicity and EPA is not following a cumulative risk approach based on a common mechanism of toxicity for the conazoles. For information regarding EPA's procedures for cumulating effects from substances found to have a common mechanism of toxicity, see EPA's Web site at *http://www.epa.gov/pesticides/cumulative.*

Propiconazole is a triazole-derived pesticide. This class of compounds can form the common metabolite 1,2,4-triazole and two triazole conjugates (triazolylalanine and triazolylacetic acid). To support existing tolerances and to establish new tolerances for triazole-derivative pesticides, including propiconazole, U.S. EPA conducted a human health risk assessment for exposure to 1,2,4-triazole, triazolylalanine, and triazolylacetic acid resulting from the use of all current and pending uses of any triazole-derived fungicide. The risk assessment is a highly conservative, screening-level evaluation in terms of hazards associated with common metabolites (e.g., use of a maximum combination of uncertainty factors) and potential dietary and non-dietary exposures (i.e., high end estimates of both dietary and non-dietary exposures). In addition, the Agency retained the additional 10X FQPA safety factor for the protection of infants and children. The assessment includes evaluations of risks for various subgroups, including those comprised of infants and children. The Agency's complete risk assessment is found in the propiconazole reregistration docket at *http://www.regulations.gov,* Docket Identification (ID) Number EPA–HQ–OPP–2005–0497 and an update to assess the addition of the commodities included in this action may be found in docket ID number EPA–HQ–OPP–2011–0072, in the document titled ''Common Triazole Metabolites: Updated Dietary (Food + Water) Exposure and Risk Assessment to Address the Amended Propiconazole Section 3 Registration to Add Foliar Use on Sugarcane.''

*D. Safety Factor for Infants and Children*

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

2. *Prenatal and postnatal sensitivity.* In the developmental toxicity study in rats, fetal effects observed in this study at a dose lower than that evoking maternal toxicity are considered to be quantitative evidence of increased susceptibility of fetuses to in utero exposure to propiconazole. In the developmental toxicity study in rabbits, neither quantitative nor qualitative evidence of increased susceptibility of fetuses to in utero exposure to propiconazole was observed in this study. In the 2-generation reproduction study in rats, neither quantitative nor qualitative evidence of increased susceptibility of neonates (as compared to adults) to prenatal and/or postnatal exposure to propiconazole was observed. There is no evidence of

neuropathology or abnormalities in the development of the fetal nervous system from the available toxicity studies conducted with propiconazole. In the rat acute neurotoxicity study, there was evidence of mild neurobehavioral effects at 300 mg/kg/day, but no evidence of neuropathology from propiconazole administration. Although there was quantitative evidence of increased susceptibility of the young following exposure to propiconazole in the developmental rat study, the Agency determined there is a low degree of concern for this finding and no residual uncertainties because the increased susceptibility was based on minimal toxicity at high doses of administration, clear NOAELs and LOAELs have been identified for all effects of concern, and a clear dose-response has been well defined.

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

i. The toxicity database for propiconazole is complete except for the lack of immunotoxicity and subchronic neurotoxicity studies. In the absence of specific immunotoxicity studies, EPA has evaluated the available propiconazole toxicity data to determine whether an additional database uncertainty factor is needed to account for potential immunotoxicity. There was no evidence of adverse effects on the organs of the immune system in any propiconazole study. In addition, propiconazole does not belong to a class of chemicals (e.g., the organotins, heavy metals, or halogenated aromatic hydrocarbons) that would be expected to be immunotoxicity. Based on the considerations in this Unit, EPA does not believe that conducting a special Harmonized Guideline 870.7800 immunotoxicity study will result in a POD less than the NOAEL of 10.0 mg/kg/day used in calculating the cPAD for propiconazole, and therefore, an additional database uncertainty factor is not needed to account for potential immunotoxicity.

ii. In the absence of the subchronic neurotoxicity study, EPA has evaluated the available propiconazole toxicity data to determine whether an additional database uncertainty factor is needed to account for potential neurotoxicity after repeated exposures. With the exception of the developmental studies in the rat, there were no indications in any of the repeated dose studies that propiconazole is neurotoxic. In the developmental studies in the rat, there were some clinical signs of neurotoxicity at 300 mg/kg/day but not at lower doses. Further, there is no evidence of neuropathology or abnormalities in the development of the fetal nervous system from the available toxicity studies conducted with propiconazole. In the rat acute neurotoxicity study, there was evidence of mild neurobehavioral effects at 300 mg/kg, but no evidence of neuropathology from propiconazole administration. Based on the considerations in this Unit, EPA does not believe that conducting a Harmonized Guideline 870.6200b subchronic neurotoxicity study will result in a POD less than the NOAEL of 10 mg/kg/day used in calculating the cPAD for propiconazole, and therefore, an additional database uncertainty factor is not needed to account for potential neurotoxicity from repeated exposures.

iii. Although an apparent increased quantitative susceptibility was observed in fetuses and offspring, for the reasons noted in this Unit residual uncertainties or concerns for prenatal and/or postnatal toxicity are minimal.

iv. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments were performed based on 100 PCT and tolerance-level residues. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to propiconazole in drinking water. EPA used similarly conservative assumptions to assess postapplication exposure of children as well as incidental oral exposure of toddlers. These assessments will not underestimate the exposure and risks posed by propiconazole.

### *E. Aggregate Risks and Determination of Safety*

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

1. *Acute risk.* Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to propiconazole will occupy 79% of the aPAD for children 1–2 years old, the population group receiving the greatest exposure.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to propiconazole from food and water will utilize 21% of the cPAD for children 1–2 years old the population group receiving the greatest exposure. Based on the explanation in Unit III.C.3., regarding residential use patterns, chronic residential exposure to residues of propiconazole is not expected.

3. *Short-term risk.* Short-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Propiconazole is currently registered for uses that could result in short-term residential exposure and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water and with short-term residential exposures to propiconazole. Using the exposure assumptions described in this unit for short-term exposures, EPA has concluded the combined short-term food, water, and residential exposure result in aggregate MOEs of 200 for children and adults.

4. *Intermediate-term risk.* The only residential use scenario that will result in potential intermediate term exposure to propiconazole is post application exposure to children from wood treatment (antimicrobial use). The aggregate MOE is 120, which is greater than the target MOE of 100. Therefore, this scenario is not of concern.

5. *Aggregate cancer risk for U.S. population.* Propiconazole is classified as a possible human carcinogen with risk quantitated using a reference dose (RfD) approach, this determination is further explained in section III.C.1.iii. As noted in Unit III.E.2., chronic exposure is below the cPAD.

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

## IV. Other Considerations

### *A. Analytical Enforcement Methodology*

Adequate enforcement methodology, a high performance liquid chromatography with ultraviolet detection method (HPLC/UV Method AG–671A) is available to enforce the tolerance expression. The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone

number: (410) 305–2905; email address: *residuemethods@epa.gov.*

*B. International Residue Limits*

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

The Codex has established MRLs for propiconazole *per se* in or on sugarcane, cane at 0.02 ppm. These MRLs are different than the tolerances established for propiconazole in the United States. Codex MRLs apply only to applications by seed piece treatment for sugarcane. The Agency considers seed piece treatment to be a non-food use and did not set a tolerance for that use. In the U.S., application to sugarcane is by foliar spray. This results in higher residues in sugarcane, and thus EPA has established a higher tolerance level for propiconazole on sugarcane than the Codex MRL.

*C. Response to Comments*

No comments received.

*D. Revisions to Petitioned-for Tolerances*

The petitioned for tolerance level of 1.0 ppm has been revised to 0.40 ppm. The Organization for Economic Cooperation and Development tolerance calculation procedures were utilized in determining the appropriate tolerance level for the requested amended use. Changes in recommended tolerance are based on the use of these calculation procedures. Additionally, the registrant made a calculation error in choosing the tolerance value.

## V. Conclusion

Therefore, tolerances are established for residues of propiconazole, 1-[[2-(2,4-dichlorophenyl)-4-propyl-1,3-dioxolan-2-yl]methyl]-1H-1,2,4-triazole), in or on sugarcane, cane at 0.40 ppm.

## VI. Statutory and Executive Order Reviews

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

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

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1501 *et seq.*).

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

## VII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), 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 action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

## List of Subjects in 40 CFR Part 180

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

Dated: December 10, 2012.

**Lois Rossi,**

*Director, Registration Division, Office of Pesticide Programs.*

Therefore, 40 CFR chapter I is amended as follows:

## PART 180—[AMENDED]

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

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

■ 2. Section 180.434 is amended by revising paragraph (a), introductory text, and by adding to the table, alphabetically, an entry for ''sugarcane, cane'' to read as follows:

### § 180.434 Propiconazole; tolerances for residues.

(a) *General.* Tolerances are established for residues of propiconazole, including its metabolites and degradates, in or on the commodities in the table below. Compliance with the tolerance levels specified below is to be determined by measuring only those propiconazole residues convertible to 2,4-dichlorobenzoic acid (2,4–DCBA), expressed as the stoichiometric equivalent of propiconazole, in or on the commodity in the table below:

| Commodity | Parts per million |
|---|---|
| * * * * * | |
| Sugarcane, cane ..... | 0.4 |
| * * * * * | |

* * * * *

[FR Doc. 2012–30447 Filed 12–18–12; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

### 49 CFR Part 229

**[Docket No. FRA–2009–0094, Notice No. 5]**

**RIN 2130–AC39**

## Locomotive Safety Standards

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

**ACTION:** Final rule; response to petitions for reconsideration.

**SUMMARY:** This document responds to eight petitions for reconsideration received in relation to FRA's final rule, published on April 9, 2012, which revised the existing regulations containing safety standards for locomotives. In response to the petitions, this document amends and clarifies certain sections of the final rule.

**DATES:** *Effective Date:* The rule is effective December 19, 2012.

**FOR FURTHER INFORMATION CONTACT:** Charles Bielitz, Office of Safety Assurance and Compliance, Motive Power & Equipment Division, RRS–14, Federal Railroad Administration, 1200 New Jersey Avenue SE., Washington, DC, (202) 493–6314 (email *charles.bielitz@dot.gov*), or Michael Masci, Trial Attorney, Office of Chief Counsel, Federal Railroad Administration, 1200 New Jersey Avenue SE., Washington, DC, (202) 493–6037 (email *michael.masci@dot.gov*).

**SUPPLEMENTARY INFORMATION:**

### I. Background

On February 22, 2006, FRA presented, and the Railroad Safety Advisory Committee (RSAC) accepted, the task of reviewing existing locomotive safety needs and recommending consideration of specific actions useful to advance the safety of rail operations. The RSAC established the Locomotive Safety Standards Working Group (Working Group) to handle this task. The Working Group met twelve times between October 30, 2006, and April 16, 2009. The Working Group successfully reached consensus on the following locomotive safety issues: locomotive brake maintenance, pilot height, headlight operation, danger markings placement, load meter settings, reorganization of steam generator requirements, and the establishment locomotive electronics requirements based on industry best practices. The full RSAC voted to recommend the consensus issues to FRA on September 10, 2009, which were incorporated into the notice of proposed rulemaking (NPRM) issued in this proceeding on January 12, 2011. *See* 76 FR 2199. The specific regulatory language recommended by the RSAC was amended slightly for clarity and consistency. FRA independently developed proposals related to remote control locomotives, alerters, and locomotive cab temperature, issues that the Working Group discussed, but ultimately did not reach consensus. *Id.* Many comments were submitted to the public docket in response to the NPRM. The comment period closed on March 14, 2011, and after considering the public comments FRA issued a final rule on April 9, 2012. *See* 77 FR 21312.

In accordance with the provisions of Executive Order (E.O.) 13563, the final rule also modified the existing Locomotive Safety Standards based on what was been learned from FRA's retrospective review of the regulation. E.O. 13563 requires agencies to review existing regulations to identify rules that are overly burdensome, and when possible, modify them to reduce the burden. As a result its retrospective review, FRA determined that reductions in the burdens imposed on the industry could be achieved by modifying the regulations related to periodic locomotive inspection and locomotive headlights. FRA continues to believe that the modifications related to periodic locomotive inspection and locomotive headlights that are contained in the final rule do not reduce railroad safety.

Following publication of the final rule, parties filed petitions seeking FRA's reconsideration of some of the final rule's requirements. Petitioners included: The American Association for Justice (AAJ), the Association of American Railroads (AAR), the Central Railway MFG (CRM), D. P. Honold (Honold), David Lombardi (Lombardi), Paul, Reich & Myers, P.C. (PRM), Wabtec Corporation (Wabtec), and the ZTR Equipment Management (ZTR). The petitions filed by these parties principally relate to the following subject areas: locomotive electronics; locomotive alerters; remote control locomotives; periodic inspection of locomotives; preemption of State law; and, locomotive diesel exhaust. In addition to the issues raised in the petitions, FRA has determined that clarification or modification of the final rule is needed with respect to placement of the air flow method (AFM) indicator calibration date on the Form 6180–49A; the duration of the remote control locomotive (RCL) audio indication; and the date by which railroads and vendors must notify FRA regarding electronic locomotive control products that are under development. This document responds to all the issues raised in the petitions for reconsideration and clarifies and amends certain sections of the final rule in response to some of the issues raised in the petitions and clarifies certain other final rule requirements.

### II. Issues Raised by Petitions for Reconsideration

In response to the petitions for reconsideration, FRA is modifying the Locomotive Safety Standards final rule related to: § 229.303, Applicability of the Locomotive Electronics; § 229.305, Definition of New or Next-Generation Locomotive; § 229.140(d), Locomotive Alerters; § 229.15(b)(4), RCL Conditioning Run; § 229.15(a)(12)(xii), RCL Audio Indication; and, § 229.23(b)(2) Mechanical Inspection. FRA respectfully refers interested parties to the agency's section-by-section analysis of the final rule and the NPRM for a full discussion of those aspects of the rulemaking that remain unchanged. *See* 76 FR 2199 and 77 FR 21312. The following is a discussion of each of the issues raised in various petitions for reconsideration. These discussions should be read in conjunction with the specific section-by-section analysis that identifies the specific modifications or clarifications being made to the text of the final rule.

#### *A. Locomotive Electronics*

Several of the petitions request clarification or revision of certain requirements related to locomotive electronics. FRA's responses to each of the requests that were made in the petitions are provided in this discussion and the specific regulatory changes or modifications are discussed in the section-by-section analysis. For discussion purposes, the responses have been grouped into seven general categories: (1) Responsibility and Applicability, (2) Definitions, (3) Safety Analysis, (4) Appendix F, (5)

Confidentiality and Other Product Development Issues, (6) Small Businesses, and (7) Training.

1. Responsibility and Applicability

AAR's petition recommends that FRA ''place responsibility for compliance [with the locomotive electronics requirements that are contained in part 229, subpart E (Locomotive Electronics Requirements)] on the suppliers instead of the entities merely purchasing products.'' According to the AAR, it ''is illogical to hold railroads responsible for compliance [with the Locomotive Electronics Requirements] for products they do not produce;'' and, it is ineffective to ''hold railroads responsible for products developed by other companies since individual railroads will not have the complete picture of problems or developments associated with the products.''

FRA declines to adopt the AAR's recommendation to place responsibility for compliance with the Locomotive Electronics Requirements with only the suppliers and denies this portion of AAR's petition. The purpose of the Locomotive Electronics Requirements is to ensure that safety critical electronic locomotive control systems, subsystems, and components are designed, operated, and maintained to promote the safe functioning of these systems. FRA believes that both the railroads and suppliers play an important role in ensuring the safety of these systems and that both need to be responsible for properly fulfilling their respective roles.

The final rule provides that a railroad shall develop a Safety Analysis (SA) of each product created in conjunction with safety-critical electronic control systems, subsystems, and components, *See* § 229.301(a)–(b). Section 229.7(b) of the existing regulation provides that, ''any person (including but not limited to a railroad; any manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad; and any employee of such owner, manufacture, lessor, lessee, or independent contractor)'' who violates any requirement of part 229 or of the Locomotive Inspection Act or causes the violation of any such requirement can be subject to civil penalties to the same extent as the railroad. Thus, the onus of responsibility for ensuring safety compliance does not lie solely on the railroads. Compliance is a responsibility shared between the railroads, suppliers, manufacturers, and contractors to ensure the safe handling and functioning of locomotives for industry employees and the public.

For enforcement purposes, FRA retains the authority to determine which entity is more culpable for non-compliance related to a specific product and focus enforcement efforts on that entity or a group of entities. The determination would be based on a fact specific analysis that weighs each entity's role in the non-compliance. However, FRA retains the authority and discretion to hold each and every entity responsible for non-compliance, as provided for in § 229.7(b).

While FRA does acknowledge that the supplier will most likely prepare the initial SA for the product, it is the railroad that makes the final determination of where, when, and how a supplier's product is used. The supplier may, or may not, be fully aware of the manner in which the product is used, nor can it ensure that a product is being used within the design limitations laid out for the product. If, for a given product, the railroad always utilizes the supplier's product within the design limitations as laid out in the SA, implements all of the suppliers design changes as they occur, and does not implement third-party changes that are outside the scope of the SA, then no action would be required by the railroad. The SA would either remain unchanged as in the first case, or would have been updated by the supplier or third-party in the later cases when the supplier or third-party implemented the product change.

Only the railroad would know if they choose not to implement all product design changes specified by a manufacturer, choose to implement additional third party changes to the supplier's product, or choose to use the product in a manner not foreseen in the supplier's SA. If such choices are made by a railroad, the railroad would responsible for ensuring the safety of the product. To comply with these requirements, the railroad may choose to make the changes to the SA to address the changes themselves, it may have the supplier revise the SA to account for the railroad's actions, or it may have a third-party revise the SA to address the differences between the railroad's actual use and the suppliers design use.

Section 229.307(a) of the final rule requires that the railroad develop the SA for a product prior to its use. The railroad is not prohibited from delegating authority for creating or modifying the SA. While a supplier may have contractual obligations to a railroad for providing and maintaining a product that meets a minimum level of safety designated by the railroad, it is ultimately the railroad that makes the determination to: accept or reject the product; place the product in use; and, maintain the product in such a manner to ensure the safety and integrity of the product. FRA recognizes the possibility exists that a supplier may discontinue support for its product for any number of reasons. For example, the supplier may leave the market place. Such an action by a supplier does not preclude the railroad from continuing to operate and maintain the product despite the lack of a responsible supplier. In such a situation, while the railroad remains responsible for the SA, there is no requirement that it modify the SA as provided for in the regulation, electing to have the changes made by a third-party. It is only in the situation where there is no vendor or third-party available that the railroad alone must execute necessary changes to the SA.

Similarly, § 229.309(a) of the final rule places responsibility on the railroad for product changes that are accepted by a railroad. As with § 229.307(a), § 229.309(a) does not prohibit the railroad from delegating responsibility for the SA changes to the supplier or a third party designated by the railroad. FRA recognizes that the supplier is in the best position to aggregate reported product failures and safety hazards. However, the individual railroads that are using the product are in the best position to note the occurrence of a product failure. During operation, when a safety hazard exists, it is also the railroad that is utilizing the product that is best able to determine what immediate actions are necessary to ensure the safety of the crews and public pending final resolution of the problem by the supplier.

Suppliers and other parties are required to aggregate and report problems associated with a product to the railroads, so the railroads may determine what the appropriate course of action is to take in their specific circumstances. *See* § 229.309(b) and (c). Suppliers that fail to make these reports to the potentially affected railroads are potentially subject to enforcement action by FRA. FRA believes that actions by suppliers and other parties that amount to hidden recalls are unacceptable. Such actions place individual railroads in an untenable position.

FRA also discourages duplicate submissions of SAs for the same product. There is no requirement to submit a SA to FRA unless one is specifically requested by FRA. Indeed, § 229.311(a) was clearly intended to not require action by FRA. The SA is

assumed to have been reviewed and approved by the railroad. FRA does not believe the requirement that the railroad review and approve the SA to be especially onerous, and believes that it reflects what would be appropriate risk mitigation actions by the railroad. FRA finds it extremely unlikely that a railroad would knowingly use a supplier product without understanding the potential hazards and limitations of a product—information that would be specifically detailed in the SA. FRA also believes that the railroad will maintain the SA for the life of the product's use on the railroad. The information in the SA will provide a written record of a products design and safety limitations and hazards to all personnel not intimately involved with the initial acquisition.

In its petition, Wabtec requests that the final rule be changed to eliminate § 229.303(c). According to Wabtec, the railroad and the supplier should not be responsible for evaluating whether products or product changes will result in degradation of safety, or a material increase in safety-critical functionality. FRA believes that it is the responsibility of the railroad and the supplier to evaluate all products with regards to their safety functionality irrespective of the presence or lack of a prior formal SA as required by this regulation. Product changes must be evaluated to determine if they change the level of safety provided, and if the change is such that it results in degradations in safety, or an increase in safety functionality, the product should be formally evaluated and documented in a SA. FRA declines to make any change based on the Wabtec request and denies this portion of Wabtec's petition.

Wabtec also requests that the final rule be changed to exempt products that undergo minor changes from the SA requirements contained in subpart E. As stated in the preamble to the final rule, ''products with slightly different specifications that are used to allow the gradual enhancement of a product's capability do not require a full safety analysis.'' *See* 77 FR 21331. FRA's intent in the final rule is not to require a full SA for minor product changes or enhancements. However, FRA remains concerned that a series of minor changes over time may result in a major change in functionality from that initially defined and justified in the original SA. As a consequence, FRA does not agree with providing a general exemption as requested by Wabtec and denies Wabtec's petition on this issue. At some point, cumulative changes over time may require a new SA to be developed.

a. Section 229.303(a)(1)

In its petition, Wabtec requests that FRA clarify the language contained in § 229.303(a)(1) of the final rule, which states that ''products that are in service prior to June 8, 2012'' are exempt from the locomotive electronics requirements contained in subpart E. According to Wabtec, the exemption should apply to products that have been fully developed prior to June 8, 2012. FRA agrees that it intended the final rule to cover products that are fully developed by June 8, 2012, although the products may not yet be in service and agrees to change the language contained in § 229.303(a)(1) to clarify the intent of the final rule. Thus, FRA grants Wabtec's petition in this regard and this document changes the language contained in § 229.303(a)(1) of the final rule to state that ''products that are fully developed prior to June 8, 2012'' are exempt from the locomotive electronics requirements contained in subpart E.

b. Section 229.303(a)(2)

Wabtec's petition also requests that FRA clarify the language contained in § 229.303(a)(2) of the final rule, which states that ''products that are under development as of October 9, 2012, and are placed in service prior to October 9, 2017'' are exempt from the locomotive electronics requirements contained in subpart E. According to Wabtec, the exemption should apply to products that have been fully developed prior to October 9, 2017. FRA agrees that it intended for the final rule to cover products that are fully developed by October 9, 2017, even though they may not be in service as of that date and agrees to change the language contained in § 229.303(a)(2) to clarify the intent of the final rule. Thus, FRA grants Wabtec's request and this document modifies the language contained in § 229.303(a)(2) to state that ''products that are fully developed prior to October 9, 2017'' are exempt from the locomotive electronics requirements contained in subpart E.

2. Definitions

The AAR requests that FRA clarify the definition for the term ''new or next-generation locomotive'' that is provided in § 229.305 of the final rule. According to the AAR, a definition is provided for the term, but the term is not used in subpart E and that there is no need to define a term, if it is not used in the subpart. FRA agrees, grants AAR's petition in this regard and removes the term ''new or next-generation locomotive'' from § 229.305 in this document.

ZTR requests that FRA clarify the definition of the term ''safety-critical'' as it is used in the final rule. FRA believes that the definition that is provided in § 229.305 of the final rule is clear and believes that ZTR's petition fails to explain the definition's lack of clarity. In its petition, ZTR simply states that the definition of ''safety-critical'' is not clear to ZTR, when it considers its entire product line, including systems and subsystems. FRA's understanding is that generally, locomotive manufacturers consider their product to be the entire locomotive. This includes systems and subsystems. In this situation, the manufacturers' extensive knowledge of the product allows them to conduct a safety analysis on the safety critical elements, including locomotive control systems. Similarly, major suppliers to locomotive manufacturers are also familiar with their own products. They too can clearly identify the safety critical elements and conduct the safety analysis accordingly. Safety-critical electronic systems include, but would not be limited to: Directional control; graduated throttle or speed control; graduated locomotive independent brake application and release; train brake application and release; emergency air brake application and release; fuel shut-off and fire suppression; alerters; wheel slip/slide applications; audible and visual warnings; remote control locomotive systems; remote control transmitters; pacing systems; and speed control systems.

While these provide general examples, any specific item must be considered in the context of its use. For example, fuel injectors might possibly be considered as providing ''fuel shut off.'' However, in the context of the entire locomotive, they do not act as the primary means of ''fuel shut off,'' but rather are an element of the engine, the fuel to which is controlled by a separate independent control system. In this situation the injector's would clearly not be safety-critical, while other elements of the fuel control system may. FRA believes that manufacturers are capable of determining which elements of their product line contain safety critical elements, and which ones do not. As such, FRA denies this portion of ZTR's petition and declines to change the definition of ''safety critical.''

Wabtec requests that FRA revise the definition of the term ''product'' that is contained in § 229.305 of the final rule to clarify what is meant by the phrase ''directly related to'' that is used in the definition. In the final rule, the term ''product'' means ''any safety critical electronic locomotive control system,

subsystem, or component, not including safety critical processor based signal and train control systems, whose functions are *directly related to* safe movement and stopping of the train as well as the associated man-machine interfaces irrespective of the location of the control system, subsystem, or component.'' (Emphasis added). FRA believes that the definition of the term ''product'' is clear and is denying this portion of Wabtec's petition and declines to revise the definition.

The locomotive electronics requirements contained in subpart E are performance based. They are intended to address the application of products, processes, and technologies that have already been identified as well as new and emergent products, processes, and technologies not yet identified. They are also intended to address the application of products, processes, and technologies in manner different than they are currently being used. FRA believes that it is not possible to envision all possible applications of a technology and enumerate all possible products arising from that technology. FRA believes that any enumeration as requested in Wabtec's petition would be inappropriate.

3. Safety Analysis

According to ZTR's petition, due to the complexity and vastness of the certifications required by Appendix F to part 229 of the final rule, each railroad could have their own SA, and in some cases, they could conflict across the same product line. ZTR requests that FRA revise the final rule to resolve this potential conflict.

FRA agrees that there may be differences not only in a product line, but also for the same product. FRA also believes that different railroads may require different levels of detail from their suppliers. However, FRA does not see where this should be an issue for a supplier as it reflects the reality of the market place. Currently, when different railroads purchase the same products from the same vendor, each railroad may require unique customizations to suit that railroads business and operational needs. Different railroads may have different standards for ''due diligence,'' and therefore, may require different degrees of granularity of the information provided by the vendor. FRA does agree that different elements of a product line may have a different SA based on the complexity of the product and its intended use by the railroad. However, FRA believes that requiring a SA which addresses the complexity and intended use of the product by a railroad is critical to ensuring that the product's safety functionality not only operates correctly, but does so in the environment which the railroad intends it to be used. This type of customized analysis becomes especially critical if different railroads desired to use the product in different manners to support the railroads operations.

Without this type of customization, the risk exposure of the railroad, the railroads employees, and the public, cannot be determined by either the railroad or FRA. Generally, only a single inclusive SA that addresses the different use cases for the products used by the different railroads is required. FRA would recognize as acceptable any appropriately inclusive SA done under the auspices of one railroad, or a consortium of railroads.

ZTR's petition also states that because FRA's approval of the SA is ''open-ended,'' it is subject to interpretation by each individual reviewer and may be inconsistent. Section 229.311(b) of the final rule is intended to limit FRA's review of SAs. FRA reemphasizes that it conducts reviews of SAs on a case-by-case basis, and does not formally approve or disapprove SAs. FRA anticipates that the railroad will exercise due diligence in the design and review process prior to placing the product in use for purposes that are outside of the scope of subpart E. A vendor's railroad customer therefore would determine the level of detail necessary in a SA to prove that they have demonstrated due diligence prior to a product change, or placing a new or next generation product in use. Because individual railroads may have different expectations as to what is required to them to demonstrate due diligences, any SA, by necessity will be subject to differing interpretations and differing degrees of granularity. This, of course, does not restrict FRA review where it appears that due diligence has not been exercised, there are indications of fraud or malfeasance, or the underlying technology or architecture represent significant departures from existing practice.

Also, as previously indicated, the locomotive electronics requirements that are contained in subpart E of the final rule are performance based, and therefore, are by their very nature somewhat open-ended. As its name implies, performance based regulation and oversight is an approach that focuses on performance, as well as the desired results and outcomes. This approach differs from the traditional, prescriptive regulatory and oversight approach in that it emphasizes what must be achieved, rather than how the desired results and outcomes must be obtained. As is the case with any such regulatory and oversight approach, a variety of different issues and concerns can exist that reflect the specific concerns of the overseeing organization. Issues that concern the frequency and nature of reviews and inspections, the style of interaction of inspectors and inspected entities, the way in which sanctions are used, and the willingness of organizations responsible for to accept alternative approaches to accomplishing the same end will differ.

In the specific context of FRA regulatory oversight, any regulatory approach must confront a fundamental issue of how tight controls should be in promoting consistency and accountability versus how much discretion should be granted in promoting flexibility and innovation. As discussed in detail below, the performance based approach to regulation moves this balance from promoting consistency and accountability under current prescriptive approaches toward a greater emphasis on flexibility and innovation. At issue for any particular regulatory situation is how that balance is being struck.

FRA fully recognizes the reality that this regulation rests on what FRA inspectors do in the field when enforcing the regulation and monitoring performance, and that this is where the potential for inequities and inconsistencies exist. FRA also recognizes that regulated entities will react negatively to the lack of predictability if performance based regulations are inconsistently interpreted. However, FRA also believes that regulated entities will see little improvement over the prior more prescriptive regulations, if performance based regulations are interpreted too narrowly in allowing for a limited range of solutions. While there is the risk that there may be some inconsistencies, FRA believes the potential benefits of greater effectiveness in reaching specific regulatory objectives, flexibility in the means of adhering to the regulation, increased incentives for innovation, and reduced costs of compliance for regulated entities far outweigh the risks of inconsistencies in the application of regulations.

ZTR's petition also requests that FRA clarify when a ''grandfathered'' system may have to undergo a SA due to design change. FRA clarifies as follows; FRA believes that the evaluation of a product must be done on a case-by-case basis within the context of the proposed use of the product. Products that result in degradation of safety or a material

increase in safety critical functionality are not exempt. Products with slightly different specifications that are used to allow the gradual enhancement of the product's capabilities do not require a full SA but do require a formal verification and validation to the extent that the changes involve safety-critical functions. The grandfathering provision does not apply to new or next-generation locomotive control system, which refers to locomotive control products using technologies or combinations of technologies not in use on the effective date of this regulation, products that are under development as of October 9, 2012, and are fully developed by October 9, 2017, or products without established histories of safe practice. Traditional, non-microprocessor systems, as well as microprocessor and software based locomotive control systems that are currently in use have used existing technologies, existing architectures, or combinations of these to implement their functionality are grandfathered.

Wabtec's petition notes that FRA is silent on the estimated costs of preparing and maintaining a SA that is required by the final rule. FRA believes that the requirements that are contained in subpart E related to the SA represent good engineering practice for safety-critical systems, and that the costs of such an effort are a normal part of the system design lifecycle. Meeting these requirements represents an exercise of the due diligence required on the part of the railroad and/or supplier to minimize product liability. FRA believes that by allowing for broad flexibility in the specific standards, processes, and procedures used by the railroad and vendor, the railroad and vendors can accomplish this in a manner which both satisfies good engineering practice and is consistent with the railroads and vendors business philosophy. As such, FRA disagrees with Wabtec's petition, which alleges that the SA requirements are so inflexible that they will result in significant product cost increases or decreases in vendor profitability. FRA believes that virtually all companies developing safety critical systems currently conduct a comprehensive SA as an integral part of its products lifecycles. FRA does not specify any particular format for the SA, so there should be no additional costs for preparing documents that the suppliers are presently preparing in the normal course of their business.

4. Appendix F

In its petition, ZTR contends that there is too much room for interpretation in regards to the number and level of certifications suggested in Appendix F for any and all products. ZTR asserts that it's not clear whether 5% or 95% of these certifications will be requested, or whether they will be requested for simpler or more complex products. Contrary to ZTR's assertion, there is no requirement in the final rule for certification by the FRA, or the railroad purchasing a product for electronic systems covered by part 229. There is a requirement that the railroads ''* * * shall develop a Safety Analysis (SA) for each product subject to this subpart prior to the initial use of such product on their railroad.'' The requirements contained in the final rule hold individual railroads accountable for ensuring that an appropriate SA for products that they buy has been done and the analysis is

> ''* * * based on good engineering practice and *should be consistent with the guidance contained in Appendix F* (emphasis added) of this part in order to establish that a product's safety-critical functions will operate with a high degree of confidence in a fail-safe manner (see 49 CFR 229.307(a) and (b).''

FRA involvement in the review process of a railroad's SA is on a case-by-case basis. *See* § 229.311(b) of the final rule. ZTR is correct in noting that that the regulation does not specify the scope of the SA. Such specificity would be inconsistent with the performance based nature of the regulation. The scope of a SA will vary greatly depending upon the function of the product in question, the safety criticality of its elements, its implementation, and good engineering practice.

FRA notes that the use of Appendix F is not mandatory. Appendix F offers one approach to developing a SA. There are a number of equally effective or better approaches. FRA encourages railroads and manufacturers to select an approach best suited to their business model. FRA would consider as acceptable any approach that would be equal to, or more effective than, the one outlined in Appendix F. As such, FRA is denying those portions of the petitions requesting modification of the appendix and declines to revise Appendix F of the final rule.

Wabtec requests that FRA revise the final rule to standardize an approach to developing a SA and the appropriate level of human factors analysis. As FRA states in both the preamble and the rule text to the final rule, Appendix F represents only one possible set of minimum recommended practices for design and safety analysis. FRA recognizes that there may be any number of practices in use both within and outside the railroad industry that can be used to demonstrate the same or better levels of safety. FRA also recognizes that the practices and standards that should be implemented may vary depending on the safety criticality and sensitivity of the product in question. Rather than mandate that all railroads and suppliers adopt the same standards and practices for all products, regardless of the product in question and the railroads and vendors already defined standards and processes, FRA believes it is more appropriate to outline representative general standards and requirements and address specific standards on a case-by-case basis. Therefore, FRA denies Wabtec's petition in this regard and declines to revise the final rule. That said, FRA would not be adverse to the industry's use of a specific railroad industry standard that provides the same or equivalent level of functionality, if such a standard were developed and approved by the industry.

Wabtec's petition also requests that FRA revise the final rule to specify a single applicable standard for verification and validation of products. FRA believes that the latitude granted in the final rule enables railroads and vendors to accomplish the requirements in a manner that not only satisfies the technical requirements, but also is consistent with the railroads and vendors existing business practices. FRA continues to believe that mandating a single standard without due regard to existing business practices and engineering philosophies would actually result in increased costs as well as decreased innovation. Thus, FRA denies Wabtec's petition on this issue and FRA declines to make any change to the final rule. FRA notes that it would not be adverse to the industry's use of a specific railroad industry standard that provided the same or equivalent level functionality, if such a standard were developed and approved by industry.

5. Confidentiality and Other Product Development Issues

The petitions of both ZTR and Wabtec express concerns regarding the intellectual property protection and public disclosure of design documentation, as well as development plans without any guarantee of confidentiality. The SA and associated documentation is primarily shared between the supplier and its railroad customer and covered by mutually agreed non-disclosure agreements. To ensure confidential treatment by FRA of

business sensitive information that is provided to FRA, a request for confidential treatment should be made as instructed by 49 CFR 209.11. Thus, FRA believes that no change to the final rule is necessary. It is the responsibility of the railroad and their suppliers to clearly designate what elements of a submission to FRA should be exempted from a public request and the basis of such an exemption.

ZTR also expresses concern that the final rule will negatively impact the nimbleness of product development for suppliers and most certainly will reduce the amount of Research and Development (R&D) invested in rail. According to the ZTR, there is already a substantial risk on the part of the supplier during the R&D stages of product development. The outcome of this ruling will require that at the beginning of the R&D cycle, the effort and cost required to understand and satisfy the SA must be clearly understood. FRA disagrees. The regulation places no restrictions on the type and nature of research and development that may be undertaken. The regulation does require that products resulting from R&D and development efforts are proactively designed and built to demonstrate they can meet an acceptable level of safety over the life of the product. Proven safety methods and techniques are used to prevent, eliminate and control hazards. Such safety considerations begin at the initial design stages of a project. Although design cannot eliminate unsafe acts by irresponsible employees, it can incorporate measures to reduce the individual's ability to take a risk.

One of the biggest challenges to life cycle safety is cost. The influences to overall project/system safety considerations have more of an impact and cost less when factored into the mix early on. Using this cost influence concept allows designers to minimize cost impact while positively influencing the safety considerations and implementations to systems and projects. However, cutting too many costs at the design level can compromise workers' safety and result in long-term economic losses associated with system downtime, on-site design repairs, and injury to workers that may result in legal action. Obviously, cutting too many corners can be more costly and unsafe than if the original budget had provided sufficient funding for life cycle safety.

According the ZTR's petition, safety originates from certainty and therefore railroad safety requirements need to be clearly spelled out and not subject to interpretation. This knowledge would enable more intelligent decision making when evaluating and moving forward with R&D investments. It also would keep product costs to a minimum, while ensuring safety is at the forefront. Again, FRA disagrees. System safety begins the structured assessment of potential hazards and risks with the aim to design out problems at source rather than incorporate measures at a later time to deal with a problem. The approach uses systems theory and systems engineering to prevent foreseeable accidents and to minimize the result of unforeseeable accidents. Losses in general, not just human death or injury are considered. Such losses may include destruction of property, loss of mission, and environmental harm.

The design goal is the management of hazards: Their identification, evaluation, elimination, and control through analysis, design and management procedures. Safety considerations must be part of the initial stage of concept development and requirements definition. The degree to which it is economically feasible to eliminate a hazard rather than to control it depends upon the stage in system development at which the hazard is identified and considered. Early integration of safety considerations into the system development process allows maximum safety with minimal negative impact. The alternative is to design the product, identify the hazards, and then add on protective equipment to control the hazards when they occur, which is usually more expensive and less effective.

6. Small Businesses

According to the CRM's petition, the requirements contained in the final rule related to locomotive electronics do not take into account the limited resources of small railroad suppliers and favor conglomerate suppliers that are currently in the market place. FRA has exempted currently existing products from the requirement to create a SA and provided a grace period for products already under development and will be fully developed by October of 2017. For changes to existing products, the need for a SA has been limited to changes that result in degradations in safety or an increase in safety functionality. FRA recognizes that there may be any number of practices in use both within and outside the railroad industry that can be used to create a SA and demonstrate the same or better levels of safety. FRA also recognizes that the practices and standards that should be implemented may vary depending on the safety-criticality and sensitivity of the product in question. Rather than mandate all railroads and suppliers adopt the same standards and practices for all products, regardless of the product in question and the railroads and vendors already defined standards and processes, FRA believes it is more appropriate to outline representative general standards and requirements and address specific standards on a case-by-case basis. To that end, FRA has indicated in both the preamble and the rule text of the final rule that Appendix F represents only one possible set of minimum recommended practices for design and safety analysis. FRA believes that the latitude granted in the final rule enables railroads and vendors to accomplish the requirements in a manner that not only satisfies the technical requirements, but also is consistent with the railroads and vendors existing business practices. FRA believes that mandating a single standard without due regard to existing business practices and engineering philosophies would actually result in increased costs as well as decreased innovation.

FRA believes that the requirements of subpart E related to the SA represent good engineering practice for safety critical systems, and that the costs of such an effort are a normal part of the system design lifecycle. Meeting these requirements represents an exercise of the due diligence required on the part of the railroad and/or supplier to minimize product liability. FRA believes that by allowing for broad flexibility in the specific standards, processes, and procedures used by the railroad and vendor, the railroad and vendors can accomplish this in a manner which both satisfies good engineering practice and is consistent with the railroads and vendors business philosophy. Thus, FRA disagrees with the assertions of CRM and continues to believe that the approaches taken in the final rule are consistent with existing good business practice and provide necessary flexibilities to allow small business to comply with the requirements without undue hardship.

7. Training

AAR's petition requests that FRA eliminate the requirement related to training that is contained in § 229.317 of the final rule. FRA declines to eliminate the requirement for developing training based on task analysis (TA). FRA believes that the TA based training addresses a need for training that will address human factors related to the implementation of subpart E. The TA analysis provides the background, setting, and context for training. AAR

appears to express concern regarding the cost of training, but fails to provide any human factors based rationale for elimination of the requirement.

TA is a fundamental methodology in the assessment and reduction of human error. The term TA can be applied very broadly to encompass a wide variety of human factors techniques. Nearly all TA techniques provide, as a minimum, a description of the observable aspects of operator behavior at various levels of detail, together with some indications of the structure of the task. These are action-oriented approaches. Other techniques focus on the mental processes, which underlie observable behavior, *e.g.* decision making and problem solving. These are known as cognitive approaches.

TA methods can be used to eliminate the preconditions that give rise to errors before they occur. They can be used as an aid in the design stage of a new system, or the modification of an existing system. They can also be used as part of an audit of an existing system. TA can also be used in a retrospective mode during the detailed investigation of major incidents. The starting point of such an investigation must be the systematic description of the way in which the task was actually carried out when the incident occurred. This may, of course, differ from the prescribed way of performing the operation, and TA provides a means of explicitly identifying such differences. Such comparisons are valuable in identifying the immediate causes of an accident.

A TA is an important component of the instructional systems design (ISD) approach to training. As the ultimate purpose of a systematic approach to training design is to produce a properly trained person, the training designer must understand a job and its contents in considerable detail to design, develop and carry out effective training. If this step is not done, and done well, there will be no factual basis for development of effective, efficient instruction.

The analysis process provides information for the design and development of education/training that, in turn, is used to produce organizations that can accomplish their missions, and individuals capable of performing their tasks and duties. TA: (1) Identifies valid training and non-training solutions to organization and individual performance deficiencies; (2) determines what is trained in the form of critical, collective, and individual tasks, and supporting skills and knowledge; (3) provides an accurate description of identified critical tasks; and, (4) provides a definitive performance standard that describes what constitutes successful organization and individual performance of the task. Based on the discussion above, FRA denies that portion of AAR's petition related to this issue and declines to make any changes to this portion of the final rule.

*B. Locomotive Alerters*

AAR's petition requests that FRA amend the alerter requirement that is contained in § 229.140(d) of the final rule to eliminate the lower bound for the alerter warning indication interval. The final rule requires that an alerter provide a warning indication at a frequency that is within 10 seconds of the amount of time that is calculated by the following formula: Timing cycle specified in seconds = 2400 ÷ track speed. According to AAR, its standard differs from the final rule because it establishes a maximum interval of approximately 120 seconds. The final rule requires a warning indication interval that could be much greater than 120 seconds when operating at speeds of less than 20 mph.

AAR states that alerter warning indications at intervals that exceed 120 seconds (nominal) at or below 20 miles per hour are incompatible with the existing AAR standard for alerters and that more frequent alerts will enhance safety. While limiting their discussion to speeds under 20 miles per hour, AAR then petitions for a rule change which would allow the alerter to be activated more frequently than the formula given in the regulation at all speeds. FRA denies the petition for speeds of 20 mph and above, and will retain the formula given in the final rule. Arguments made by AAR for a maximum interval of 120 seconds (nominal) at speeds below 20 mph have merit, particularly in light of the findings of the National Transportation Safety Board's (NTSB) investigation of the rear end collision at Red Oak, Iowa, on April 17, 2011. *See* NTSB Accident ID DCA11FR002, Operations Group Factual Report at page 6. In that accident, two lives were lost at a speed only three mph faster than the proposed dividing speed, and approximately seven seconds away from activation of the alerter. Although neither the formula in the final rule, nor the AAR proposed maximum interval of approximately 120 seconds, would have prevented the fatalities at Red Oak, the accident is an example of a variance of a few seconds of the timing of the alerter warning indication can make a difference, even at relatively low speeds. For speeds below 20 mph, FRA is partially granting AAR's Petition and revising the alerter timing to 120 seconds, with the same 10 second tolerance that is provided for in this section for all other speeds. The specific changes are discussed in the section-by-section analysis below.

*C. Remote Control Locomotives*

1. § 229.15(b)(4) RCL Conditioning Run

AAR's petition requests that FRA clarify the RCL requirement related to conducting conditioning runs that are contained in § 229.15(b)(4) of the final rule. Section 229.15(b)(4) provides that: ''[e]ach time an RCL is placed in service and at the start of each shift locomotives that utilize a positive train stop system shall perform a conditioning run over tracks that the positive train stop system is being utilized on to ensure that the system functions as intended.'' According to the AAR, its understanding is that FRA intended that: (1) An RCL must pass over only one transponder to ensure that the system is working; and (2) that the conditioning run is required to be performed at the beginning of each shift, but not necessarily the first task that is performed by the RCL operator. However, AAR is concerned that the requirement could be misinterpreted to mean that a conditioning run is required: (1) Over each and every track that utilizes a positive train stop system that could be utilized by an RCL during a shift; or (2) at the beginning of every shift before any work is done.

FRA agrees that the existing final rule language could potentially be misinterpreted as stated by AAR. Such misinterpretations could lead to impractical results from an operational perspective. For example, at a hump yard where positive train stop is used, the requirement could be misinterpreted to mean that switching over the hump would have to cease while the conditioning run was being performed. As another example, in the same hump yard, the requirement could be misinterpreted to mean that when an RCL that is coupled to cars being moved over the hump when the previous shift ends with the job only partially complete (*e.g.* some cars are halfway up the hump), then the new RCL operator would have to perform a conditioning run prior to completing the hump move. To avoid these misinterpretations, FRA is clarifying the RCL requirement related to the conditioning run that is contained in § 229.15(b)(4) of the final rule as discussed in the section-by-section analysis below.

2. § 229.15(a)(12)(xii) RCL Audio Indication

AAR's petition also requests clarification of the requirement related

to the audio indication of RCL movement that is contained in § 229.15(a)(12)(xii) of the final rule. This section requires that the operator control unit (OCU) shall be capable of providing an audio indication of movement of the RCL. According to AAR, all RCL's currently provide an audio indication of movement when they are moving via the locomotive bell. The AAR assertion that this audio indication complies with the requirement that is contained in § 229.15(a)(12)(xii), because the OCU controls the movement of the RCL and the OCU provides an audio indication of the movement of the RCL via the locomotive bell. In addition, the AAR expresses concern that this requirement could be misinterpreted to mean that the OCU is required to produce an audio indication that emanates directly from the OCU, rather than from the RCL. FRA intended for the final rule to require the audio indication to emanate from the RCL as it is being operated by the OCU. A properly sounding locomotive bell is an acceptable example of an audio indication that emanates from the locomotive. The audio indication functions as a warning to people who are nearby the moving locomotive and not necessarily nearby the OCU. FRA also recognizes that the existing language could lead to misinterpretation, as stated in the AAR petition. Therefore, FRA grants AAR's petition related to this issue and agrees to clarify the language that is contained in § 229.15(a)(12)(xii) to identify the RCL as the source of the audio indication.

*D. Locomotive Periodic Inspection and Mechanical Inspection*

In its petition, AAR requests that FRA revise the periodic inspection requirement that is contained in § 229.23 of the final rule to make the 184-day interval optional. FRA believes that the 184-day interval is optional and does not believe anything in the final rule states otherwise. However, FRA's expectation is that the railroad will note on the FRA Form 6180–49A whether a locomotive is on a 92-day or 184-day inspection interval. The railroad must choose one inspection interval and stick with it until the inspection cycle is completed.

Section 229.23(b)(2) Daily Inspection by QMI

AAR's petition also requests that FRA modify the frequency of the daily inspection that is performed by a qualified mechanical inspector (QMI daily inspection) that is contained in § 229.23 of the final rule. The final rule requires a QMI daily inspection to be performed every 31 days. According to the AAR, the final rule could require a QMI daily inspection within a few days before the next periodic inspection, which AAR states would include a QMI daily inspection, by standard industry practice. The AAR asserts that two QMI daily inspections within days of each other cannot be justified and recommends that the final rule be modified so that a QMI daily inspection is not required to be performed when a periodic inspection is due within 41 days of the previous QMI daily inspection, effectively permitting 10 days of flexibility. While recognizing that overly frequent QMI daily inspections could be required under the provisions of the final rule, FRA does not agree with the AAR's proposed solution of a variable interval for the QMI daily inspection. FRA believes it would be awkward and possibly confusing to implement a requirement containing variable intervals. Generally, the inspection requirements that are contained in the Locomotive Safety Standards do not have provisions for variable interval inspections, except in the case of out-of-service credit that provided for in § 229.33.

FRA's intent in the final rule is to require that a minimum of five QMI daily inspections be performed between 184 day periodic inspections. FRA recognizes that a 31-day interval provides little, if any, flexibility in scheduling the QMI daily inspections. For example, if the average interval for the first five QMI daily inspections is 30 days, only one day shorter than the maximum amount of time that is permitted by the requirement, then a sixth QMI daily inspection would be due on day 181, three days before the periodic inspection. To keep the inspection interval constant, and provide the flexibility that the industry seeks, FRA is partially granting the AAR's petition on this issue and changing the QMI daily inspection interval to 33 days in this response. This will provide 12 days of potential flexibility in each periodic inspection cycle.

*E. Locomotive Cab Temperature*

The petitions of Honold and Lombardi request that the requirements contained in the final rule related to cab temperature be revised to require that air conditioning units be installed and operative in all lead locomotives. FRA declines to adopt this request for revision for several reasons. First and foremost is that there are several safety-critical systems or components that must take precedence over air conditioning on lead units. These include but are not limited to: An ability to control certain subsystems throughout the consist (*See* § 229.13); an air brake control system which functions as intended (*See* § 229.46); and, headlights and auxiliary lights which provide night vision for the crew and enhanced grade crossing safety for the public (*See* § 229.125). Adding air conditioning in locomotive cabs to the list of items which disqualify a locomotive from lead service could create power shortages, including preventing a trailing unit which is otherwise lead-qualified from being switched to the lead position when an en route failure of the lead locomotive could otherwise be remedied by that move.

Another major consideration was the difficulty of adequately measuring cab conditions under which air conditioning would be required. Disqualifying a locomotive from lead service on a day where ambient (un-conditioned) temperature in the cab is moderate would have no safety benefit. As pointed out in comments received in response to the NPRM from U.S. Army Joint Munitions Command, Transportation Division, (Docket Number FRA–2009–0094–0018), available scientific research on human performance in hot environments has shown that it is not simply temperature (scientifically called dry-bulb temperature) but Wet-bulb Globe Temperature (WBGT) which must be measured. A rule based on WBGT would be exceedingly difficult to enforce, because the expense of the equipment required to make the measurement would mean that few people would be able to make reliable measurements.

Overall, the goal of this change in the Locomotive Safety Standards is to take a first step toward improving the temperature conditions in locomotive cabs. Maintenance of the air conditioners is currently required at periodic inspections. In the preamble to the final rule, FRA stated that it will monitor air conditioning maintenance performed by railroads to ensure that maintenance is being adequately performed. If FRA determines that the prescribed level of maintenance is insufficient to ensure the proper functioning of the air conditioning units, FRA will consider taking further regulatory action to address the issue. The issue of cab temperature is also being referred to the Railroad Safety Advisory Committee's Fatigue Management Working Group (which includes participants representing rail labor) for further study.

*F. Preemption*

PRM's petition requests that FRA provide its current position on the pre-emptive effect of the Locomotive Inspection Act (LIA). The pre-emptive effect of the LIA, to the extent that it was addressed by the Supreme Court in *Kurns* v. *Railroad Friction Products Corp.,* 132 S. Ct. 1261 (2012), has been determined by the Supreme Court. FRA is in the process of fully considering the implications of the Supreme Court's decision in *Kurns,* and FRA's application of the LIA in light of the decision. Moreover, FRA believes that this issue is outside the scope of the petitions for reconsideration of the Locomotive Safety Standards final rule. The final rule did not establish or modify any Federal requirements related to the pre-emptive effect of the LIA. As such, FRA denies PRM's petition on this issue and declines to further discuss the pre-emptive effect of the LIA in this rulemaking proceeding.

*G. Locomotive Diesel Exhaust*

The petition of AAJ requests that FRA clarify its preamble discussion of the locomotive diesel exhaust requirement that is contained in § 229.43. FRA believes that the preamble discussion related to locomotive diesel exhaust is clear and accurately reflects FRA's existing understanding and implementation of the requirement. The final rule does not establish or modify any requirements related to the locomotive diesel exhaust requirement. As such, FRA believes that the AAJ's request is outside the scope of this rulemaking proceeding. Thus, FRA denies AAJ's petition related to this issue.

## III. Clarifying Amendments

*A. Recording AFM Calibration Date on the Blue Card*

Following the publication of the final rule, FRA is undertaking the task of updating the FRA Form F 6180–49A (blue card) to accurately reflect the requirements contained in part 229 as they stand after the Locomotive Safety Standards final rule has become effective. During this process, FRA determined that the blue card that is under development may be unclear regarding where the AFM calibration date should properly be recorded. The blue card, currently under development, contains a box labeled ''AFM calibration,'' while § 229.29 requires that the AFM calibration date be recorded in the remarks section of the blue card. FRA intended for the calibration date to be recorded in the remarks section of the blue card only in the absence of a specific box labeled ''AFM calibration.'' When such a box exists, the AFM calibration date should be recorded in the specifically labeled box. When such a box does not exist, the AFM calibration date should be recorded in the remarks section. FRA is revising the language contained in § 229.29 to clarify this point to allow for entry of AFM calibration information in either place.

*B. Record of Defects and Repairs Between Periodic Inspections*

FRA is amending the language contained in § 229.23(h) of the final rule to clarify the requirement. The final rule states that ''[t]he railroad shall maintain, and provide employees performing inspections under this section with, a list of the defects and repairs made on each locomotive over the last ninety-two days.'' This requirement is intended to ensure that an employee who performs an inspection that is required by this section is given the locomotive's history of defects that were found during inspections, and repairs that were made to the locomotive, since the date that the last inspection that is required by this section occurred. The locomotive's history will provide the employee with important information that will assist in the performance of a proper inspection. Prior to the final rule, periodic inspections required by this section were required to be performed at intervals not to exceed 92 days. As such, the record of the defects and repairs for the locomotive was required to be maintained and provided to appropriate employees for up to 92 days. Section 229.23(b) of the final rule modified the requirement to permit certain locomotives to operate for up to 184 days between periodic inspections. For a locomotive that is permitted to receive a periodic inspection at intervals not to exceed 184 days, the record of the defects and repairs for the locomotive is required to be maintained and provided to appropriate employees for up to 184 days. Based on the rule contained in the final rule, FRA believes that the requirement could be understood to mean that all locomotives, including those that are permitted to operate for 184 days between periodic inspections, require only 92 days of records to be maintained and provided to appropriate employees. To clarify the requirement, FRA is amending the language to read as follows: ''The railroad shall maintain, and provide employees performing inspections under this section with, a list of the defects and repairs made on each locomotive since the date that the last inspection required by this section was performed.''

*C. Duration of the RCL Audio Indication*

Section 229.15(a)(12)(xii) of the final rule requires that the RCL shall be capable of providing an audio indication of movement of the RCL. FRA believes that in order to function as intended as a warning to people that are nearby that the RCL that the equipment is moving, the audio indication must be a minimum of 3 seconds in duration. FRA believes that at this time all RCL units comply with this requirement as they are currently manufactured and that this timeframe is standard practice within the industry. Thus, FRA is clarifying the final rule in this document by specifically including that the audio indication last at least 3 seconds.

*D. RCL Remote Control Pullback Protection as an Example of a Positive Train Stop System*

FRA is clarifying the requirement that is contained in § 229.15(b)(4) of the final rule by modifying the language. The final rule states that ''[e]ach time an RCL is placed in service and at the start of each shift locomotives that utilize a positive train stop system shall perform a conditioning run over tracks that the positive train stop system is being utilized on to ensure that the system functions as intended.'' Section 229.5 of the final rule provides a definition for the term ''Remote Control Pullback Protection,'' (RCPP), which is a type of positive train stop system (PTSS). FRA included the definition in the final rule because it intended to provide RCPP as an example of a PTSS that is acceptable for the purposes of § 229.15. To clarify this point, the language is being amended to read as follows: ''[e]ach time an RCL is placed in service and at the start of each shift locomotives that utilize a positive train stop system, such as remote control pullback protection, shall perform a conditioning run over tracks that the positive train stop system is being utilized on to ensure that the system functions as intended.''

This section is also being amended in response to petitions for reconsideration of the final rule. For a discussion of those changes, please see section (c)(1) of the Issues Raised by Petitions for Reconsideration.

*E. Removing Erroneous Internet Address That Is Contained in the Electronic Recordkeeping Requirements*

Section 229.20(d)(2) of the final rule contains an erroneous link to Westlaw. The Internet address has no significance related to the electronic recordkeeping requirements and was not intended to be included in the rule text. As such, to

prevent any confusion, the Internet address is being removed.

## IV. Section-by-Section Analysis

*Section 229.15 Remote Control Locomotives*

FRA is modifying the language contained in § 229.15(a)(12)(xii) of the final rule to clarify that an RCL is required to produce audio indication of movement for at least 3 seconds and that the OCU must be capable of activating the audio indication of movement. FRA believes that in order to function as intended as a warning to people that are nearby that the RCL that the equipment is moving, the audio indication must be a minimum of 3 seconds in duration. This was not expressly stated in the final rule, but to provide additional clarity on the issue, FRA is expressly adding the 3 second duration to § 229.15(a)(12)(xii) in this response to petitions for reconsideration. In addition, the language contained in the final rule could incorrectly be read as providing that the OCU itself is required to produce an audio indication of movement. To avoid such a misinterpretation, the word ''activate'' is being added to § 229.15(a)(12)(xii) to read as follows ''[a]ctivate the audio indication of movement that is located on the RCL for a duration of at least 3 seconds * * *'' FRA believes that these changes clarify the final rule.

FRA is also modifying the RCL requirement related to the conditioning run that is contained in § 229.15(b)(4) of the final rule to clarify that: (1) an RCL must pass over only one transponder to ensure that the system is working; and, (2) that the conditioning run is required to be performed at the beginning of each shift, but not necessarily the first task that is performed by the RCL operator. The language contained in the final rule states that''[e]ach time an RCL is placed in service and at the start of each shift locomotives that utilize a positive train stop system shall perform a conditioning run over tracks that the positive train stop system is being utilized on to ensure that the system functions as intended.'' The modified language that is established by this response to petitions for reconsideration is as follows ''[e]ach time an RCL is placed in service and at the first practical time after the start of each shift, but not more than 2 hours after the start of that shift, locomotives that utilize a positive train stop system shall perform a conditioning run over a track that the positive train stop system is being utilized on to ensure that the system functions as intended.'' Adding the phrase ''at the first practical time after * * * but not more than 2 hours after the start of that shift * * *'' and changing the word ''tracks'' to ''track,'' add clarity to this requirement.

FRA is further modifying the language that is contained in § 229.15(b)(4) of the final rule to clarify FRA included the definition of RCPP in the final rule because it intended to provide RCPP as an example of a PTSS that is acceptable for the purposes of § 229.15. For a more detailed discussion of the change to this section please see section D of the Clarifying Amendments.

*Section 229.20 Electronic Recordkeeping*

Section 229.20(d)(2) of the final rule contains an erroneous link to Westlaw. The Internet address has no significance related to the electronic recordkeeping requirements and was not intended to be included in the rule text. As such, to prevent any confusion, the Internet address is being removed and the section will read as follows: [p]aper copies of electronic records and amendments to those records that may be necessary to document compliance with this part, shall be provided to FRA for inspection and copying upon request. Paper copies shall be provided to FRA no later than 15 days from the date the request is made; and, * * *.''

*Section 229.23 Periodic Inspection: General*

FRA is amending the language contained in § 229.23(b)(2) of the final rule to change the frequency of the QMI daily inspection from every 31 days to every 33 days. As noted in the discussion of AAR's petition contained in section D of the Issues Raised by Petitions for Reconsideration above, FRA believes that the intent of the final rule is to require that a minimum of five QMI daily inspections be performed between 184 day periodic inspections. FRA recognizes that a 31-day interval provides little, if any, flexibility in scheduling the QMI daily inspections. For example, if the average interval for the first five QMI daily inspections is 30 days, only 1 day shorter than the maximum amount of time that is permitted by the requirement, then a sixth QMI daily inspection would be due on day 181, three days before the periodic inspection. To keep the inspection interval constant, and provide the flexibility that the industry seeks, FRA is partially granting the AAR's petition on this issue and changing the QMI daily inspection interval to 33 days. This will provide 12 days of potential flexibility in each periodic inspection cycle.

FRA is also amending the language contained in § 229.23(h) of the final rule to clarify the requirement. The final rule states that ''[t]he railroad shall maintain, and provide employees performing inspections under this section with, a list of the defects and repairs made on each locomotive over the last ninety-two days.'' To clarify the requirement, FRA is amending the language to read as follows: ''The railroad shall maintain, and provide employees performing inspections under this section with, a list of the defects and repairs made on each locomotive since the date that the last inspection required by this section was performed.'' For a more detailed discussion of the change to this section please see section B of the Clarifying Amendments.

*Section 229.29 Air Brake System Calibration, Maintenance, and Testing*

To clarify the final rule, FRA is amending the language contained in § 229.29(g)(1) to indicate that the date of AFM indicator calibration shall be recorded and certified on the Form F6180–49A. Please see the preceding discussion in section A of the Clarifying Amendments for background information related to this modification.

*Section 229.140 Alerters*

FRA is amending the language that is contained in § 229.140(d) of the final rule to establish a fixed interval for the alerter warning indication when operating at speeds below 20 mph. To make this change, FRA is revising the requirement for locomotives operating at speeds under 20 mph to 120 seconds, with the same 10 second tolerance that is provided for in this section for all other speeds. Please see the preceding discussion in section B of the Issues Raised by Petitions for Reconsideration for background information related to this modification.

*Section 229.303 Applicability*

The language contained in § 229.303 is being modified to clarify that certain products are excluded from the locomotive electronics requirements. The language is being modified by replacing the phrase ''placed in service'' that is contained in §§ 229.303(a)(1) and (a)(2) with the phrase ''fully developed.'' Please see the preceding discussion in section (A)(1) of the Issues Raised by Petitions for Reconsideration for background information related to this modification. In addition, FRA is extending the date for railroads and vendors to identify all products that are under development as identified in paragraph (a)(2) of this section to FRA from October 9, 2012 to February 9,

2013. The substantive requirement is not being changed, as the requirements that govern which products can be properly identified under paragraph (a)(2) of this section remain unchanged. Only the date by which the products must be identified and submitted to FRA is being changed.

*Section 229.305 Definitions*

Section 229.305 of the final rule is being amended by removing the definition for the term ''new or next-generation locomotive.'' Please see the preceding discussion in section (A)(2) of the Issues Raised by Petitions for Reconsideration for background information related to this modification.

## V. Regulatory Impact and Notices

### *A. Executive Order 12866 and DOT Regulatory Policies and Procedures*

This action has been evaluated in accordance with existing policies and procedures and determined to be non-significant under both Executive Order 12866 and DOT policies and procedures. *See* 44 FR 11034; February 26, 1979. The original final rule was determined to be non-significant. Furthermore, the amendments contained in this action are not considered significant because they generally clarify requirements currently contained in the final rule or allow for greater flexibility in complying with the rule.

These amendments and clarifications are in response to commenters petitions for reconsideration and will provide greater flexibility in the implementation and enforcement of this final rule. The amendments modify the remote control locomotive provisions and also Subpart E. Both of these are not mandatory requirements to operate locomotives, and therefore will not cause a change in FRA's estimated costs in the final rule's regulatory impact analysis (RIA). In addition, there is an amendment that modifies section 229.140 for locomotive alerters. This amendment is in response to a commenter's petition and should improve compliance with the alerter requirement in the final rule. This change to the alerter timing interval below 20 mph would result in a modest cost saving to the industry, particularly in regard to the January 1, 2017, full implementation requirement because it makes more currently installed alerters compliant, thus reducing the number to be modified. FRA does not believe that the amount of potential savings warrants modification of the RIA. There are amendments to the periodic inspection requirements in section 229.23 which are also in response to a commenter's petition. The amendment will have minimal economic impact on the railroads that are able to use the final rule's 184 day periodic inspection provision. Any impact it will have, will serve to decrease the estimated costs in the final rule's RIA. The amendment to section 229.29 is not a change in the air brake system calibration, maintenance, and testing requirements but rather a change in where and how the calibration is recorded on the locomotive's blue card.

In summary, FRA has concluded that these amendments will have a minimal net effect on FRA's original analysis of the costs and benefits associated with the final rule. Hence, FRA has not revised the final rule's RIA.

### *B. Regulatory Flexibility Act and Executive Order 13272*

To ensure potential impacts of rules on small entities are properly considered, FRA developed this action and the original final rule in accordance with Executive Order 13272 (''Proper Consideration of Small Entities in Agency Rulemaking'') and DOT's procedures and policies to promote compliance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Pursuant to the Regulatory Flexibility Act (5 U.S.C. 605(b)), FRA certifies that this action would not have a significant economic impact on a substantial number of small entities.

The amendments contained in this action that modify provisions for the use of remote control locomotives and will not impact any small entities. Most small railroads do not use remote control locomotives and the use of remote control locomotives is permissive and not mandatory. The amendments to the periodic inspection requirements in § 229.23 would not negatively impact any small entities. This is due to that fact that the amendments to this section should reduce cost for a railroad that has locomotives that can utilize a longer, *i.e.,* 184 day, period inspection. In addition, most, if not all, small railroads currently do not have locomotives that would qualify to utilize the longer periodic inspection period. The amendment to § 229.29 is not a change in the air brake system calibration, maintenance, and testing requirements but rather a change in where and how the calibration is recorded on the locomotive's blue card. There is one amendment on § 229.140 which adds a requirement to establish a ''fixed interval'' for the audible warning indication for locomotive alerters for speeds under 20 mph. This amendment will not impact any small railroad since many small railroads operate at speeds that do not require an alerter, and the amendment is granting a commenter's request. Finally the amendments to subpart E relate to clarification on the requirements for new advanced electronic locomotive control systems, which would be found on new locomotives. No small railroads purchase new locomotives that would have these systems on them. Accordingly, because the amendments contained in this action generally clarify requirements currently contained in the final rule, FRA has concluded that there are no substantial economic impacts on small entities resulting from this action.

### *C. Paperwork Reduction Act*

FRA has carefully reviewed agency amendments to certain sections of this final rule in response to petitions for reconsideration. There are no changes to any of the final rule's information collection requirements and estimated burden published in the FR on April 9, 2012. *See* 77 FR 21312. These information collection requirements and associated burden were approved by the Office of Management and Budget on November 21, 2012, under OMB No. 2130–0004, for the maximum time period.

### *D. Federalism Implications*

FRA has analyzed this rule in accordance with the principles and criteria contained in Executive Order 13132, issued on August 4, 1999, which directs Federal agencies to exercise great care in establishing policies that have federalism implications. *See* 64 FR 43255. This final rule will not have a substantial effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among various levels of government. This final rule will not have federalism implications that impose any direct compliance costs on State and local governments.

This final rule could have preemptive effect by operation of law under certain provisions of the Federal railroad safety statutes, specifically, the former Federal Railroad Safety Act of 1970 (former FRSA), repealed and recodified at 49 U.S.C. 20106, and the former Locomotive Boiler Inspection Act at 45 U.S.C. 22–34, repealed and recodified at 49 U.S.C. 20701–20703. *See Kurns* v. *Railroad Friction Products Corp.,* 132 S. Ct. 1261 (2012); and *Napier* v. *Atlantic Coast Line R.R.,* 272 U.S. 605 (1926).

*E. International Trade Impact Assessment*

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and where appropriate, that they be the basis for U.S. standards.

This action is purely domestic in nature and is not expected to affect trade opportunities for U.S. firms doing business overseas or for foreign firms doing business in the United States.

*F. Environmental Impact*

FRA has evaluated this action in accordance with its ''Procedures for Considering Environmental Impacts'' (FRA's Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this action is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA's Procedures. *See* 64 FR 28547 (May 26, 1999).

In accordance with section 4(c) and (e) of FRA's Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this action that might trigger the need for a more detailed environmental review. As a result, FRA finds that this action is not a major Federal action significantly affecting the quality of the human environment.

*G. Unfunded Mandates Reform Act of 1995*

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 2 U.S.C. 1531), each Federal agency ''shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).'' Section 202 of the Act (2 U.S.C. 1532) further requires that ''before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $140,800,000 or more in any one year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement'' detailing the effect on State, local, and tribal governments and the private sector. The action will not result in the expenditure, in the aggregate, of $140,800,000 or more in any one year, and thus preparation of such a statement is not required.

*H. Energy Impact*

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any ''significant energy action.'' 66 FR 28355 (May 22, 2001). Under the Executive Order, a ''significant energy action'' is defined as any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this action in accordance with Executive Order 13211. FRA has determined that this action is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this action is not a ''significant energy action'' within the meaning of Executive Order 13211.

*I. Privacy Act*

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 document, if submitted on behalf of an association, business, labor union, etc.). See *http://www.regulations.gov/#!privacy.* Notice for the privacy notice of regulations.gov or interested parties may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477).

**List of Subjects in 49 CFR Part 229**

Locomotives, Railroad safety, Remote control locomotives.

**The Rule**

For the reasons discussed in the preamble, FRA amends part 229 of title 49 of the Code of Federal Regulations as follows:

## PART 229—[AMENDED]

■ 1. The authority citation for part 229 continues to read as follows:

**Authority:** 49 U.S.C. 20102–03, 20107, 20133, 20137–38, 20143, 20701–03, 21301–02, 21304; 28 U.S.C. 2401, note; and 49 CFR 1.49.

■ 2. Section 229.15 is amended by revising paragraphs (a)(12)(xii) and (b)(4) to read as follows:

**§ 229.15 Remote control locomotives.**

(a) * * *

(12) * * *

(xii) Activate the audio indication of movement that is located on the RCL for a duration of at least 3 seconds; and

* * * * *

(b) * * *

(4) Each time an RCL is placed in service and at the first practical time after the start of each shift, but no more than 2 hours after the start of that shift, locomotives that utilize a positive train stop system, such as remote control pullback protection, shall perform a conditioning run over a track that the positive train stop system is being utilized on to ensure that the system functions as intended.

* * * * *

■ 3. Section 229.20 is amended by revising paragraph (d)(2) to read as follows:

**§ 229.20 Electronic recordkeeping.**

* * * * *

(d) * * *

(2) Paper copies of electronic records and amendments to those records that may be necessary to document compliance with this part, shall be provided to FRA for inspection and copying upon request. Paper copies shall be provided to FRA no later than 15 days from the date the request is made; and,

* * * * *

■ 4. Section 229.23 is amended by revising paragraphs (b)(2) and (h) to read as follows:

**§ 229.23 Periodic inspection: general.**

* * * * *

(b) * * *

(2) At least once each 33 days, the daily inspection required by § 229.21, shall be performed by a qualified mechanical inspector as defined by § 229.5. A record of the inspection that contains the name of the person

performing the inspection and the date that it was performed shall be maintained in the locomotive cab until the next periodic inspection is performed.

* * * * *

(h) The railroad shall maintain, and provide employees performing inspections under this section with, a list of the defects and repairs made on each locomotive since the date that the last inspection required by this section was performed;

* * * * *

■ 5. Section 229.29 is amended by revising paragraph (g)(1) to read as follows:

**§ 229.29 Air brake system calibration, maintenance, and testing.**

* * * * *

(g) * * *

(1) The date of AFM indicator calibration shall be recorded and certified on Form F6180–49A.

* * * * *

■ 6. Section 229.140 is amended by revising paragraph (d) to read as follows:

**§ 229.140 Alerters.**

* * * * *

(d) Alerter warning timing cycle interval shall be within 10 seconds of the calculated setting utilizing the formula (timing cycle specified in seconds = 2400 ÷ track speed specified in miles per hour). For locomotives operating at speeds below 20 mph, the interval shall be between 110 seconds and 130 seconds.

* * * * *

■ 7. Section 229.303 is amended by revising paragraphs (a)(1), (a)(2), and (b) to read as follows:

**§ 229.303 Applicability.**

(a) * * *

(1) Products that are fully developed prior to June 8, 2012.

(2) Products that are under development as of October 9, 2012, and are fully developed prior to October 9, 2017.

* * * * *

(b) Railroads and vendors shall identify all products identified in paragraph (a)(2) of this section to FRA by February 9, 2013.

* * * * *

■ 8. Section 229.305 is amended by removing the definition for the term ''new or next-generation locomotive control system.''

Issued in Washington, DC, on December 7, 2012.

**Joseph C. Szabo,**

*Administrator.*

[FR Doc. 2012–30289 Filed 12–18–12; 8:45 am]

BILLING CODE 4910–06–P

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 648

**[Docket No. 120604138–2672–02]**

**RIN 0648–BC21**

## Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Atlantic Surfclam and Ocean Quahog Fishery

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

**ACTION:** Interim final rule; request for comments.

**SUMMARY:** This interim final rule reopens a portion of the Georges Bank Closed Area to the harvest of Atlantic surfclams and ocean quahogs. The area has been closed since 1990 due to the presence of toxins known to cause paralytic shellfish poisoning. The reopening is based on a request from the Mid-Atlantic Fishery Management Council and the recent adoption of a testing protocol into the National Shellfish Sanitation Program.

**DATES:** Effective January 1, 2013. Comments must be received by February 19, 2013.

**ADDRESSES:** An environmental assessment (EA) was prepared for this action that describes the final action and other alternatives considered and provides an analysis of the impacts of the measures and alternatives. Copies of the EA are available on request from the NMFS Northeast Regional Administrator, John K. Bullard, 55 Great Republic Drive, Gloucester, MA 01930. The EA is also available online at *http://www.nero.noaa.gov/.* You may submit comments on this document, identified by NOAA–NMFS–2012–0121 by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal *www.regulations.gov.* To submit comments via the e-Rulemaking Portal, first click the ''submit a comment'' icon, then enter NOAA–NMFS–2012–0121 in the keyword search. Locate the document you wish to comment on from the resulting list and click on the ''Submit a Comment'' icon on the right of that line.
- *Mail:* Submit written comments to John K. Bullard, Regional Administrator, Northeast Region, NMFS, 55 Great Republic Drive, Gloucester, MA 01930–2298. Mark on the outside of the envelope, ''Comments on GB PSP Closed Area Reopening.''
- *Fax:* (978) 281–9135; Attn: Jason Berthiaume.

*Instructions:* Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (e.g., name, address, etc.) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

**FOR FURTHER INFORMATION CONTACT:** Jason Berthiaume, Fishery Management Specialist, phone (978) 281–9177, fax (978) 281–9135.

**SUPPLEMENTARY INFORMATION:**

### Background

The Georges Bank (GB) Closed Area, located in the Exclusive Economic Zone east of 69°00′ W. long. and south of 42°20′ N. lat., has been closed to the harvest of surfclams and ocean quahogs since 1990 due to red tide blooms that cause paralytic shellfish poisoning (PSP). The closure was implemented based on advice from the U.S. Food and Drug Administration (FDA) after samples tested positive for toxins (saxitoxins) that cause PSP. These toxins are produced by the alga *Alexandrium fundyense,* which can form blooms commonly referred to as red tides, or harmful algal blooms, and can accumulate in water column filter-feeding shellfish. Shellfish contaminated with the toxin, if eaten in large enough quantity, can cause illness or death in humans.

Due to inadequate testing or monitoring of the water and shellfish

within the area for the presence of PSP-causing toxins, the closure was made permanent in 1999, under Amendment 12 to the Atlantic Surfclam and Ocean Quahog Fishery Management Plan (FMP). Since the implementation of the closure, NOAA's National Ocean Service has provided grants to the FDA, the states of Maine, New Hampshire, and Massachusetts, and a clam industry representative to collect water and shellfish samples from Federal waters off southern New England. NMFS has also issued exempted fishing permits (EFPs) since 2008 to surfclam and ocean quahog vessels to conduct research in the closure area. Testing of clams on GB by the FDA in cooperation with NMFS and the fishing industry under the EFPs demonstrate that PSP toxin levels have been well below the regulatory limit established for public health safety (FDA 2010). The FDA and NMFS also developed a Protocol for Onboard Screening and Dockside Testing in Molluscan Shellfish (the protocol) that is designed to test and verify that clams harvested from GB are safe. The protocol was formally adopted into the National Shellfish Sanitation Program at the October 2011 Interstate Shellfish Sanitation Conference.

On June 30, 2010, NMFS published a similar proposal in the **Federal Register** (75 FR 37745) to re-open a portion of the GB Closed Area. This proposed rule was later withdrawn due to public comments that opposed reopening the GB Closed Area without having a testing protocol in place. Now that the protocol has been formally adopted, NMFS is reopening a portion of the GB Closed Area with the requirement that the protocol be used on all fishing trips into the area.

This action also implements specific reporting requirements for the reopened area. To access the reopened area, a vessel must obtain a letter of authorization (LOA) from NMFS. The LOA outlines the harvesting requirements for the reopened area; by obtaining the LOA, a vessel acknowledges and agrees to the terms and conditions of the protocol and the LOA. Signing up for an LOA also allows NMFS to know which vessels are eligible to fish in the reopened area. NMFS has the authority to invalidate the LOA, should a vessel not comply with the requirements for harvesting in the reopened area. NMFS has also developed new vessel monitoring system (VMS) codes for the area. These codes will allow NMFS and enforcement agencies to readily identify a vessel's intent to fish in the area. The new VMS codes and the LOA will provide NMFS with additional oversight tools to assist enforcement and monitoring efforts in order to ensure public health and safety.

Since research began in the area in 2008, no PSP toxin measurements have been recorded above regulatory limits, and PSP toxin monitoring will be conducted under the terms of the protocol for all trips into the area. NMFS retains the authority to close any area to harvesting of surfclams and ocean quahogs to prevent contaminated shellfish from entering the market. Any future closures or openings within the GB Closed Area will be based upon PSP toxin testing results conducted under the terms of the protocol, the advice of the FDA, and the most current information available.

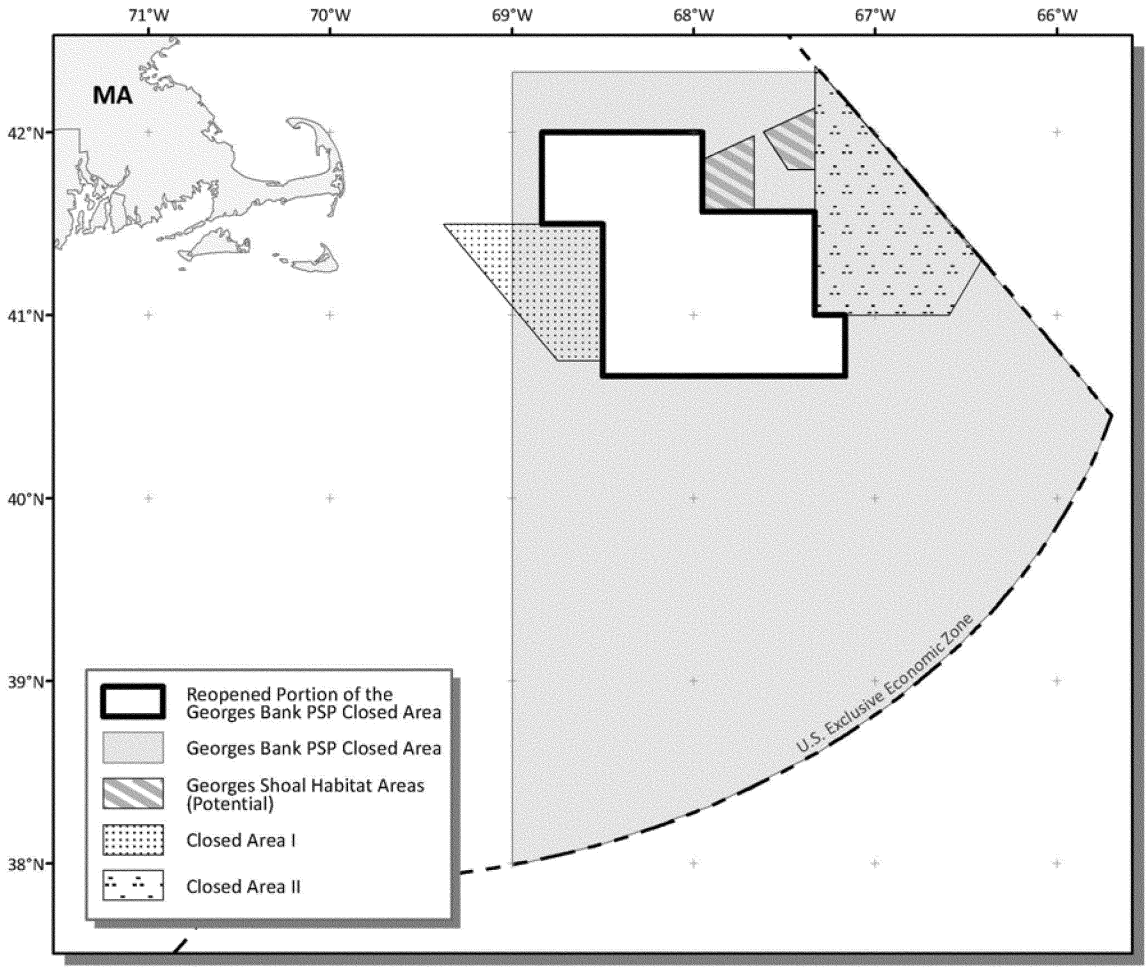
NMFS reopens the identified portion of the GB Closed Area to the harvest of surfclams and ocean quahogs, under its authority at § 648.76(c). However, we will continue to defer to the FDA in matters of public health and, should we receive new data or advice from the FDA, we may have to reconsider the status of any reopened areas or the need for additional closures.

**Changes From Proposed Rule**

NMFS published a proposed rule for this action in the **Federal Register** on August 31, 2012 (77 FR 53164), with a 30-day comment period that ended on October 1, 2012. In the proposed rule, three alternatives were identified: Alternative A was the largest of the three, and encompassed the entire area between Closed Area I and Closed Area II; Alternative B was smaller than Alternative A area and encompassed the area defined under the 2012 EFP; Alternative C was the smallest of the three areas, and is known as the Cultivator Shoals area. Due to comments received on the proposed rule, the area being reopened with this interim final rule represents a slight modification to the Alternative A area. The New England Fishery Management Council (NEFMC) submitted a comment informing NMFS that its Habitat Oversight Committee is currently developing Essential Fish Habitat (EFH) Omnibus Amendment 2, which may include potential habitat management areas (HMAs) that, if implemented, would spatially overlap with the areas initially proposed for reopening. Because of this, NMFS has modified the area that will be reopened with this interim final rule to ensure that there is no overlap with any portion of the potential HMAs. This will allow the NEFMC to continue development of the habitat amendment without additional risk to the potential new HMAs, while also allowing the Atlantic surfclam/ocean quahog fleet to access most of the proposed area. This will prevent any additional Atlantic surfclam/ocean quahog effort from being introduced into the potential HMAs while they are still being developed. After the habitat amendment has been completed, and after NMFS reviews any additional comments on the measures in this interim final rule, NMFS may reconsider the reopened area and will publish a final rule in the **Federal Register** implementing the final area. In the meantime, the surfclam and ocean quahog fishery can access the majority of the area originally proposed, and the areas of concern to the NEFMC will remain closed pending further comments and/or actions by the NEFMC.

The area being reopened is defined in the table below and illustrated in the map and the remaining portion of the GB Closed Area will remain closed.

| Point | N. latitude | W. longitude |
|---|---|---|
| ROA1 | 42°00′ | 68°50′ |
| ROA2 | 42°00′ | 67°57′ |
| ROA3 | 41°34′ | 67°57′ |
| ROA4 | 41°34′ | 67°20′ |
| ROA5 | 41°00′ | 67°20′ |
| ROA6 | 41°00′ | 67°10′ |
| ROA7 | 40°40′ | 67°10′ |
| ROA8 | 40°40′ | 68°30′ |
| ROA9 | 41°30′ | 68°30′ |
| ROA10 | 41°30′ | 68°50′ |




This interim final rule also includes a clarifying prohibition that was not included in the proposed rule. The additional regulation prohibits the harvest of Atlantic surfclams or ocean quahogs from the reopened portion of the GB Closed Area without being in compliance with the protocol, LOA, and VMS requirements.

**Comments and Responses**

NMFS received 19 comments on the proposed rule. One comment opposed reopening any portion of the GB Closed Area, but provided no factual basis for the opposition. Eleven comments were in support of reopening the Alternative A area; three were in support of the Alternative C area; and no comments were received specifically supporting the Alternative B area. Generally, all comments received were in support of reopening a portion of the GB Closed Area and were also in support of requiring the testing protocol and corresponding reporting requirements on all trips into the reopened area.

*Comment 1:* One of the comments voiced support for reopening the Alternative C area, but provided no rationale for this support, and also wanted to ensure a mechanism exists to prohibit access to the reopened area should a vessel not follow the protocol.

*Response:* With this action, NMFS is also implementing measures that allow for additional oversight of vessels harvesting in the reopened area including mechanisms to control and monitor access. A vessel that wishes to harvest from the reopened areas must obtain an LOA from NMFS. The LOA explicitly outlines the harvesting requirements for the reopened area and by obtaining the LOA the vessel is acknowledging and agreeing to the terms and conditions of the protocol and the LOA, including NMFS's ability to invalidate the LOA, should the vessel not comply with the requirements. Further, NMFS has also developed new VMS codes that are specific to the area. With these codes, NMFS will able to readily identify a vessel's intent to fish in the area, requiring the vessel to follow the terms and conditions of the protocol. The new VMS codes will help facilitate enforcement and perform monitoring of the area. Thus, with the protocol, the LOA, and the new VMS codes, NMFS has the necessary mechanisms available to appropriately monitor and enforce the provisions in this rule, including prohibiting a vessel's access to the area, should it become necessary.

*Comment 2:* Cote Fisheries, Inc., and the Atlantic Offshore Lobstermen's Association provided comments on behalf of the lobster industry in support of the Alternative C area due to concerns regarding potential gear conflicts within the larger Alternative A area. The commenters also raised concerns that hydraulic dredge fishing gear could bycatch soft shell and egg-bearing lobsters. The commenters state that lobster fishing takes place in the southern portion of the area during the summer and autumn months and request that the reopened area should only be reopened seasonally to prevent gear conflicts. Additionally, the commenter expressed concerns about the reopened area frequently closing and reopening, and state that this will encourage derby style fishing and create an unpredictable fishery that make it difficult for fixed gear fisherman to

operate with little advanced notice of future closures or reopening.

*Response:* NMFS acknowledges that gear conflicts between fixed and mobile gear fisherman are ongoing and sharing access to an area can be difficult to coordinate. However, this area is already open to all other types of bottom-tending mobile fishing gear and NMFS does not anticipate that the additional effort will result in substantial additional gear conflicts. Further, surfclam and ocean quahog vessels have been operating in this area under an EFP since 2008, and NMFS is not aware of any ongoing gear conflicts in the area. Reopening the area on a seasonal basis, based on lobster fishing activity, would be inequitable for the surfclam and ocean quahog fleet and could create safety-at-sea concerns. If NMFS were to implement the reopening on a seasonal basis as requested, the surfclam and ocean quahog fleet would be limited to harvesting in the area in the winter and spring, at a time when the weather offshore is subject to frequent change and is often unsafe for commercial fishing. Further, NMFS does not anticipate that this reopening will create a derby style fishery. The surfclam and ocean quahog fishery is largely market driven and it is unlikely that the market would allow for the flood of product produced by a derby-type fishery. Additionally, there is significant coordination between processors and harvesters in the surfclam and ocean quahog fishery and this would also likely prevent a derby-style fishery. Because the majority of the product in the surfclam and ocean quahog fishery is processed, this fishery typically operates and benefits by supplying the processers with steady and consistent quantities of surfclams and/or ocean quahogs. Although NMFS has the authority to implement future openings or closing, it is not anticipated that the area will be frequently closed and reopened. The protocol was designed to prevent this, but NMFS must retain the authority to close and reopen areas based on environmental conditions, should problems arise beyond what can be handled by the protocol. Therefore, we do not anticipate frequent closures and reopening that would create a derby-style fishery leading to excessive gear conflicts.

As for the lobster bycatch concern, while clam dredge gear may interact to some extent with lobsters, documented incidences of bycatch are very low. Clam dredge gear is towed at very low speeds, allowing most species to avoid the gear, and the unique way clam dredge gear operates typically yields little bycatch. The 1997 NMFS Northeast Fisheries Science Center survey results support that the surfclam and ocean quahog fishery is considered a clean fishery with regard to incidental catch because the target species comprises well over 80 percent of the catch. No fish were caught during the survey, and only sea scallops, representing other commercially desirable invertebrates, were caught at around 0.5 percent of the total catch. The remaining non-target species caught included a variety of benthic invertebrates, including a variety of crabs, other bivalves, snails, and starfish, among them rock crab, Jonah crab, several species of whelks, and horseshoe crabs. Thus, it is unlikely that reopening the area will produce substantial bycatch of lobster resulting in a negative impact to the fishery.

*Comment 3:* Two of the comments in support of reopening the Alternative A area were also concerned that NMFS should not have the authority to close or reopen areas based on PSP testing results. The commenters explain that the protocol was designed to prevent frequent and routine closures and reopenings that would result in excessive administrative burden, unnecessarily extending the time between closures and reopenings, which would restrict harvesting.

*Response:* NMFS understands how the protocol operates and also recognizes the burden involved with the administrative process of closures and reopening, but these processes are necessary precautions to safeguard public health. This authority existed prior to this rulemaking and is part of the Atlantic Surfclam and Ocean Quahog FMP. This is not a new authority being implemented as part of this action. The Regional Administrator's authority to close or reopen an area due to the presence of PSP is not specific to this area, and this authority is necessary should PSP blooms occur in this or other areas. We do not anticipate that routine and frequent closures and openings will occur as a result of this action; rather, this authority is intended for more large-scale and long-term closures. NMFS will continue to defer to the FDA in matters of the public health and, should we receive advice from the FDA, it may be necessary for NMFS to close or reopen any area to the harvesting of surfclams and ocean quahogs to prevent contaminated shellfish from entering the market. It is not NMFS' intention to disregard the effectiveness of the protocol and frequently implement routine closures and reopening; however, NMFS must maintain this authority to protect public health.

*Comment 4:* The Massachusetts Department of Public Health, Bureau of Environmental Health, and the Massachusetts Department of Fish and Game, Division of Marine Fisheries, jointly serve as the State Shellfish Control Authority (SSCA) in Massachusetts and submitted a comment in support of Alternative A, provided the SSCA continues to have the flexibility to develop individual agreements with harvesters that may be more stringent than the minimum requirements of the testing protocol.

*Response:* The protocol that this action is based on will continue to include this flexibility, and thus the Massachusetts SSCA can continue to require additional testing that aligns with its individual agreements.

*Comment 5:* The NEFMC submitted a comment informing us that its Habitat Oversight Committee is currently developing an Essential Fish Habitat Omnibus Amendment, which may include potential HMAs that, if implemented, would spatially overlap with the areas proposed for reopening. The NEFMC also requested that we extend the comment period on the proposed rule for an additional 60 days to allow them time compose a more formal comment. Oceana also submitted a similar comment requesting that the NEFMC be consulted in this matter.

*Response:* Due to this comment and the similar comment received from Oceana, NMFS has modified the area that will be reopened through this interim final rule to ensure that there is no overlap with any portion of the potential HMAs. This will also prevent any additional Atlantic surfclam/ocean quahog effort from being introduced into the potential HMAs while they are still being developed. However, NMFS chose not to extend the proposed rule comment period for an additional 60 days. The MAFMC and the surfclam and ocean quahog industry has requested that this area be reopened by the start of the fishing year on January 1, 2013, and extending the comment period for an additional 60 days would not allow sufficient time to implement this action by January 1. To allow the habitat amendment to be completed, while also allowing the Atlantic surfclam/ocean quahog fleet to access the reopened area, NMFS is publishing this action as an interim final rule, which allows for an additional comment period after the modified area is reopened. After the habitat amendment has been completed, and after NMFS reviews any additional comments on the measures in this interim final rule, NMFS may

reconsider the reopened area and will publish a final rule in the **Federal Register** implementing the final area.

*Comment 6:* Oceana provided a comment that does not directly oppose any of the area alternatives, but raised a number of concerns. They stated that NMFS does not have the authority to implement this action, and that the action should have been initiated by the MAFMC and should include the entire Council process. The commenter also alleged that NMFS intentionally placed the 30-day comment period between two Council meetings, which prevented the Councils or their committees from commenting.

Oceana also requested that the National Environmental Policy Act (NEPA) analysis accompanying this action be an environmental impact statement (EIS) rather than an EA, stating that NEPA requires that all significant actions go through the public comment, scrutiny, and analysis of an EIS. Their rationale for this is that hydraulic clam dredge fishing gear is among the most destructive gear types and will impact EFH as well as the existing fisheries on GB. The commenter also stated that, because Atlantic surfclams and ocean quahog resources are abundant on GB, the resulting high catch rates will impact the administration of the fishery, including how the fishery is prosecuted, the quota specifications, and overfishing definitions.

*Response:* In regards to the authority that NMFS is using to take this action, Oceana's comment broadly cites the regulations at § 648.76(c), but their comment quotes the regulations at § 648.76(c)(2), which pertain only to NMFS's authority in implementing short-term emergency closures to prevent adverse effects to public health. However, the authority for this action is found at § 648.76(c)(1). This section pertains to the process for reopening areas and also provides the Regional Administrator with the authority to close or reopen an area provided NMFS publish a **Federal Register** notice with a 30-day comment period. NMFS published a proposed rule for this action in the **Federal Register** on August 31, 2012 (77 FR 53164), with a 30-day comment period that ended on October 1, 2012. Therefore, NMFS is authorized to take this action separate from the MAFMC under the Regional Administrator's authority at § 648.76(c)(1). In fact, this action was initiated at the specific request of the MAFMC. Further, the comment period for this action was not deliberately placed between Council meetings. To meet the January 1, 2013, deadline for this action, as requested by the industry and the MAFMC, the comment period needed to be initiated as soon as the proposed rule was fully developed. The 30-day comment period for this proposed rule is the typical length of a comment period for FMP frameworks and amendments. The NEFMC did in fact provide comment on the proposed rule, and the area being reopened is based on the NEFMC's comment.

In response to Oceana's request to complete an EIS rather than an EA, NMFS does not agree that an EIS is necessary for this action. The EA completed for this action is fully compliant with the applicable NEPA requirements and the analysis resulted in a finding of no significant impact, consistent with all applicable guidance and the regulations implementing NEPA; therefore, an EIS is not required and none has been prepared. The commenter's concerns are all addressed in the EA and are also discussed below.

Alternative A has been revised in response to comments received. It excludes the potential Georges Shoal Habitat Areas, which were previously included in the draft EA, as well as Closed Area I and Closed Area II. In regards to Oceana's concern about impacts to other fisheries that occur on GB, the Atlantic surfclam and ocean quahog fishery is considered a clean fishery because the target species comprise well over 80 percent of the catches. Based upon scientific surveys, bycatch typically consists of scallops and other benthic invertebrates. The EA found that reopening the area will result in a net reduction of bycatch, temporarily, for the entire fishery due to the fewer dredges and shorter dredge time anticipated in an area of high biomass such as GB. This fishery is managed under an IFQ, so total fishing effort is capped by the IFQ allocated to the fishery. Because there would be no increase in harvesting permitted, reopening the area would have negligible impacts to the non-target and bycatch species. It is, in addition, highly unlikely that this action will cause any additional gear conflicts with other types of mobile gear, but NMFS acknowledges that gear conflicts between fixed and mobile gear fishermen can be challenging to resolve. However, this area is open already to all other types of bottom-tending mobile gear, including scallop dredges and otter trawls, and NMFS does not anticipate that the additional effort will result in substantial additional gear conflicts with fixed gear fishermen. Further, several surfclam/ocean quahog vessels have been operating in this area under an EFP since 2008, and NMFS is not aware of any ongoing gear conflicts in the area.

Concerning impacts to EFH from hydraulic clam dredge gear, the EA contains a thorough description of hydraulic dredge gear, including a detailed analysis of the impacts to EFH. Other types of bottom-tending gear are currently also used in the subject area, including scallop dredges, trawls, sink gill nets, longlines, pots, and traps. Most of the area for clam dredging where the fishing activity is expected to be concentrated is located in a relatively shallow (30–60 m) part of GB that is routinely highly disturbed by strong tidal currents and wave action from storms. Published studies of the effects of hydraulic clam dredges in high-energy, sandy, habitats, such as those where clam fishing occurs, indicate that, in this type of environment, the affected physical and biological features of the seafloor can be expected to recover from the impacts of this gear in less than a year, and can actually recover within a matter of a few days or months. For this reason, it was determined that the use of this gear would not have significant impacts on EFH in the affected area, because the impacts are minimal or temporary (i.e., ones that are limited in duration and that allow the particular environment to recover without measurable impact). For these same reasons (i.e., because this habitat is highly energetic and recovers relatively quickly), the cumulative impacts from the existing use of bottom trawling and scallop dredging gear together with the expected addition of hydraulic clam dredge gear is also not expected to be significant.

In deeper water, in the southern part of the Alternative A area, habitat recovery times may be longer and the habitat impacts may be more substantial. In addition, because the deeper, southern portion of this area is currently subjected to some bottom trawling and scallop dredging, there could be some cumulative impacts resulting from the three gears being used together in this area. However, because the biomass of surfclams and ocean quahogs is much higher on GB than on the traditional clam fishing grounds in the Mid-Atlantic, hydraulic dredge vessels that move from these grounds to GB to take advantage of the higher concentrations of clams would require less fishing time to achieve their catch quotas and, as a result, the cumulative area of seafloor swept throughout the range of the fishery would very likely be substantially reduced. The positive effect of the net reduction in clam dredging effort would, in all likelihood, mitigate any cumulative impacts of

using all three mobile, bottom-tending gears in the fairly small southern portion of the area. Thus, because quotas are not changing as a result of this action and because catch rates on GB exceed those in the Mid-Atlantic, any shift of clam dredging effort on to GB is expected overall to minimize any adverse direct, indirect, or cumulative impacts of this action on EFH. This conclusion supports a FONSI and, therefore, an EIS is not required. Further analysis of the impacts to the physical environment and habitat including EFH, are discussed at length in sections 5.0 and 6.0 of the EA prepared for this action.

NMFS acknowledges that reopening a portion of the revised GB Closed Area may cause some fundamental shifts in the administration and operations of the fishery; however, the EA prepared for this action includes these considerations in the economic analysis. The area being reopened with this rule is not expected to have an adverse impact on the economy. The reopened area provides a larger area open to the harvest of surfclams and ocean quahogs. In addition, the fishery is managed under an individual transferable quota, and this action does not change the quota. Furthermore, the amount of surfclams and ocean quahogs harvested in the fishery is largely driven by market demand; therefore, it is unlikely that there will be a substantial increase in landings and revenue. The entire allocated quota available for surfclams has not been harvested since 2001. In fishing year 2011, the quota harvested for surfclams and ocean quahog was the lowest to date, 71 percent and 52 percent, respectively. This is another indicator that the fishery is market-limited. Overall, the reopened area is expected to provide a positive economic impact due to the increased area and target species biomass available to harvest surfclam and ocean quahogs, but, because overall catch is not increasing, it is not expected that the positive economic impact will be substantial.

The majority of surfclams harvested in Federal waters are landed in New Jersey and trucked to Delaware for processing. New Jersey, however, has already authorized landings of clams harvested from the GB area through an EFP that NMFS issued. The EFP authorizes vessels to participate in shellfish harvesting to continue to test the recently approved sampling protocol that was developed by state and Federal regulatory agencies to test for presence of saxitoxins in shellfish. Since New Jersey, Delaware, Massachusetts, and Maine have already authorized landings and processing of clams harvested from the revised GB Closed Area, this action is not expected to have a significant impact on major landing ports and processing plants.

## Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the Assistant Administrator for Fisheries, NOAA, has determined that this final rule is consistent with the Atlantic Surfclam and Ocean Quahog FMP, other provisions of the Magnuson-Stevens Act, and other applicable law.

Pursuant to the Administrative Procedures Act (APA), 5 U.S.C. 553(d)(1), NMFS waives the 30-day delay in effectiveness of this rule because it is a substantive rule that relieves a restriction. This final rule will reopen an area that has been closed to the harvest of surfclams and ocean quahogs since 1990 due to red tide blooms that cause PSP. Because recent testing in the GB Closed Area has demonstrated that PSP toxin levels were well below the regulatory limit established for public health and safety, continued closure of the area is not necessary and could unnecessarily restrict Atlantic surfclam and ocean quahog fishing. Furthermore, NMFS finds good cause to waive the 30-day delay in effectiveness under 5 U.S.C. 553(d)(3). The GB Closed Area has caused harvesting to be limited to the Mid-Atlantic, where Atlantic surfclam and ocean quahog stocks have recently become less abundant. A 30-day delay in effectiveness would continue to prohibit harvest from the GB Closed Area and would continue to put pressure on Mid-Atlantic stocks. Waiving the 30-day delay would allow the GB Closed Area to be reopened sooner, which could relieve fishing pressure on southern stocks and would allow for greater distribution of Atlantic surfclam and ocean quahog harvest effort in the region. We also received public comment on the proposed rule for this action that fishing is only being continued in the Mid-Atlantic region to maintain the market, and vessels may no longer be profiting. Thus, a delay in effectiveness would continue to limit vessels to harvesting in the Mid-Atlantic region and could result in continued loss of revenue for the Atlantic surfclam and ocean quahog fishing fleet.

Moreover, the industry and the MAFMC have requested that the reopening become effective by the start of the 2013 Atlantic surfclam and ocean quahog fishing year on January 1, 2013. A 30-day delay in effectiveness would result in this action not being implemented by January 1, as requested. Because the industry and MAFMC have requested that the area be reopened by January 1, regulated entities are aware of this action and have likely already begun preparing for the area to be reopened on January 1. Therefore, a 30-day delay in effectiveness would not serve any beneficial purpose.

The Office of Management and Budget has determined that this rule is not significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration at the proposed rule stage that this final rule will not have a significant economic impact on a substantial number of small entities. The factual basis for this certification was provided in the proposed rule that was published on August 31, 2012 (77 FR 53163) and is not repeated here. No comments were received on this certification and no new information has been obtained that would change this determination. As a result, a final regulatory flexibility analysis is not required and none has been prepared.

NMFS prepared an EA for this action that analyzes the impacts of this rule. A copy of the EA is available from the Federal e-Rulemaking portal *http://www.regulations.gov.* Type ''NOAA–NMFS–2012–0121'' in the Enter Keyword or ID field and click search. A copy of the EA is also available upon request from the NMFS Northeast Regional Administrator, John K. Bullard (see **ADDRESSES**).

## Reporting, Recordkeeping, and Other Compliance Requirements

This final rule contains reporting and recordkeeping requirements and associated information collections subject to the Paperwork Reduction Act (PRA) that have been previously approved by OMB under control numbers 0648–0202 and 0648–0240. Measures implemented by this final rule include provisions that require either new or revised collection-of-information requirements. The protocol includes a detailed procedure outlining how shellfish are to be harvested, tested, and handled. The PSP testing protocol includes the following requirements that require analysis under the Paperwork Reduction Act: Submission of concurrence from the state of landing; maintain and submit harvest records; compile and submit laboratory results; create and maintain a written onboard lot segregation plan; and provide notification prior to unloading.

Additionally, to monitor and control the harvest of surfclams and ocean

quahogs from the area, and to ensure vessels adhere to the protocol, vessels fishing in the area are required to apply for and obtain a LOA from NMFS. The LOA will help to ensure that vessels are adhering to the regulations for harvesting within the area and provides a mechanism for NMFS to restrict harvesting in the area should a vessel not comply with the terms and conditions of the LOA and/or the PSP testing protocol. The full protocol is available for viewing at *www.nero.noaa.gov/sfd/clams/ApprovedProtocol.pdf.*

In regards to the requirement to obtain an LOA, in 2011, there were 47 Federal open-access surfclam and/or ocean quahog permitted vessels that landed surfclams and/or ocean quahogs that may wish to fish in the area proposed to be reopened. Each vessel may apply up to once a year, for a maximum of 47 applications. It is expected that each application will take 5 min to complete, for a fleet maximum of 4 hr. There is no additional public cost associated with this change as the application will be submitted with the previously existing annual permit renewal package.

In regards to the information collection required under the protocol, if all of the permitted vessels in 2011 fished in the area, there would be a total of 47 entities, as well as 11 states, that would be required to adhere to the terms and conditions of the PSP testing protocol. While the PSP testing protocol outlines what is required, there will likely be differences in the complexity of the documents as well as varying methods of submission. For this PRA analysis, it is assumed that the traditional method of submission will be used, physical mail at 45 cents per submission; however, it is likely that many submissions will be completed electronically and, therefore, the overall cost would be reduced.

The testing protocol requires numerous elements that contain collection of information requirements, including elements that are submitted to NMFS, as well as to state and private entities. The submission of concurrence from state of landing element is required only of the state, which total 11 entities. This submission will be in the form of an annual written letter, with a total time burden estimate of 11 hr (11 submissions × 1 hr) and would cost $5 (11 submissions × $0.45).

The remainder of the requirements in the protocol apply to individual vessels, and is based on the maximum number of trips that occurred in the area in 2011 (46 trips). Three of these elements require document submission—one of which is an annual submission, and the other two that are required on each trip. The result is 4,370 submissions (((47 × 46) × 2) + 46), with a total public cost burden of $1,967 (4,370 × $0.45). The offload notification requirement does not impose any additional costs, as the notification will be completed through a pre-existing email or cellular phone account and is not required to be submitted in writing.

It is estimated that both the requirement to submit and maintain harvest records and compile and submit laboratory test results would take 30 min each to complete. Based on the number of anticipated trips into the area, there would be 4,324 submissions and a public burden of 2,162 hr (4,324 submissions × 30 min). The element to create and maintain a written onboard lot segregation plan is required annually and will take approximately 60 min to complete for a public burden of 47 hr (47 submissions × 1 hr). The notification element is required on each trip and is estimated to take 5 min per notification, resulting in 180 hr of burden (2,162 notifications × 5 min). The total resulting time burden to the public from all of the requirements to fish in the reopened portion of the GB Closed Area is 2,404 hr (4 + 11 + 2,162 + 47 + 180).

These estimates include the time required for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

## List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: December 13, 2012.

**Alan D. Risenhoover,**

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

For the reasons set out in the preamble, 50 CFR part 648 is amended as follows:

## PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

■ 1. The authority citation for part 648 continues to read as follows:

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

■ 2. In § 648.14, paragraph (a)(10)(v) is added to read as follows:

### § 648.14 Prohibitions.

(a) * * *

(10) * * *

(v) Fish for, harvest, catch, possess, or attempt to fish for, harvest, catch, or possess Atlantic surfclams and ocean quahogs from the reopened portion of the Georges Bank Closed Area, as defined in § 648.76(a)(4), unless issued a Letter of Authorization, and fishing under the appropriate VMS declaration and under the terms and conditions of the PSP testing protocol, as specified in § 648.76(a)(4)(i).

* * * * *

■ 3. In § 648.76, paragraph (a)(4) is revised to read as follows:

### § 648.76 Closed areas.

(a) * * *

(4) *Georges Bank.* The paralytic shellfish poisoning (PSP) contaminated area, which is located on Georges Bank, and is located east of 69° W. long., and south of 42°20′ N. lat. is closed to the harvest of surfclams and ocean quahogs. A portion of the Georges Bank Closed Area is reopened to harvest surfclams and ocean quahogs provided the vessel complies with the requirements specified in paragraph (a)(4)(i) of this section. The reopened portion of the Georges Bank Closed Area is defined by straight lines connecting the following points in the order stated:

| Point | N. latitude | W. longitude |
|---|---|---|
| ROA1 | 42°00′ | 68°50′ |
| ROA2 | 42°00′ | 67°57′ |
| ROA3 | 41°34′ | 67°57′ |
| ROA4 | 41°34′ | 67°20′ |
| ROA5 | 41°00′ | 67°20′ |
| ROA6 | 41°00′ | 67°10′ |
| ROA7 | 40°40′ | 67°10′ |
| ROA8 | 40°40′ | 68°30′ |
| ROA9 | 41°30′ | 68°30′ |
| ROA10 | 41°30′ | 68°50′ |

(i) *Requirements for Vessels Fishing in the Reopened Portion of the Georges Bank Closed Area.* A vessel may fish in the open portion of the Georges Bank Closed Area as specified in this paragraph (a)(4), provided it complies with the following terms and conditions:

(A) A valid letter of authorization issued by the Regional Administrator must be onboard the vessel; and

(B) The vessel must adhere to the terms and conditions of the PSP testing protocol as adopted into the National Shellfish Sanitation Program by the Interstate Shellfish Sanitation Conference. All surfclams and ocean quahogs harvested from the area must

be handled in accordance with the terms and conditions of the protocol from the first point of harvest through completion of testing and release by the State Shellfish Control Authority as required by the PSP testing protocol; and

(C) Prior to leaving port at the start of a fishing trip, the vessel's owner or operator must declare its intent to fish in the area through the vessel's vessel monitoring system.

(ii) [Reserved]

* * * * *

[FR Doc. 2012–30589 Filed 12–18–12; 8:45 am]

**BILLING CODE 3510–22–P**

# Proposed Rules

Federal Register
Vol. 77, No. 244
Wednesday, December 19, 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 51

**[Docket No. PRM–51–29; NRC–2012–0215]**

## Rescinding Spent Fuel Pool Exclusion Regulations

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Petition for rulemaking; notice of receipt.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) has received a petition for rulemaking from the Commonwealth of Massachusetts (Commonwealth or petitioner) requesting that the NRC rescind its regulations excluding consideration of spent fuel pool storage impacts from license renewal environmental review. The petition was filed on June 2, 2011, with the NRC's Atomic Safety Licensing Board (ASLB) in conjunction with a request for a waiver of the NRC's spent fuel pool exclusion regulations. The petitioner requested that, if the ASLB rejected the Commonwealth's waiver petition, the NRC initiate a rulemaking. On November 28, 2011, the ASLB denied the Commonwealth's waiver petition, and on March 8, 2012, in a Commission Memorandum and Order, the petition for rulemaking was referred to NRC staff. The NRC is not requesting public comment period on this petition at this time.

**ADDRESSES:** Please refer to Docket ID NRC–2012–0215 when contacting the NRC about the availability of information for this petition. You may access information related to this petition, 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–2012–0215. 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 *''Begin Web-based ADAMS Search.''* For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this notice (if that document is available in ADAMS) is provided the first time that a document is referenced.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

**FOR FURTHER INFORMATION CONTACT:** Cindy Bladey, Chief, Rules, Announcements, and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–492–3667, email: *Cindy.Bladey@nrc.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. The Petitioner

The Commonwealth of Massachusetts, Office of the Attorney General, Environmental Protection Division has filed this petition (ADAMS Accession No. ML12254A005) with the NRC.

### II. The Petition

The petitioner requests that the NRC institute a rulemaking to rescind the regulations excluding consideration of spent fuel storage impacts from license renewal environmental review. Specifically, the petitioner requests that the spent fuel pool exclusion regulations in § 51.71(d) of Title 10 of the *Code of Federal Regulations* (10 CFR) and appendix B to subpart A of 10 CFR part 51, be rescinded because these regulations ''generically classify the environmental impacts of high-density pool storage of spent fuel as insignificant and thereby permit their exclusion from consideration in environmental impact statements (EISs) for renewal of nuclear power plant operating licenses.''

The petitioner argues that ''the appropriate vehicle for revising the conclusions that underlie the spent fuel pool exclusion regulations is a waiver [of 10 CFR 51.71(d) and 10 CFR part 51 subpart A, appendix B], because * * * many of the implications of the Fukushima accident for the Pilgrim NPP license renewal proceeding are site specific.'' The petition continues: ''[i]n the alternative, in the event that the ASLB denies the Commonwealth's Waiver Petition, pursuant to 10 CFR 2.802(a), the Commonwealth asks the NRC to rescind the spent fuel pool exclusion regulations across the board, in a rulemaking.'' The petition specifically states that, if the ASLB determines that a waiver is not justified, ''the Secretary should rescind the spent fuel exclusion regulations on a generic basis.'' The petitioner states that rescinding the spent fuel pool exclusion regulations is necessary to challenge ''the adequacy of the environmental impact analysis and severe accident mitigation alternatives (SAMA) analysis performed by Entergy Corp. and the NRC in support of their proposal to re-license the Pilgrim nuclear power plant (NPP), in light of significant new information revealed by the Fukushima accident.'' The petitioner states that ''significant new information yielded by the Fukushima accident shows fundamental errors or oversights in the key environmental analyses relied on by the NRC for its generic designation of spent fuel storage impacts as insignificant. * * *'' The petitioner further states that ''[t]he purpose of the spent fuel pool exclusion regulations—to make a generic finding of no significant impact for all NPPs—would not be served where the Fukushima accident has demonstrated that environmental impacts of spent fuel storage are so significant and where the insights from the Fukushima accident have such a plant-specific application.''

In an ASLB Memorandum and Order dated November 28, 2011, the Commonwealth of Massachusetts's request for a waiver was denied (ADAMS Accession No. ML11332A152). Subsequently, in a Commission Memorandum and Order dated March 8, 2012, the Commonwealth's petition for rulemaking was referred to NRC staff for appropriate resolution (ADAMS Accession No. ML12068A187). NRC staff has determined that the Commonwealth's petition for rulemaking has met the basic requirements set forth in 10 CFR

2.802(c). The petitioner has specified the regulations that it would like revoked. Additionally, the petitioner has stated its grounds for and interest in this action. Lastly, the petition sets forth the specific issues involved, provides views and arguments in favor of the petitioner's position, and provides relevant data to support the request to rescind 10 CFR 51.71(d) and 10 CFR part 51 subpart A, appendix B. Because the petitioner has satisfied the acceptance criteria in 10 CFR 2.802(c), the NRC has accepted, and will review the petition for rulemaking. The NRC is not requesting public comment on this petition at this time.

Dated at Rockville, Maryland, this 13th day of December 2012.

For the Nuclear Regulatory Commission.

**Annette L. Vietti-Cook,**

*Secretary of the Commission.*

[FR Doc. 2012–30528 Filed 12–18–12; 8:45 am]

**BILLING CODE 7590–01–P**

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## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 25

**[Docket No. FAA–2012–1207; Notice No. 25–12–09–SC]**

## Special Conditions: Airbus, A350–900 Series Airplane; Flight Envelope Protection (Icing and Non-Icing Conditions); High Incidence Protection and Alpha-Floor Systems

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed special conditions.

**SUMMARY:** This action proposes special conditions for Airbus A350–900 series airplanes. These airplanes will have novel or unusual design features associated with flight envelope protection in icing and non-icing conditions that use low speed incidence protection and an alpha-floor function that automatically advances throttles whenever the airplane angle of attack reaches a predetermined value. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These proposed 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:** Send your comments on or before February 4, 2013.

**ADDRESSES:** Send comments identified by docket number FAA–2012–1207 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 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:** Joe Jacobsen, FAA, Airframe and Flightcrew Interface, ANM–111, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–2011; facsimile (425) 227–1320.

**SUPPLEMENTARY INFORMATION:**

### Comments Invited

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 on or before 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

On August 25, 2008, Airbus applied for a type certificate for their new A350–900 series airplane. Later, Airbus requested and the FAA approved an extension to the application for FAA type certification to June 28, 2009. The A350–900 series airplane has a conventional layout with twin wing-mounted Rolls-Royce Trent engines. It features a twin aisle 9-abreast economy class layout, and accommodates side-by-side placement of LD–3 containers in the cargo compartment. The basic A350–900 series airplane configuration accommodates 315 passengers in a standard two-class arrangement. The design cruise speed is Mach 0.85 with a Maximum Take-Off Weight of 602,000 lbs. Airbus proposes the A350–900 series airplane to be certified for extended operations (ETOPS) beyond 180 minutes at entry into service.

### Type Certification Basis

Under title 14, Code of Federal Regulations (14 CFR) 21.17, Airbus must show that the A350–900 series airplane meets the applicable provisions of 14 CFR part 25, as amended by Amendments 25–1 through 25–128.

If the Administrator finds that the applicable airworthiness regulations (i.e., part 25) do not contain adequate or appropriate safety standards for the A350–900 series airplanes because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

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 or similar novel or unusual design feature, the special conditions would also apply to the other model under § 21.101.

In addition to the applicable airworthiness regulations and special conditions, A350–900 series airplanes must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36 and the FAA must issue a finding of regulatory adequacy under section 611 of Public Law 92–574, the ''Noise Control Act of 1972.''

The FAA issues special conditions, as defined in 14 CFR 11.19, in accordance with § 11.38, and they become part of

the type-certification basis under § 21.17(a)(2).

The current airworthiness standards do not contain adequate safety standards for the unique features of the high incidence protection system and the alpha-floor system proposed for the Airbus A350–900 series airplanes. Part I of the following proposed special conditions are in lieu of §§ 25.103, 25.145(a), 25.145(b)(6), 25.201, 25.203, 25.207, and 25.1323(d). Part II is in lieu of §§ 25.21(g), 25.105, 25.107, 25.121, 25.123, 25.125, and 25.143.

**Novel or Unusual Design Features**

The Airbus A350–900 series airplanes will incorporate the following novel or unusual design features: Low speed high incidence protection and alpha-floor systems.

The A350–900 series airplanes will have a novel or unusual feature to accommodate the unique features of the high incidence protection and the alpha-floor systems. The high incidence protection system replaces the stall warning system during normal operating conditions by prohibiting the airplane from stalling. The high incidence protection system limits the angle of attack at which the airplane can be flown during normal low speed operation, impacts the longitudinal airplane handling characteristics, and cannot be over-ridden by the crew. The existing regulations do not provide adequate criteria to address this system.

The function of the alpha-floor system is to increase automatically the thrust on the operating engines under unusual circumstances where the airplane pitches to a predetermined high angle of attack or bank angle. The regulations do not provide adequate criteria to address this system.

**Discussion**

The current airworthiness standards do not contain adequate safety standards for the unique features of the high incidence protection system and the alpha-floor system proposed for Airbus A350–900 series airplanes. Special conditions are needed to account for these features. The high incidence protection system prevents the airplane from stalling and therefore, the stall warning system is not needed during normal flight conditions. However, during failure conditions (which are not shown to be extremely improbable), the requirements of Title 14 Code of Federal Regulations (14 CFR) §§ 25.203 and 25.207 apply, although slightly modified (i.e. the flight characteristics at the angle of attack for $C_{LMAX}$ must be suitable in the traditional sense, and stall warning must be provided in a conventional manner).

The alpha-floor function automatically advances the throttles on the operating engines under flight circumstances of low speed if the airplane reaches a predetermined high angle of attack. This function is intended to provide increased climb capability.

These proposed special conditions are harmonized with the EASA Certification Review Items.

**Applicability**

As discussed above, these special conditions are applicable to Airbus A350–900 series airplanes. Should Airbus apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design feature, the special conditions would apply to that model as well.

**Conclusion**

This action affects only certain novel or unusual design features on the Airbus A350–900 series airplane. It is not a rule of general applicability.

**List of Subjects in 14 CFR Part 25**

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

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

**The Proposed Special Conditions**

Accordingly, the Federal Aviation Administration (FAA) proposes the following special conditions as part of the type certification basis for Airbus A350–900 series airplanes.

The current airworthiness standards do not contain adequate safety standards for the unique features of the high incidence protection system and the alpha-floor system proposed for the Airbus A350. Part I of the following proposed special conditions are in lieu of §§ 25.103, 25.145(a), 25.145(b)(6), 25.201, 25.203, 25.207, and 25.1323(d). Part II are in lieu of §§ 25.21(g), 25.105, 25.107, 25.121, 25.123, 25.125, and 25.143.

Special Conditions Part I—Stall Protection and Scheduled Operating Speeds—**Note:** In the following paragraphs, ''In icing conditions'' means with the ice accretions (relative to the relevant flight phase) as defined in 14 CFR part 25, amendment 121 appendix C.

**Special Conditions Part I—Stall Protection and Scheduled Operating Speeds**

*Foreword*

In the following paragraphs, ''In icing conditions'' means with the ice accretions (relative to the relevant flight phase) as defined in 14 CFR part 25, amendment 121 appendix C.

*1. Definitions*

These Special Conditions addresses novel features of the A350–900 series airplane and uses terminology that does not appear in 14 CFR part 25.

These terms for the novel features addressed by these special conditions are the following:

—High incidence protection system: A system that operates directly and automatically on the airplane's flying controls to limit the maximum angle of attack that can be attained to a value below that at which an aerodynamic stall would occur.

—Alpha-floor system: A system that automatically increases thrust on the operating engines when angle of attack increases through a particular value.

—Alpha-limit: The maximum angle of attack at which the airplane stabilizes with the high incidence protection system operating and the longitudinal control held on its aft stop.

—$V_{min}$: The minimum steady flight speed in the airplane configuration under consideration with the high incidence protection system operating. See paragraph 3 of these Special Conditions.

—$V_{min}1g$: $V_{min}$ corrected to 1g conditions. See paragraph 3 of these Special Conditions. It is the minimum calibrated airspeed at which the airplane can develop a lift force normal to the flight path and equal to its weight when at an angle of attack not greater than that determined for $V_{min}$.

*2. Capability and Reliability of the High Incidence Protection System*

Those paragraphs of 14 CFR part 25 quoted in reference may be amended in accordance with these Special Conditions provided that acceptable capability and reliability of the high incidence protection system can be established by flight test, simulation, and analysis as appropriate. The capability and reliability required are as follows:

1—It shall not be possible during pilot induced maneuvers to encounter a stall and handling characteristics shall be acceptable, as required by section 5 of these Special Conditions.

2—The airplane shall be protected against stalling due to the effects of wind-shears and gusts at low speeds as required by section 6 of these Special Conditions.

3—The ability of the high incidence protection system to accommodate any reduction in stalling incidence must be verified in icing conditions.

4—The high incidence protection system must be provided in each abnormal configuration of the high lift devices that is likely to be used in flight following system failures.

5—The reliability of the system and the effects of failures must be acceptable in accordance with § 25.1309.

*3. Minimum Steady Flight Speed and Reference Stall Speed*

In lieu of § 25.103, Minimum steady flight speed and Reference stall speed, we propose the following requirements:

(a) The minimum steady flight speed, $V_{min}$, is the final stabilized calibrated airspeed obtained when the airplane is decelerated until the longitudinal control is on its stop in such a way that the entry rate does not exceed 1 knot per second.

(b) The minimum steady flight speed, $V_{min}$, must be determined in icing and non-icing conditions with:

(1) The high incidence protection system operating normally.

(2) Idle thrust and alpha-floor system inhibited;

(3) All combinations of flaps setting and, landing gear position for which $V_{min}$ is required to be determined;

(4) The weight used when $V_{SR}$ is being used as a factor to determine compliance with a required performance standard;

(5) The most unfavorable center of gravity allowable; and

(6) The airplane trimmed for straight flight at a speed achievable by the automatic trim system.

(c) The one-g minimum steady flight speed, $V_{min}1g$, is the minimum calibrated airspeed at which the airplane can develop a lift force (normal to the flight path) equal to its weight, while at an angle of attack not greater than that at which the minimum steady flight speed of sub-paragraph (a) was determined. It must be determined in icing and non icing conditions.

(d) The reference stall speed, $V_{SR}$, is a calibrated airspeed defined by the applicant. $V_{SR}$ may not be less than a 1-g stall speed. $V_{SR}$ must be determined in non icing conditions and expressed as:

$$V_{SR} \geq \frac{V_{CL_{MAX}}}{\sqrt{n_{zw}}}$$

*where:*

$V_{C_{L_{MAX}}}$ = Calibrated airspeed obtained when the load factor-corrected lift coefficient ( $\frac{n_{zw}W}{qS}$ ) is first a maximum during the maneuver prescribed in sub-paragraph (e)(8) of this paragraph.

$n_{ZW}$ = Load factor normal to the flight path at $V_{C_{L_{MAX}}}$

W = Airplane gross weight;

S = Aerodynamic reference wing area; and

q = Dynamic pressure.

(e) $V_{C_{L_{MAX}}}$ is determined in non icing conditions with:

(1) Engines idling, or, if that resultant thrust causes an appreciable decrease in stall speed, not more than zero thrust at the stall speed;

(2) The airplane in other respects (such as flaps and landing gear) in the condition existing in the test or performance standard in which $V_{SR}$ is being used;

(3) The weight used when $V_{SR}$ is being used as a factor to determine compliance with a required performance standard;

(4) The center of gravity position that results in the highest value of reference stall speed;

(5) The airplane trimmed for straight flight at a speed achievable by the automatic trim system, but not less than 1.13 $V_{SR}$ and not greater than 1.3 $V_{SR}$;

(6) Alpha-floor system inhibited; and

(7) The High Incidence Protection System adjusted, at the option of the applicant, to allow higher incidence than is possible with the normal production system.

(8) Starting from the stabilized trim condition, apply the longitudinal control to decelerate the airplane so that the speed reduction does not exceed one knot per second.

*4. Stall Warning*

In lieu of § 25.207 we propose the following requirements:

*4.1 Normal Operation*

If the capabilities of the high incidence protection system are met, then the conditions of paragraph 2 are

satisfied. These conditions are equivalent safety to the intent of § 25.207, Stall Warning, so the provision of an additional, unique warning device is not required.

*4.2 High Incidence Protection System Failure*

Following failures of the high incidence protection system, not shown to be extremely improbable, such that the capability of the system no longer satisfies items 1, 2 and 3 of paragraph 2, stall warning must be provided and must protect against encountering unacceptable characteristics and against encountering stall.

(a) Stall warning with the flaps and landing gear in any normal position must be clear and distinctive to the pilot and meet the requirements specified in paragraphs (d) and (e) below.

(b) Stall warning must also be provided in each abnormal configuration of the high lift devices that is likely to be used in flight following system failures.

(c) The warning may be furnished either through the inherent aerodynamic qualities of the airplane or by a device that will give clearly distinguishable indications under expected conditions of flight. However a visual stall warning device that requires the attention of the crew within the cockpit is not acceptable by itself. If a warning device is used, it must provide a warning in each of the airplane configurations prescribed in paragraph (a) above and for the conditions prescribed below in paragraphs (d) and (e) below.

(d) In non icing conditions stall warning must meet the following requirements: Stall warning must provide sufficient margin to prevent encountering unacceptable characteristics and encountering stall in the following conditions:

(1) In power off straight deceleration not exceeding one knot per second to a speed 5 knots or 5 per cent CAS, whichever is greater, below the warning onset.

(2) In turning flight stall deceleration at entry rates up to 3 knots per second when recovery is initiated not less than one second after the warning onset.

(e) In icing conditions stall warning must provide sufficient margin to prevent encountering unacceptable characteristics and encountering stall, in power off straight and turning flight decelerations not exceeding one knot per second, when the pilot starts a recovery maneuver not less than three seconds after the onset of stall warning.

(f) An airplane is considered stalled when the behavior of the airplane gives the pilot a clear and distinctive indication of an acceptable nature that the airplane is stalled. Acceptable indications of a stall, occurring either individually or in combination are:

(1) A nose-down pitch that cannot be readily arrested

(2) Buffeting, of a magnitude and severity that is strong and effective deterrent to further speed reduction; or

(3) The pitch control reaches the aft stop and no further increase in pitch attitude occurs when the control is held full aft for a short time before recovery is initiated

(g) An aircraft exhibits unacceptable characteristics during straight or turning flight decelerations if it is not always possible to produce and to correct roll and yaw by unreversed use of aileron and rudder controls, or abnormal nose-up pitching occurs.

*5. Handling Characteristics at High Incidence*

In lieu of both § 25.201 and § 25.203 we propose the following requirements:

*5.1 High Incidence Handling Demonstrations*

In lieu of § 25.201: High incidence handling demonstration in icing and non icing conditions.

(a) Maneuvers to the limit of the longitudinal control, in the nose up sense, must be demonstrated in straight flight and in 30° banked turns with:

(1) The high incidence protection system operating normally.

(2) Initial power conditions of:

I: Power off.

II: The power necessary to maintain level flight at 1.5 $V_{SR1}$, where $V_{SR1}$ is the reference stall speed with flaps in approach position, the landing gear retracted and maximum landing weight.

(3) Alpha-floor system operating normally unless more severe conditions are achieved with inhibited alpha floor.

(4) Flaps, landing gear and deceleration devices in any likely combination of positions.

(5) Representative weights within the range for which certification is requested; and

(6) The airplane trimmed for straight flight at a speed achievable by the automatic trim system.

(b) The following procedures must be used to show compliance in non-icing and icing conditions:

(1) Starting at a speed sufficiently above the minimum steady flight speed to ensure that a steady rate of speed reduction can be established, apply the longitudinal control so that the speed reduction does not exceed one knot per second until the control reaches the stop;

(2) The longitudinal control must be maintained at the stop until the airplane has reached a stabilized flight condition and must then be recovered by normal recovery techniques;

(3) Maneuvers with increased deceleration rates;

(i) In non icing conditions, the requirements must also be met with increased rates of entry to the incidence limit, up to the maximum rate achievable.

(ii) In icing conditions, with the anti-ice system working normally, the requirements must also be met with increased rates of entry to the incidence limit, up to 3kt/s.

(4) Maneuver with ice accretion prior to operation of the normal anti-ice system

With the ice accretion prior to operation of the normal anti-ice system, the requirement must also be met in deceleration at 1kt/s up to FBS (with and without alpha floor).

*5.2 Characteristics in High Incidence Maneuvers*

In lieu of § 25.203: Characteristics in High Incidence.

In icing and non icing conditions:

(a) Throughout maneuvers with a rate of deceleration of not more than 1 knot per second, both in straight flight and in 30° banked turns, the airplane's characteristics shall be as follows:

(1) There shall not be any abnormal nose-up pitching.

(2) There shall not be any uncommanded nose-down pitching, which would be indicative of stall. However reasonable attitude changes associated with stabilizing the incidence at Alpha limit as the longitudinal control reaches the stop would be acceptable.

(3) There shall not be any uncommanded lateral or directional motion and the pilot must retain good lateral and directional control, by conventional use of the controls, throughout the maneuver.

(4) The airplane must not exhibit buffeting of a magnitude and severity that would act as a deterrent from completing the maneuver specified in 5.1.(a).

(b) In maneuvers with increased rates of deceleration some degradation of characteristics is acceptable, associated with a transient excursion beyond the stabilized Alpha-limit. However the airplane must not exhibit dangerous characteristics or characteristics that would deter the pilot from holding the longitudinal control on the stop for a period of time appropriate to the maneuver.

(c) It must always be possible to reduce incidence by conventional use of the controls.

(d) The rate at which the airplane can be maneuvered from trim speeds associated with scheduled operating speeds such as $V_2$ and $V_{REF}$ up to Alpha-limit shall not be unduly damped or be significantly slower than can be achieved on conventionally controlled transport airplanes.

*5.3 Characteristics up to Maximum Lift Angle of Attack*

(a) In non-icing conditions:

Maneuvers with a rate of deceleration of not more than 1 knot per second up to the angle of attack at which

$$V_{C_{L_{MAX}}}$$

was obtained as defined in paragraph 3 must be demonstrated in straight flight and in 30° banked turns with:

(1) The high incidence protection deactivated or adjusted, at the option of the applicant, to allow higher incidence than is possible with the normal production system.

(2) Automatic thrust increase system inhibited

(3) Engines idling

(4) Flaps and landing gear in any likely combination of positions

(5) The airplane trimmed for straight flight at a speed achievable by the automatic trim system.

(b) In icing conditions:

Maneuvers with a rate of deceleration of not more than 1 knot per second up to the maximum angle of attack reached during maneuvers from 5.1(b)(3)(ii) must be demonstrated in straight flight with:

(1) The high incidence protection deactivated or adjusted, at the option of the applicant, to allow higher incidence than is possible with the normal production system.

(2) Automatic thrust increase system inhibited.

(3) Engines idling.

(4) Flaps and landing gear in any likely combination of positions.

(5) The airplane trimmed for straight flight at a speed achievable by the automatic trim system.

(c) During the maneuvers used to show compliance with paragraphs (a) (b) above, the airplane must not exhibit dangerous characteristics and it must always be possible to reduce angle of attack by conventional use of the controls. The pilot must retain good lateral and directional control, by conventional use of the controls, throughout the maneuver.

*6. Atmospheric Disturbances*

Operation of the high incidence protection system must not adversely affect aircraft control during expected levels of atmospheric disturbances, nor impede the application of recovery procedures in case of wind-shear. This shall be demonstrated in non icing and icing conditions.

*7. Alpha Floor*

In icing and non icing conditions, the Alpha-floor setting must be such that the airplane can be flown at the speeds and bank angles specified in § 25.143(h). It also must be shown that the alpha floor setting does not interfere with normal maneuvering of the airplane. In addition there must be no alpha-floor triggering unless appropriate when the aircraft is flown in usual operational maneuvers and in turbulence.

*8. Proof of Compliance*

We propose that the following requirement be made in addition to those in § 25.21(b):

(b) The flying qualities will be evaluated at the most unfavorable CG position.

*9. For These Regulations, §§ 25.145(a), 25.145(b)(6) and 25.1323(d), We Propose the Following Requirements*

§ 25.145(a) $V_{min}$ in lieu of ''stall identification''

§ 25.145(b)(6) $V_{min}$ in lieu of $V_{SW}$

§ 25.1323(d) ''From 1.23 $V_{SR}$ to $V_{min}$'' in lieu of ''1.23 $V_{SR}$ to stall warning speed'' and ''speeds below $V_{min}$'' in lieu of ''speeds below stall warning''

**Special Conditions Part II—Credit for Robust Envelope Protection in Icing Conditions**

1. Define the stall speed as provided in SC Part I in lieu of § 25.103.

2. We propose the following requirements in lieu of § 25.105(a)(2)(i):

In lieu of § 25.105(a)(2)(i) Take-off.

(i) The $V_2$ speed scheduled in non icing conditions does not provide the maneuvering capability specified in § 25.143(h) for the takeoff configuration, or

3. In lieu of § 25.107(c) (g) we propose the following requirements, with additional sections (c') and (g'):

In lieu of § 25.107(c) and (g) Take-off speeds.

(c) In non icing conditions $V_2$, in terms of calibrated airspeed, must be selected by the applicant to provide at least the gradient of climb required by § 25.121(b) but may not be less than—

(1) $V_{2MIN}$;

(2) $V_R$ plus the speed increment attained (in accordance with § 25.111(c)(2)) before reaching a height of 35 feet above the takeoff surface; and

(3) A speed that provides the maneuvering capability specified in § 25.143(h).

(c) In icing conditions with the ''take-off ice'' accretion defined in Appendix C, $V_2$ may not be less than—

(1) The $V_2$ speed determined in non icing conditions

(2) A speed that provides the maneuvering capability specified in § 25.143(h).

(g) In non icing conditions, $V_{FTO,}$ in terms of calibrated airspeed, must be selected by the applicant to provide at least the gradient of climb required by § 25.121(c), but may not be less than—

(1) 1.18 $V_{SR}$; and

(2) A speed that provides the maneuvering capability specified in § 25.143(h).

(g) In icing conditions with the ''Final take-off ice'' accretion defined in Appendix C, $V_{FTO}$, may not be less than—

(1) The $V_{FTO}$ speed determined in non icing conditions.

(2) A speed that provides the maneuvering capability specified in § 25.143(h).

4. In lieu of § 25.121(b)(2)(ii)(A), § 25.121(c)(2)(ii)(A), § 25.121(d)(2)(ii), we propose the following requirements:

In lieu of § 25.121(b)(2)(ii)(A) Climb: One-engine inoperative:

(A) The $V_2$ speed scheduled in non icing conditions does not provide the maneuvering capability specified in § 25.143(h) for the take-off configuration; or

In lieu of § 25.121(c)(2)(ii)(A) Climb: One-engine inoperative:

(A) The $V_{FTO}$ speed scheduled in non icing conditions does not provide the maneuvering capability specified in § 25.143(h) for the en-route configuration; or

In lieu of § 25.121(d)(2)(ii) Climb: One-engine inoperative:

(d)(2) The requirements of sub-paragraph (d)(1) of this paragraph must be met:

(ii) In icing conditions with the approach Ice accretion defined in Appendix C, in a configuration corresponding to the normal all-engines-operating procedure in which $V_{min}1g$ for this configuration does not exceed 110% of the $V_{min}1g$ for the related all-engines-operating landing configuration in icing, with a climb speed established with normal landing procedures, but not more than 1.4 $V_{SR}$ ($V_{SR}$ determined in non icing conditions).

5. In lieu of § 25.123(b)(2)(i) we propose the following requirements:

In lieu of § 25.123(b)(2)(i) En-route flight paths:

(i) The minimum en-route speed scheduled in non icing conditions does not provide the maneuvering capability specified in § 25.143(h) for the en-route configuration, or

6. In lieu of § 25.125(b)(2)(ii)(B), we propose paragraph § 25.125(b)(2)(ii)(C) be removed and replaced by the following requirements:

In lieu of § 25.125(b)(2)(ii)(B) and § 25.125(b)(2)(ii)(C) Landing.

(B) A speed that provides the maneuvering capability specified in § 25.143(h) with the landing ice accretion defined in appendix C.

7. In lieu of, § 25.143(j)(2)(i) we propose the following requirements for controllability and maneuverability:

In lieu of § 25.143(j)(2)(i) General.

(i) The airplane is controllable in a pull-up maneuver up to 1.5 g load factor or lower if limited by AOA protection; and

8. In lieu of § 25.207, Stall warning, to read as the requirements defined in SC Part I., Section 4.

**Ali Bahrami,**

*Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2012–30441 Filed 12–18–12; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 25

**[Docket No. FAA–2012–1292; Notice No. 25–12–17–SC]**

## Special Conditions: Embraer S.A., Model EMB–550 Airplanes; Electrical/Electronic Equipment Bay Fire Detection and Smoke Penetration

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed special conditions.

**SUMMARY:** This action proposes special conditions for the Embraer S.A. Model EMB–550 airplane. This airplane will have novel or unusual design features, specifically distributed electrical and electronic equipment bays in pressurized areas of the airplane. Older transport category airplane electrical/electronic equipment bay installations are located in the lower lobe where the flightcrew could determine the origin of smoke or fire by a straightforward airplane flight manual procedure. In distributed electrical/electronic bay installations it is not as straightforward. The FAA has no requirement for smoke and/or fire detection in the electrical/electronic equipment bays. To ensure effective mitigation of fires, the FAA proposes these special conditions. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These proposed 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:** Send your comments on or before February 4, 2013.

**ADDRESSES:** Send comments identified by docket number FAA–2012–XXXX 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 or 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://www.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 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:** Robert C. Jones, FAA, Propulsion and Mechanical Systems Branch, ANM–112, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone 425–227–1234; facsimile 425–227–1149.

**SUPPLEMENTARY INFORMATION:**

### Comments Invited

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 on or before the closing date for comments. We may change these special conditions based on the comments we receive.

### Background

On May 14, 2009, Embraer S.A. applied for a type certificate for their new Model EMB–550 airplane. The Model EMB–550 airplane is the first of a new family of jet airplanes designed for corporate flight, fractional, charter, and private owner operations. The aircraft has a conventional configuration with a low wing and T-tail empennage. The primary structure is metal with composite empennage and control surfaces. The Model EMB–550 airplane is designed for 8 passengers, with a maximum of 12 passengers. It is equipped with two Honeywell HTF7500–E medium bypass ratio turbofan engines mounted on aft fuselage pylons. Each engine produces approximately 6,540 pounds of thrust for normal takeoff. The primary flight controls consist of hydraulically powered fly-by-wire elevators, aileron and rudder, controlled by the pilot or copilot sidestick.

The Model EMB–550 airplane has electrical/electronic equipment bays distributed throughout the airplane; three of them are in the pressurized area. The current airworthiness requirements do not contain adequate or appropriate safety standards regarding smoke/fire detection and protection against penetration of hazardous quantities of smoke from equipment bays into occupied areas of the airplane for this type of airplane configuration.

### Type Certification Basis

Under the provisions of Title 14, Code of Federal Regulations (14 CFR) 21.17, Embraer S.A. must show that the Model EMB–550 airplane meets the applicable provisions of part 25, as amended by Amendments 25–1 through 25–127 thereto.

If the Administrator finds that the applicable airworthiness regulations (i.e., 14 CFR part 25) do not contain adequate or appropriate safety standards for the Model EMB–550 airplane because of a novel or unusual design feature, special conditions are

prescribed under the provisions of § 21.16.

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 or similar novel or unusual design feature, the special conditions would also apply to the other model under § 21.101.

In addition to the applicable airworthiness regulations and special conditions, the Model EMB–550 airplane must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36 and the FAA must issue a finding of regulatory adequacy under § 611 of Public Law 92–574, the ''Noise Control Act of 1972.''

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

## Novel or Unusual Design Features

The Model EMB–550 airplane will incorporate the following novel or unusual design features: The Model EMB–550 airplane has distributed electrical and electronic equipment bays that were not envisioned at the time this rule was made.

## Discussion

In general, smoke and fire detection systems are designed to:

- Automatically shut off power to the affected equipment,
- If necessary, reconfigure the environmental control systems to control any smoke resulting from a fire or overheat condition, and
- Alert the flightcrew to the existence of the fire.

Most airplanes certified under part 25 have one or two electrical equipment bays located in the lower lobe, adjacent to pressure regulator/outflow valves or vents. If a fire occurs in an electrical equipment bay, any smoke is drawn toward the outflow valves or vents and is discharged from the airplane without entering occupied areas. In the event of a smoke or fire in one of the electrical equipment bays, the procedures to isolate the bay on some airplanes requires the flightcrew to use trial and error to determine whether or not the source is in a particular electrical equipment bay. However, with this approach, the flightcrew does not know where the fire or smoke is because it is difficult to identify the source, especially during changes of phases of flight (e.g., climbing or descending) or system transients (e.g., changes in the airflow from the environmental control system).

This trial-and-error approach may be acceptable for aircraft with no more than two electrical equipment bays, both located in the lower lobe. In this case, a fire in an electrical equipment bay is in either one bay or the other. However, for an aircraft with three or more electrical equipment bays, in the time it takes to determine the source of smoke, the fire could spread, generating even more smoke and damage.

In the Model EMB–550 airplane, electrical equipment bays are distributed throughout the airplane in the pressurized compartment. Section 25.857 requires that cargo compartments have means to prevent hazardous quantities of smoke or fire extinguishing agent from penetrating into occupied areas of the airplane. However, the applicable airworthiness regulations do not address the following:

- Preventing hazardous quantities of smoke or extinguishing agent originating from the electrical equipment bays from penetrating into occupied areas of the airplane; or
- Installing smoke or fire detectors in electrical equipment bays.

The FAA determined that the Model EMB–550 needs a means to detect smoke or fire in each electrical equipment bay that is located in the pressurized cabin. This means must indicate in which bay the smoke or fire occurs, and ensure that the flightcrew can depower it. For situations in which it may be impossible for the flightcrew to shut down all the equipment in the bay due to the use of critical or essential equipment located in it, Embraer S.A. shall conduct an analysis to:

- Specify the criteria for shutting down specific electrical equipment in the electrical equipment bay that can be shut down,
- Demonstrate that remaining electrical equipment is protected against fire propagation, such as thermal protection, fire containment, and other systems as addressed in Advisory Circular 25–16, *Electrical Fault and Fire Prevention and Protection,* dated April 5, 1991.

The criteria developed for aircraft designs that incorporate distributed electrical/electronic equipment bays are based upon existing smoke/fire detection and smoke penetration guidance and acceptable past practices. Sections 25.831(b), 25.831(c), 25.831(d), and 25.869(a) provide the general requirements that apply to electrical/electronic equipment smoke penetration and evacuation. Flight tests are conducted to demonstrate compliance; however, the amount of smoke generated and flight test conditions have been highly variable.

The special conditions below require that there must be a means to detect smoke or fire in each electrical/electronic equipment bay located in the pressurized compartment. They also include requirements to prevent propagation of hazardous quantities of smoke or fire extinguishing agent throughout the passenger cabin.

## Applicability

As discussed above, these special conditions are applicable to the Model EMB–550 airplane. Should Embraer S.A. apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design feature, the special conditions would apply to that model as well.

## Conclusion

This action affects only certain novel or unusual design features on one model of airplanes. It is not a rule of general applicability.

## List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

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

## The Proposed Special Conditions

Accordingly, the Federal Aviation Administration (FAA) proposes the following special conditions as part of the type certification basis for Embraer S.A. Model EMB–550 airplanes.

1. Requirements to prevent propagation of smoke that originates in electrical equipment bays from entering the passenger cabin and flight deck:

a. To prevent such propagation, means to prevent hazardous quantities of smoke originating from the electrical equipment bays from incapacitating passengers and crew must be demonstrated. The demonstrations must include flight tests, and shall be conducted for all dispatchable system configurations.

b. A small quantity of smoke may enter an occupied area only under the following conditions:

i. The smoke enters occupied areas during system transients from below the deck or main deck sources. No sustained smoke penetration beyond that from environmental control system transients is permitted,

ii. Penetration of the small quantity of smoke is a dynamic event, involving either dissipation or mobility.

Dissipation is rapid dilution of the smoke by ventilation air. Mobility is rapid movement of the smoke into and out of the occupied area. In no case should a light haze indicative of stagnant airflow form, as this indicates that the ventilation system is failing to meet the requirements of 14 CFR 25.831,

iii. The smoke from a source below the main deck must not rise above armrest height on the main deck, and

iv. The smoke from a source in the main deck must dissipate rapidly via dilution with fresh air and be evacuated from the airplane. The Airplane Flight Manual (AFM) must include procedures to evacuate smoke from the occupied areas. To demonstrate that the quantity of smoke is small, a flight test must be conducted which simulates the emergency procedures used in the event of a fire during flight, including the use of $V_{MO}/M_{MO}$ descent profiles and a simulated landing, if such conditions are specified in the emergency procedure.

2. Requirement for smoke or fire detection in electrical/electronic equipment bays: A smoke or fire detection system compliant with §§ 25.855(a), (b), (c), and (d); and § 25.858 must be provided for each electrical/electronic equipment bay in the pressurized cabin. Each system must provide a visual indication to the flight deck within one minute after the start of a fire. Airplane flight tests must be conducted to show compliance with these requirements, and the performance of the detectors must be shown in accordance with Advisory Circular 25–9A, *Smoke Detection, Penetration, and Evacuation Tests and Related Flight Manual Emergency Procedures,* or other means acceptable to the FAA.

3. Requirement for AFM procedures safety analysis: It shall be demonstrated that the AFM procedures to shut down electrical/electronic equipment bays, or part of them, in case of smoke/fire detection, do not compromise the safe operation of the aircraft. If a procedure requests to shut down only part of the equipment, the remaining equipment shall be incorporated with safety precautions against fire propagation.

Issued in Renton, Washington, on December 13, 2012.

**Ali Bahrami,**

*Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2012–30493 Filed 12–18–12; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 39

**[Docket No. FAA–2011–1285; Directorate Identifier 2010–SW–073–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; Eurocopter Deutschland GmbH Helicopters

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Supplemental notice of proposed rulemaking (SNPRM); reopening of comment period.

**SUMMARY:** We are revising an earlier proposed airworthiness directive (AD) for Eurocopter Deutschland GmbH (Eurocopter) Model BO–105A, BO–105C, BO–105LS A–1, BO–105LS A–3, and BO–105S helicopters, which proposed inspecting for debonding of the erosion protective shell (abrasion strip) on the leading edge of each main rotor blade. This SNPRM proposes to revise those inspection requirements by identifying specific dates of replacement of the applicable parts and identifying a specific inspection method for debonding of an abrasion strip.

**DATES:** We must receive comments on this proposed AD by February 4, 2013.

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

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

### Examining the AD Docket

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

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

**FOR FURTHER INFORMATION CONTACT:** Jim Grigg, Manager, Safety Management Group, Rotorcraft Directorate, FAA, 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone (817) 222–5110; email *jim.grigg@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

### Comments Invited

We invite you to participate in this rulemaking by submitting written comments, data, or views. We also invite comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting the proposals in this document. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should send only one copy of written comments, or if comments are filed electronically, commenters should submit only one time.

We will file in the docket all comments that we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, we will consider all comments we receive on or before the closing date for comments. We will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. We may change this proposal in light of the comments we receive.

### Discussion

On November 29, 2011, we issued a proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to Eurocopter Model BO–105A, BO–105C, BO–105LS A–1, BO–105LS A–3, and BO–105S helicopters with a main rotor blade, part number (P/N) 105–15103, 105–15141, 105–15141V001, 105–15143, 105–15150, 105–15150V001, 105–15152, 105–81013, 105–87214, 1120–15101, or 1120–15103; where the main rotor blade erosion protective shell was replaced between September 2006

and March 2010. This proposal was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on December 6, 2011 (76 FR 76068). The NPRM proposed to require a one-time inspection of each main rotor blade for debonding of the erosion protective shell within 50 hours time-in-service (TIS). If debonding was detected during the inspection, the NPRM proposed replacing the main rotor blade with an airworthy main rotor blade before further flight. The proposed requirements were intended to detect debonding of the main rotor blade erosion protective shell, which could lead to an unbalanced main rotor, high vibration, damage to the tail boom or tail rotor, and loss of control of the helicopter.

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA Emergency AD No. 2010–0216–E, dated October 21, 2010 (corrected October 29, 2010), applicable to Eurocopter Model BO105 A, BO105 C, BO105 D, BO105 LS A–1, BO105 LS A–3, and BO105 S helicopters, all variants (except variants CB–5 and DBS–5). EASA advises that during an inspection on a BO105 helicopter, debonding was found on the erosion protective shell of a main rotor blade, and investigation showed the debonding was caused by incorrect installation of the erosion protective shell. In addition, EASA states that an incident occurred where a second BO105 helicopter lost its erosion protective shell during hover flight. EASA advises that this condition, if not corrected, could result in loss of the main rotor blade erosion protective shell during flight, leading to an unbalanced main rotor and high vibrations, which could damage the tail boom or tail rotor or result in loss of tail rotor control and loss of control of the helicopter.

## Actions Since Previous NPRM Was Issued

Since we issued the previous NPRM (76 FR 76068, December 6, 2011), we discovered the need for identifying specific dates of replacement of the applicable parts and identifying that a tap inspection would be the required method for inspecting for debonding of an abrasion strip. The previous NPRM stated the proposed AD would apply to certain part-numbered main rotor blades with a main rotor blade abrasion strip that was replaced between September 2006 and March 2010. This supplemental NPRM proposes clarifying the date range to be inclusive of September 1, 2006 through March 31, 2010. The previous NPRM also proposed to require inspecting for debonding of the abrasion strip along the leading edge of each main rotor blade. This supplemental NPRM clarifies that the proposed inspection method is a tap inspection.

Because these proposed changes expand the applicability and may increase the economic burden on some operators, the FAA will reopen the comment period to provide additional opportunity for public comment.

## FAA's Determination

We are proposing this AD because we evaluated all known relevant information and determined that an unsafe condition is likely to exist or develop on other helicopters of these same type designs. Certain changes described above expand the scope of the original NPRM (76 FR 76068, December 6, 2011). As a result, we have determined that it is necessary to reopen the comment period to provide additional opportunity for the public to comment.

## Related Service Information

Eurocopter has issued Emergency Alert Service Bulletin (ASB) No. ASB BO105–10–124, dated July 14, 2010, for the Model BO105 helicopter, with a main rotor blade, P/N 105–15103, 105–15141, 105–15141V001, 105–15143, 105–15150, 105–15150V001, 105–15152, 105–81013, 105–87214, 1120–15101, or 1120–15103, where the main rotor blade erosion protective shell was replaced between September 2006 and March 2010. Eurocopter also issued Emergency ASB No. ASB–BO105LS–10–12, dated July 14, 2010, for the Model BO105LS A–3 helicopter, with a main rotor blade, P/N 105–15141, where the main rotor blade erosion protective shell was replaced between September 2006 and March 2010. Both Emergency ASBs exclude helicopters from this inspection if each main rotor blade was inspected at the last 600 flight hour inspection and no debonding was detected during the inspection. Both Emergency ASBs specified a one-time inspection of the main rotor blades within the next 50 flight hours to determine if debonding of the main rotor blade erosion protective shell has occurred.

Eurocopter subsequently issued Emergency ASB No. ASB BO105–10–124, Revision 1, dated October 18, 2010, and Emergency ASB No. ASB–BO105LS–10–12, Revision 1, dated October 20, 2010. These service bulletins specify the same inspection requirements as the original service bulletins, but revise the inspection compliance time from 50 flight hours to 10 flight hours. EASA classified these service bulletins as mandatory and issued EASA Emergency AD No. 2010–0216–E, dated October 21, 2010 (corrected October 29, 2010) to ensure the continued airworthiness of these helicopters.

## Proposed Requirements of the Supplemental NPRM

This proposed AD would require, within 50 hours TIS, inspecting for debonding by tap testing the abrasion strip of the leading edge of each main rotor blade. If there is debonding in any area of the abrasion strip, this proposed AD would require, before further flight, replacing the main rotor blade.

## Differences Between This Supplemental NPRM and the EASA AD

The differences between this proposed AD and the EASA AD are:

- The EASA AD allows compliance within ''10 flight hours, or 4 flight cycles, or 4 weeks, whichever occurs first,'' and this proposed AD would require compliance within 50 hours TIS.
- The EASA AD allows you to replace the main rotor blade erosion protective shell if debonding is detected, and this proposed AD would require you to replace the main rotor blade with an airworthy main rotor blade if debonding is detected.
- The EASA AD is applicable to the Model BO105 D helicopter; however, this proposed AD would not include this model because it does not have a type certificate in the U.S.

## Costs of Compliance

We estimate that this AD would affect 97 helicopters of U.S. Registry. We estimate that operators may incur the following costs in order to comply with this proposed AD. It would take about 1.0 work-hour per helicopter to perform the inspection at an average labor rate of $85 per work-hour. Based on these figures, we estimate the cost of the inspection on U.S. operators would be $8,245 or $85 per helicopter. If there is debonding, we estimate that it would take about 2 work-hours to replace a main rotor blade and required parts would cost $114,182, for a total cost of $114,352 per blade. We have no way of determining how many operators will incur replacement costs.

## Authority for This Rulemaking

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

detail the scope of the Agency's authority.

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

**Regulatory Findings**

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

For the reasons discussed, I certify this proposed regulation:

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

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

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

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

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

**List of Subjects in 14 CFR Part 39**

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

**The Proposed Amendment**

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

**§ 39.13 [Amended]**

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

**Eurocopter Deutschland GmbH:** Docket No. FAA–2011–1285; Directorate Identifier 2010–SW–073–AD.

**(a) Applicability**

This AD applies to Model BO–105A, BO–105C, BO–105LS A–1, BO–105LS A–3, and BO–105S helicopters, with a main rotor blade, part number 105–15103, 105–15141, 105–15141V001, 105–15143, 105–15150, 105–15150V001, 105–15152, 105–81013, 105–87214, 1120–15101, or 1120–15103; where the main rotor blade erosion protective shell (abrasion strip) was replaced between September 1, 2006 and March 31, 2010, inclusive; certificated in any category.

**(b) Unsafe Condition**

This AD defines the unsafe condition as debonding of a main rotor blade erosion protective shell (abrasion strip). This condition could result in loss of the abrasion strip and an unbalanced main rotor, high vibration, damage to the tail boom or tail rotor, and loss of control of the helicopter.

**(c) Compliance**

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

**(d) Required Actions**

(1) Within 50 hours time-in-service, inspect the main rotor blade for debonding of the erosion protective shell by tap testing the abrasion strip of the leading edge of each main rotor blade.

(2) If the abrasion strip is debonding in any area, before further flight, replace the main rotor blade.

**(e) Alternative Methods of Compliance (AMOCs)**

(1) The Manager, Safety Management Group, FAA, may approve AMOCs for this AD. Send your proposal to: Jim Grigg, Manager, Safety Management Group, Rotorcraft Directorate, FAA, 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone (817) 222–5110; email *jim.grigg@faa.gov.*

(2) For operations conducted under a 14 CFR part 119 operating certificate or under 14 CFR part 91, subpart K, we suggest that you notify your principal inspector, or lacking a principal inspector, the manager of the local flight standards district office or certificate holding district office before operating any aircraft complying with this AD through an AMOC.

**(f) Additional Information**

(1) Eurocopter Emergency Alert Service Bulletin No. ASB BO105–10–124, Revision 1, dated October 18, 2010, and No. ASB–BO105LS–10–12, Revision 1, dated October 20, 2010, which are not incorporated by reference, contain additional information about the subject of this AD. For this service information, contact American Eurocopter Corporation, 2701 N. Forum Drive, Grand Prairie, Texas 75052; telephone (972) 641–0000 or (800) 232–0323; fax (972) 641–3775; or at *http://www.eurocopter.com/techpub.* You may review a copy of the service information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

(2) The subject of this AD is addressed in European Aviation Safety Agency Emergency AD No. 2010–0216–E, dated October 21, 2010 (corrected October 29, 2010).

**(g) Subject**

Joint Aircraft Service Component (JASC) Code: 6210, Main Rotor Blades.

Issued in Fort Worth, Texas, on December 12, 2012.

**S. Frances Cox,**

*Acting Directorate Manager, Rotorcraft Directorate, Aircraft Certification Service.*

[FR Doc. 2012–30588 Filed 12–18–12; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF JUSTICE

## Drug Enforcement Administration

## 21 CFR Part 1308

**[Docket No. DEA–369]**

## Schedules of Controlled Substances: Placement of Lorcaserin Into Schedule IV

**AGENCY:** Drug Enforcement Administration, Department of Justice.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Drug Enforcement Administration (DEA) proposes placing the substance lorcaserin, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible, into Schedule IV of the Controlled Substances Act (CSA). This proposed action is based on a recommendation from the Assistant Secretary for Health of the Department of Health and Human Services (HHS) and on an evaluation of all other relevant data by DEA. If finalized, this action would impose the regulatory controls and criminal sanctions of Schedule IV on the manufacture, distribution, dispensing, importation, exportation, and possession of lorcaserin and products containing lorcaserin.

**DATES:** DEA will permit interested persons to file written comments on this proposal pursuant to 21 CFR 1308.43(g). Electronic comments must be submitted and written comments must be postmarked on or before January 18, 2013. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after midnight Eastern Time on the last day of the comment period.

Interested persons, defined as those ''adversely affected or aggrieved by any rule or proposed rule issuable pursuant to section 201 of the Act (21 U.S.C. 811),'' [1] may file a request for hearing or waiver of participation pursuant to 21 CFR 1308.44 and in accordance with 21 CFR 1316.45. Requests for hearing and waivers of participation must be received on or before January 18, 2013.

**ADDRESSES:** To ensure proper handling of comments, please reference ''Docket No. DEA–369'' on all electronic and written correspondence. DEA encourages all comments be submitted electronically through *http://www.regulations.gov* using the electronic comment form provided on that site. An electronic copy of this document and supplemental information to this proposed rule are also available at the *http://www.regulations.gov* Web site for easy reference. Paper comments that duplicate the electronic submission are not necessary as all comments submitted to *www.regulations.gov* will be posted for public review and are part of the official docket record. Should you, however, wish to submit written comments via regular or express mail, they should be sent to the Drug Enforcement Administration, Attention: DEA Federal Register Representative/OD, 8701 Morrissette Drive, Springfield, VA 22152. All requests for hearing and waivers of participation must be sent to Drug Enforcement Administration, Attention: Hearing Clerk/LJ, 8701 Morrissette Drive, Springfield, VA 22152.

**FOR FURTHER INFORMATION CONTACT:** John W. Partridge, Executive Assistant, Office of Diversion Control, Drug Enforcement Administration; Mailing Address: 8701 Morrissette Drive, Springfield, Virginia 22152. Telephone: (202) 307–7165.

**SUPPLEMENTARY INFORMATION:**

## Posting of Public Comments

Please note that all comments received are considered part of the public record and made available for public inspection online at *http://www.regulations.gov* and in the DEA's public docket. Such information includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online or made available in the public docket, you must include the phrase ''PERSONAL IDENTIFYING INFORMATION'' in the first paragraph of your comment. You must also place all the personal identifying information you do not want posted online or made available in the public docket in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it to be posted online or made available in the public docket, you must include the phrase ''CONFIDENTIAL BUSINESS INFORMATION'' in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted online or made available in the public docket.

Personal identifying information and confidential business information identified and located as set forth above will be redacted and the comment, in redacted form, will be posted online and placed in the DEA's public docket file. Please note that the Freedom of Information Act applies to all comments received. If you wish to inspect the agency's public docket file in person by appointment, please see the ''For Further Information Contact'' paragraph, above.

## Requests for Hearing or Waiver of Participation in Hearing

In accordance with the provisions of the CSA (21 U.S.C. 811(a)), this action is a formal rulemaking ''on the record after opportunity for a hearing.'' Such proceedings are conducted pursuant to the provisions of the Administrative Procedure Act (5 U.S.C. 556 and 557) and 21 CFR 1308.41. Pursuant to 21 CFR 1308.44(a) and (c), requests for a hearing and waivers of participation may be submitted only by interested persons, defined as those ''adversely affected or aggrieved by any rule or proposed rule issuable pursuant to section 201 of the Act (21 U.S.C. 811).'' [2] Requests for a hearing must conform to the requirements of 21 CFR 1308.44(a) and 1316.47. A request should state, with particularity, the interest of the person in the proceeding and the objections or issues, if any, concerning which the person desires to be heard. Any waiver must conform to the requirements of 21 CFR 1308.44(c), including a written statement regarding the interested person's position on the matters of fact and law involved in any hearing.

Please note that pursuant to 21 U.S.C. 811(a), the purpose and subject matter of the hearing is restricted to ''(A) find[ing] that such drug or other substance has a potential for abuse, and (B) mak[ing] with respect to such drug or other substance the findings prescribed by subsection (b) of section 812 of this title for the schedule in which such drug is to be placed * * *'' Requests for hearing and waivers of participation in the hearing should be submitted to DEA using the address information provided above. DEA may grant a hearing only ''for the purpose of receiving factual evidence and expert opinion regarding the issues involved in the issuance, amendment or repeal of a rule issuable'' pursuant to 21 U.S.C. 811(a).

## Legal Authority

DEA implements and enforces Titles II and III of the Comprehensive Drug Abuse Prevention and Control Act of 1970, often referred to as the Controlled Substances Act (CSA) and the Controlled Substances Import Export Act (CSIEA) (21 U.S.C. 801–971), as amended (hereinafter, ''CSA'').

Under the CSA, controlled substances are classified in one of five schedules based upon their potential for abuse, their currently accepted medical use, safety and the degree of dependence the substance may cause. 21 U.S.C. 812. The initial schedules of controlled substances are found at 21 U.S.C. 812(c). Pursuant to 21 U.S.C. 811(a)(1), the Attorney General may, by rule, ''add to such a schedule or transfer between such schedules any drug or other substance if he (A) finds that such drug or other substance has a potential for abuse, and (B) makes with respect to such drug or other substance the findings prescribed by subsection (b) of section 812 of this title for the schedule in which such drug is to be placed* * *'' Pursuant to 28 CFR 0.100(b), the Attorney General has delegated this scheduling authority to the Administrator of DEA.

## Background

Lorcaserin ((*R*)-8-chloro-1-methyl-2,3,4,5-tetrahydro-1*H*-3-benzepine hydrochloride hemihydrate) is a new chemical entity which has central nervous system hallucinogenic properties. Lorcaserin is a serotonin receptor agonist, at the $5HT_{2C}$ and $5HT_{2A}$ receptor subtypes. Lorcaserin was approved by the Food and Drug Administration (FDA) on June 27, 2012, as an addition to a reduced-calorie diet and exercise, for chronic weight

[1] 21 CFR 1300.01.

[2] 21 CFR 1300.01.

management and it will be marketed under the trade name BELVIQ®.

**Proposed Determination To Schedule Lorcaserin**

Pursuant to the CSA, 21 U.S.C. 811(a), proceedings to add a drug or substance to those controlled under the CSA may be initiated by request of the Secretary of HHS. On June 25, 2012, HHS provided DEA with a scientific and medical evaluation document prepared by FDA entitled ''Basis for the Recommendation for Control of Lorcaserin in Schedule IV of the Controlled Substances Act.'' Pursuant to 21 U.S.C. 811(b), (c), and (f), this document contained an eight-factor analysis of the abuse potential of lorcaserin as a new drug, along with HHS' recommendation to control lorcaserin under Schedule IV of the CSA.

In response, DEA conducted an eight-factor analysis of abuse potential of lorcaserin pursuant to 21 U.S.C. 811(c). Included below is a brief summary of each factor as considered by HHS and DEA. Please note that both the DEA and HHS analyses are available in whole in the ''Supporting and Related Material'' of the public docket for this rule at *www.regulations.gov* under docket number DEA–369. Full analysis of and citations to the information referenced in the summary may be found in the supporting material.

1. *The Drug's Actual or Relative Potential for Abuse:* Lorcaserin is a new chemical substance that has not been marketed in the U.S. or in any other country. As such, there is no information available which details actual abuse of lorcaserin. However, the legislative history of the CSA offers another methodology for assessing a drug or substance's potential for abuse:

> The drug or drugs containing such a substance are new drugs so related in their action to a drug or drugs already listed as having a potential for abuse to make it likely that the drug will have the same potentiality for abuse as such drugs, thus making it reasonable to assume that there may be significant diversions from legitimate channels, significant use contrary to or without medical advice, or that it has a substantial capability of creating hazards to the health of the user or to the safety of the community.[3]

According to HHS, lorcaserin is an agonist at the serotonin receptor subtypes 5–$HT_{2C}$ and 5–$HT_{2A}$. Lorcaserin is indicated as an addition to a reduced-calorie diet and exercise, for chronic weight management. There is evidence, described below, that lorcaserin produces subjective effects in humans and in animals that are similar to those produced by zolpidem (Schedule IV) and ketamine (Schedule III)

HHS described a human abuse potential study in recreational drug abusers of psychedelic drugs and CNS depressants, in which lorcaserin and the comparator drugs zolpidem (Schedule IV) and ketamine (Schedule III) produced significant increases on positive subjective measures (visual analog scales (VAS)) for ''high'' and ''good drug effects as well as an increase on the VAS for ''hallucinations.'' Lorcaserin, as well as zolpidem and ketamine, significantly increased reports of ''sedation'' on the subjective scale of the Addiction Research Center Inventory (ARCI), compared to placebo. HHS summarized that these subjective response data suggest that lorcaserin produces subjective effects similar to those produced by zolpidem and ketamine. According to HHS, 20–60 mg of lorcaserin produced a high rate of euphoria in 6–19% of the subjects in a human abuse potential study. The incidence of euphoria following lorcaserin administration in the human abuse potential study is similar to that reported following zolpidem (Schedule IV) administration (13–16%) and lower than that following ketamine (Schedule III) administration (50%).

According to HHS, lorcaserin is not available or marketed in any country. Thus there is no evidence of lorcaserin diversion, illicit manufacturing, or deliberate ingestion. Because lorcaserin has been shown to produce euphoria in humans, it is anticipated that there will be significant use contrary to or without medical advice. Lorcaserin is not readily synthesized from available substances, and thus its diversion will be likely from the legitimate channels.

2. *Scientific Evidence of the Drug's Pharmacological Effects, If Known:* HHS stated that lorcaserin is a 5–$HT_{2C}$ and 5–$HT_{2A}$ serotonin receptor agonist. DEA further notes that it has been shown that lorcaserin through activation of 5–$HT_{2C}$ receptors causes inositol phosphate accumulation with an $EC_{50}$ of 9 nM. Lorcaserin also activated the 5–$HT_{2A}$ and 5–$HT_{2B}$ receptors, with $EC_{50}$s of 168 nM and 943 nM, respectively.

HHS stated that acutely, lorcaserin decreases locomotor activity in rats. Tolerance does develop to this effect, because after 21 days, lorcaserin does not affect the locomotor activity of the rats. DEA further notes that a study showed that food intake in rats was reduced after a single administration of lorcaserin. The doses administered were 3, 6, 12, and 24 mg/kg. Lorcaserin decreased the cumulative food intake at 2, 4, 6, and 22 hours. The $ED_{50}$ for food intake inhibition was 18 mg/kg.

According to HHS' review, a drug discrimination study conducted in 2,5-dimethoxy-4-methylamphetamine (DOM)-trained rats showed that lorcaserin (0.1–10 mg/kg) produced full generalization (≥ 80%) to the DOM cue in 7 of 9 rats. DOM is a Schedule I hallucinogen and a 5-$HT_{2A}$ and 5-$HT_{2C}$ receptor agonist. These data suggest that lorcaserin in doses 0.1 to 10 mg/kg produces discriminative stimulus responses similar to DOM, a hallucinogen.

As described by HHS in a human abuse potential study with individuals with a history of abusing drugs, lorcaserin was evaluated for its abuse potential; it was compared to ketamine (Schedule III NMDA antagonist), zolpidem (Schedule IV GABA agonist), and a placebo. In clinical trials, lorcaserin, similar to ketamine and zolpidem, produced euphoric and hallucinogenic adverse events (AEs).

3. *The State of the Current Scientific Knowledge Regarding the Drug or Other Substance:* HHS states that lorcaserin ((*R*)-8-chloro-1-methyl-2,3,4,5-tetrahydro-1*H*-3-benzepine hydrochloride hemihydrate) is water-soluble. The molecular formula is $C_{11}H_{14}ClN$ and its molecular weight is 241.6 g/mol, the CAS number is 616202–92–7.

According to HHS, in humans, lorcaserin is rapidly absorbed from the gastrointestinal tract after oral administration, the $t_{max}$ (time to reach maximum plasma concentration) is ≤ 2 hours and its half-life in plasma is about 11 hours. DEA further notes that after a single oral administration of 10 mg/kg lorcaserin to rats, the absorption from the gastrointestinal tract was rapid, resulting in a mean maximum plasma concentration ($C_{max}$) of 0.76 μg/ml at 0.25 hour. The time from oral administration to brain maximal exposure was 1 hour.

According to HHS, the major circulating metabolite of lorcaserin is lorcaserin sulfamate (M1). Lorcaserin is metabolized by the liver and excreted by the kidney. M1 is considered inactive and it does not bind significantly to monoamine transporters. DEA further notes that the major metabolite in the urine is N-carbamoyl glucuronide (M5).

4. *Its History and Current Pattern of Abuse:* History and current pattern of abuse of lorcaserin is not available since it has not been marketed in any country. As stated in HHS' review, lorcaserin produced positive subjective effects in a human abuse potential study that are

[3] Comprehensive Drug Abuse Prevention and Control Act of 1970, H.R. Rep. No. 91–1444, 91st Cong., Sess. 1 (1970); 1970 U.S.C.C.A.N. 4566, 4601.

similar to those produced by zolpidem (Schedule IV) and ketamine (Schedule III). HHS states that the positive subjective effects reported from supratherapeutic doses of lorcaserin administration, are predictive of its potential for abuse.

5. *The Scope, Duration, and Significance of Abuse:* According to the HHS review, the information on lorcaserin's scope, duration and significance of abuse is not available since it has not been marketed in any country. Thus, the evaluation of the significance of abuse of lorcaserin derives from positive indicators in pre-market clinical trials which are believed to be predictive of drug abuse. Based on the AEs reported in the clinical efficacy studies and the data from a human abuse potential lorcaserin study, HHS concluded that the scope and significance of the abuse potential of lorcaserin is similar to Schedule IV substances. HHS states that marketing lorcaserin as a Schedule IV substance will decrease its abuse, as opposed to marketing it as an uncontrolled or Schedule V substance.

6. *What, if any, Risk There is to the Public Health:* According to HHS, the abuse potential of lorcaserin presents a risk to the public health. HHS states that lorcaserin produces a number of AEs that are commonly seen with other Schedule IV substances that are abused. Some of these AEs include feeling jittery, psychomotor hyperactivity, paresthesia, abnormal dreams, and state of confusion. Headache, nausea, and dizziness were the most commonly reported AEs in lorcaserin clinical studies. In a human abuse potential study, 20–60 mg lorcaserin produced a high incidence of the AE euphoria in 6–19% of the subjects. According to HHS, because lorcaserin binds to 5-$HT_2$ receptors and generalizes to 5-$HT_2$ agonists in drug discrimination studies in rats, it is expected to have a hallucinogenic profile. DEA further notes that in the human abuse potential study conducted by Shram and colleagues (2011), supratherapeutic doses of lorcaserin were associated with significantly higher peak scores on the ''Detached'' (40 and 60 mg), ''Hallucinations'' (40 mg), and ''Spaced Out'' (40 and 60 mg) visual analog scales.

7. *Its Psychic or Physiological Dependence Liability:* According to HHS' review, there were two clinical studies conducted to determine the ability of lorcaserin to induce physical dependence. The patients in these studies were obese and lorcaserin was administered for 4 and 12 weeks prior to drug discontinuation. Upon lorcaserin discontinuation, there were no signs of changes in mood, food interest, or body weight. Discontinuation of lorcaserin administration to animals also did not produce typical withdrawal symptoms. However, according to HHS, the ability of lorcaserin to produce hallucinations, euphoria, and positive subjective responses at supratherapeutic doses is suggestive of its potential to produce psychic dependence.

8. *Whether the Substance is an Immediate Precursor of a Substance Already Controlled Under the CSA:* Lorcaserin is not an immediate precursor of a substance already controlled under the CSA.

*Conclusion:* Based on consideration of the scientific and medical evaluation conducted by HHS and its recommendation, and after considering its own eight-factor analysis, DEA has determined that these facts and all relevant data constitute substantial evidence of potential for abuse of lorcaserin. As such, DEA hereby proposes to schedule lorcaserin as a controlled substance under the CSA.

**Proposed Determination of Appropriate Schedule**

The CSA establishes five schedules of controlled substances known as Schedules I, II, III, IV, and V. The statute outlines the findings required in placing a drug or other substance in any schedule. 21 U.S.C. 812(b). After consideration of the analysis and recommendation of the Assistant Secretary for Health of HHS and review of all available data, the Administrator of DEA, pursuant to 21 U.S.C. 812(b), finds that:

(1) Lorcaserin has a low potential for abuse relative to the drugs or other substances in Schedule III. The overall abuse potential of lorcaserin is comparable to the Schedule IV substances;

(2) Lorcaserin has a currently accepted medical use in treatment in the United States. Lorcaserin was approved for marketing by FDA as an addition to a reduced-calorie diet and exercise, for chronic weight management; and

(3) Abuse of lorcaserin may lead to limited psychological dependence relative to the drugs or other substances in Schedule III. This finding is based on the ability of lorcaserin to produce positive subjective effects at supratherapeutic doses.

Based on these findings, the Administrator of DEA concludes that lorcaserin, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible, warrants control in Schedule IV of the CSA (21 U.S.C. 812(b)(4)).

**Requirements for Handling Lorcaserin**

If this rule is finalized as proposed, lorcaserin would be subject to CSA regulatory controls and administrative, civil and criminal sanctions applicable to the manufacture, distribution, dispensing, importing and exporting of a Schedule IV controlled substance, including the following:

*Registration.* Any person who manufactures, distributes, dispenses, imports, exports, engages in research or conducts instructional activities with lorcaserin, or who desires to manufacture, distribute, dispense, import, export, engage in instructional activities or conduct research with lorcaserin, would need to be registered to conduct such activities pursuant to 21 U.S.C. 822 and in accordance with 21 CFR Part 1301.

*Security.* Lorcaserin would be subject to Schedules III–V security requirements and would need to be manufactured, distributed, and stored pursuant to 21 U.S.C. 823 and in accordance with 21 CFR 1301.71, 1301.72(b), (c), and (d), 1301.73, 1301.74, 1301.75(b) and (c), 1301.76, and 1301.77.

*Labeling and Packaging.* All labels and labeling for commercial containers of lorcaserin which are distributed on or after finalization of this rule would need to be in accordance with 21 CFR 1302.03–1302.07, pursuant to 21 U.S.C. 825.

*Inventory.* Every registrant required to keep records and who possesses any quantity of lorcaserin would be required to keep an inventory of all stocks of lorcaserin on hand pursuant to 21 U.S.C. 827 and in accordance with 21 CFR 1304.03, 1304.04, and 1304.11. Every registrant who desires registration in Schedule IV for lorcaserin would be required to conduct an inventory of all stocks of the substance on hand at the time of registration.

*Records.* All registrants would be required to keep records pursuant to 21 U.S.C. 827 and in accordance with 21 CFR 1304.03, 1304.04, 1304.21, 1304.22, and 1304.23.

*Prescriptions.* All prescriptions for lorcaserin or prescriptions for products containing lorcaserin would be required to be issued as a controlled substance pursuant to 21 U.S.C. 829 and in accordance with 21 CFR 1306, including but not limited to 21 CFR 1306.03–1306.06, 1306.08, 1306.09, and 1306.21–1306.27.

*Importation and Exportation.* All importation and exportation of lorcaserin would need to be done in

accordance with 21 CFR Part 1312, pursuant to 21 U.S.C. 952, 953, 957, and 958.

*Criminal Liability.* Any activity with lorcaserin not authorized by, or in violation of, Subchapter I Part D and Subchapter II of the CSA occurring on or after finalization of this proposed rule would be unlawful.

**Regulatory Analyses**

**Executive Orders 12866 and 13563**

In accordance with 21 U.S.C. 811(a), this proposed scheduling action is subject to formal rulemaking procedures done ''on the record after opportunity for a hearing,'' which are conducted pursuant to the provisions of 5 U.S.C. 556 and 557. Such actions are exempt from review by the Office of Management and Budget pursuant to Section 3(d)(1) of Executive Order 12866 and the principles reaffirmed in Executive Order 13563.

**Executive Order 12988**

This proposed regulation meets the applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988 Civil Justice Reform to eliminate ambiguity, minimize litigation, establish clear legal standards and reduce burden.

**Executive Order 13132**

This proposed rulemaking does not preempt or modify any provision of State law; nor does it impose enforcement responsibilities on any State; nor does it diminish the power of any State to enforce its own laws. Accordingly, this rulemaking does not have federalism implications warranting the application of Executive Order 13132.

**Executive Order 13175**

This proposed rule will not have tribal implications and will not impose substantial direct compliance costs on Indian tribal governments.

**Regulatory Flexibility Act**

The Administrator, in accordance with the Regulatory Flexibility Act (5 U.S.C. 601–612), has reviewed this proposed rule and by approving it certifies that it will not have a significant economic impact on a substantial number of small entities. Lorcaserin products, as recently approved by the FDA, will be used as an adjunct treatment of partial onset seizure. Handlers of lorcaserin will also handle other controlled substances used as anti-seizure agents, which are already subject to the regulatory requirements of the CSA.

**Unfunded Mandates Reform Act of 1995**

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $136,000,000 or more (adjusted for inflation) in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under provisions of the Unfunded Mandates Reform Act of 1995.

**Paperwork Reduction Act of 1995**

This action does not impose a new collection of information requirement under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3521.

**List of Subjects in 21 CFR Part 1308**

Administrative practice and procedure, Drug traffic control, Reporting and recordkeeping requirements.

For the reasons set out above, 21 CFR part 1308 is proposed to be amended as follows:

## PART 1308—SCHEDULES OF CONTROLLED SUBSTANCES

1. The authority citation for part 1308 continues to read as follows:

**Authority:** 21 U.S.C. 811, 812, 871(b), unless otherwise noted.

2. Section 1308.14 is amended by redesignating paragraphs (e) and (f) as paragraphs (f) and (g) and adding a new paragraph (e) to read as follows:

**§ 1308.14 Schedule IV.**

* * * * *

(e) *Lorcaserin.* Any material, compound, mixture, or preparation which contains any quantity of the following substances, including its salts, isomers, and salts of such isomers, whenever the existence of such salts, isomers, and salts of isomers is possible:

(1) Lorcaserin ..... 1625

* * * * *

Dated: December 13, 2012.

**Michele M. Leonhart,**

*Administrator.*

[FR Doc. 2012–30531 Filed 12–18–12; 8:45 am]

BILLING CODE 4410–09–P

## DEPARTMENT OF HOMELAND SECURITY

## Coast Guard

## 33 CFR Part 165

**[Docket Number USCG–2012–1013]**

**RIN 1625–AA00**

## Safety Zone; Woldenburg Park, Mississippi River, New Orleans, LA

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of Proposed Rulemaking.

**SUMMARY:** The Captain of the Port New Orleans, under the authority of the Ports and Waterways Safety Act, intends to establish a temporary safety zone on the Mississippi River in the vicinity of Woldenburg Park, mile marker 94 to mile marker 96, extending out 300 feet from the East Bank of the Mississippi River during Super Bowl 2013 celebratory events. The Super Bowl is a large scale event that poses many public safety concerns due to the number of people that will attend. This safety zone would be established to protect the public from the hazards created by congested river traffic. This rule would be effective from 6:00 a.m. on January 29, 2013 through 6:00 a.m. on February 4, 2013. The zone will be enforced between the hours of 8:00 a.m. and 10:00 p.m. on each day of the effective period described above.

**DATES:** Comments and related material must be received by the Coast Guard on or before December 30, 2012.

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

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* 202–493–2251.

(3) *Mail or Delivery:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001. Deliveries accepted between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for further instructions on submitting comments. To avoid duplication, please use only one of these three methods.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, call or email LCDR Kenneth Blair, Sector New Orleans, U.S. Coast Guard; telephone (504) 365–2392, email

*Kenneth.E.Blair@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

**SUPPLEMENTARY INFORMATION:**

**Table of Acronyms**

DHS Department of Homeland Security
FR **Federal Register**
NPRM Notice of Proposed Rulemaking

**A. Public Participation and Request for Comments**

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

*1. Submitting Comments*

If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online at *http://www.regulations.gov,* or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online, it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* type the docket number (USCG–2012–1013) in the ''SEARCH'' box and click ''SEARCH.'' Click on ''Submit a Comment'' on the line associated with this rulemaking.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

The comment period for this NPRM expires on December 30, 2012. The Super Bowl events for which this safety zone is intended to be effective begin the last week of January 2013, therefore a comment period extending beyond December 2012 could delay publication of the final rule. While the Coast Guard does not expect significant public comment for this rule as the safety zone will not significantly impact navigation, we will consider requests to extend the comment period.

*2. Viewing Comments and Documents*

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number (USCG–2012–1013) in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

*3. Privacy Act*

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

*4. Public Meeting*

We do not now plan to hold a public meeting. But you may submit a request for one on or before December 3, 2012, using one of the methods specified under **ADDRESSES**. Please explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

**B. Basis and Purpose**

The 2013 National Football League Super Bowl in New Orleans, Louisiana will occur on February 3, 2013. This is a very high profile event, with tens of thousands of people expected to attend events at Woldenburg Park and other Mississippi River riverfront locations before, during, and after the football game. Due to the unusually large crowds expected along the riverfront, the consequences to the public of an incident involving a vessel in the immediate area will greatly increase. To address this concern, the Captain of the Port New Orleans intends to establish a temporary safety zone on the Mississippi River in the vicinity of Woldenburg Park, mile marker 94 to mile marker 96, extending out 300 feet from the East Bank of the Mississippi River. This safety zone would be established to protect the public from the potential hazards created by congested river traffic. All vessels would be prohibited from entering into or transiting through the safety zone without prior approval of the Captain of the Port New Orleans.

The legal basis and authorities for this rule are found in 33 U.S.C. 1231, 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Public Law 107–295, 116 Stat. 2064; and Department of Homeland Security Delegation No. 0170.1, which collectively authorize the Coast Guard to propose, establish, and define regulatory safety zones.

**C. Discussion of Proposed Rule**

The Captain of the Port New Orleans intends to establish a temporary safety zone on the Mississippi River in the vicinity of Woldenburg Park, New Orleans, Louisiana, mile marker 94 to mile marker 96, extending out 300 feet from the East Bank of the Mississippi River. This zone will be in effect from 6:00 a.m. on January 29, 2013 through 6:00 a.m. on February 4, 2013. The zone will be enforced between the hours of 8:00 a.m. and 10:00 p.m. on each day of the effective period described above. All vessels would be prohibited from entering into, remaining within, or transiting through the safety zone without prior approval of the Captain of the Port New Orleans.

**D. Regulatory Analyses**

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

*1. Regulatory Planning and Review*

This proposed rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders. The impacts on navigation will

be minimal due to the duration and location of the safety zone, and the fact that vessels will be able to safely navigate around this area on the Mississippi River. Additionally, vessels may request permission from the Captain of the Port to enter into or transit though the safety zone.

*2. Impact on Small Entities*

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered the impact of this proposed rule on small entities. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule will not have a significant economic impact on a substantial number of small entities.

This proposed rule would affect the following entities, some of which might be small entities: The owners or operators of vessels intending to transit on the Mississippi River in the Vicinity of Woldenburg Park, New Orleans, Louisiana, mile marker 94 to mile marker 96, between 6:00 a.m. on January 29, 2013 through 6:00 a.m. on February 4, 2013.

This safety zone would not have a significant economic impact on a substantial number of small entities because most vessel traffic could pass safely around the safety zone. Vessel traffic that cannot pass safely around the safety zone would be allowed to pass through the zone with the permission of the Captain of the Port New Orleans. Before the activation of the safety zone, the Captain of the Port New Orleans would issue maritime advisories widely available to users of the river.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

*3. Assistance for Small Entities*

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT**, above. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

*4. Collection of Information*

This proposed rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520.).

*5. Federalism*

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this proposed rule under that Order and determined that this rule does not have implications for federalism.

*6. Protest Activities*

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

*7. Unfunded Mandates Reform Act*

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

*8. Taking of Private Property*

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

*9. Civil Justice Reform*

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

*10. Protection of Children From Environmental Health Risks*

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

*11. Indian Tribal Governments*

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

*12. Energy Effects*

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

*13. Technical Standards*

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

*14. Environment*

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. A preliminary ''Environmental Analysis Checklist'' supporting this determination will be available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

**List of Subjects in 33 CFR Part 165**

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

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

## PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

**Authority:** 33 U.S.C. 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

2. Add § 165.T08–1013 to read as follows:

**§ 165.T08–1013 Safety Zone; Woldenburg Park, Mississippi River, New Orleans, LA.**

(a) *Location.* The following area is a safety zone: The waters on the Mississippi River in the vicinity of Woldenburg Park, New Orleans, Louisiana, mile marker 94 to mile marker 96, extending out approximately 300 feet from the East Bank of the Mississippi River.

(b) *Effective Dates:* This rule is effective from 6:00 a.m. on January 29, 2013 through 6:00 a.m. on February 4, 2013.

(c) *Enforcement Periods:* This safety zone will be enforced from 8:00 a.m. until 10:00 p.m. on each day of the effective dates described in paragraph (b).

(c) *Regulations.* (1) In accordance with the general regulation in 165.23 of this part, vessels must not enter into, remain within, or transit through this safety zone, unless authorized by the Captain of the Port New Orleans.

(2) Vessels requiring entry into or passage through the Safety Zone must request permission from the Captain of the Port New Orleans, or a designated representative. The Captain of the Port New Orleans, or a designated representative, may be contacted on VHF–16, or by telephone at (504) 365–2543.

(3) All persons and vessels shall comply with the instructions of the Captain of the Port New Orleans and designated personnel. Designated personnel include commissioned, warrant, and petty officers of the U.S. Coast Guard.

Dated: December 5, 2012.

**P.W. Gautier,**

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

FR Doc. 2012–30626 Filed 12–18–12; 8:45 am]

**BILLING CODE 9110–04–P**

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 180

**[EPA–HQ–OPP–2012–0001; FRL–9372–6]**

## Notice of Receipt of Several Pesticide Petitions Filed for Residues of Pesticide Chemicals in or on Various Commodities

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of filing of petitions and request for comment.

**SUMMARY:** This document announces the Agency's receipt of several initial filings of pesticide petitions requesting the establishment or modification of regulations for residues of pesticide chemicals in or on various commodities.

**DATES:** Comments must be received on or before January 18, 2013.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number and the pesticide petition number (PP) of interest as shown in the body of this document, by one of the following methods:

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

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

**FOR FURTHER INFORMATION CONTACT:** A contact person, with telephone number and email address, is listed at the end of each pesticide petition summary. You may also reach each contact person by mail at Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this action apply to me?*

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

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

If you have any questions regarding the applicability of this action to a particular entity, consult the person listed at the end of the pesticide petition summary of interest.

*B. What should I consider as I prepare my comments for EPA?*

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

**II. What action is the agency taking?**

EPA is announcing its receipt of several pesticide petitions filed under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), (21 U.S.C. 346a), requesting the establishment or modification of regulations in 40 CFR part 180 for residues of pesticide chemicals in or on various food commodities. The Agency is taking public comment on the requests before responding to the petitioners. EPA is not proposing any particular action at this time. EPA has determined that the pesticide petitions described in this document contain the data or information prescribed in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the pesticide petitions. After considering the public comments, EPA intends to evaluate whether and what action may be warranted. Additional data may be needed before EPA can make a final determination on these pesticide petitions.

Pursuant to 40 CFR 180.7(f), a summary of each of the petitions that are the subject of this document, prepared by the petitioner, is included in a docket EPA has created for each rulemaking. The docket for each of the petitions is available online at *http://www.regulations.gov.*

As specified in FFDCA section 408(d)(3), (21 U.S.C. 346a(d)(3)), EPA is publishing notice of the petition so that the public has an opportunity to comment on this request for the establishment or modification of regulations for residues of pesticides in or on food commodities. Further information on the petition may be obtained through the petition summary referenced in this unit.

New Tolerances

1. *PP 2E7980.* (EPA–HQ–OPP–2012–0454). Syngenta Crop Protection, LLC, P.O. Box 18300, Greensboro, NC 27419–8300, requests to establish tolerances in 40 CFR part 180 for residues of the fungicide fenpropidin, 1-[3-[4-(1,1-dimethylethyl) phenyl]-2-methyl-propyl] piperidine in or on banana, unbagged fruit at 9 parts per million (ppm) and banana, pulp from unbagged fruit at 0.4 ppm using the Organization for Economic Cooperation and Development/Maximum residue level (OECD/MRL) calculator. An adequate, validated method is available for enforcement purposes (method REM 164.09). Final determination is carried out with triple quadrupole mass spectrometric detection liquid chromatography-mass spectrometry ((LC–MS/MS), Applied Biosystems API 3,000 detector). Contact: Tamue L. Gibson, (703) 305–9096, email address: *gibson.tamue@epa.gov.*

2. *PP 2E8011.* (EPA–HQ–OPP–2012–0858). Syngenta Crop Protection, LLC, P.O. Box 18300, Greensboro, NC, 27419, requests to establish a tolerance in 40 CFR part 180 for residues of the insecticide thiamethoxam (3-[(2-chloro-5-thiazolyl)methyl] tetrahydro-5-methyl-*N*-nitro-4*H*-1,3,5-oxadiazin-4-imine) (CAS Reg. No. 153719–23–4) and its metabolite [*N*-(2-chloro-thiazol-5-yl)methyl]-*N*′-methyl-*N*′-nitro-guanidine, in or on tea at 20 ppm. Syngenta Crop Protection, LLC, has submitted practical analytical methodology for detecting and measuring levels of thiamethoxam in or on raw agricultural commodities. This method is based on crop specific cleanup procedures and determination by LC with either ultraviolet (UV) or mass spectrometry (MS) detections. Contact: Jennifer Urbanski, (703) 347–0156, email address: *urbanski.jennifer@epa.gov.*

3. *PP 1F7826.* (EPA–HQ–OPP–2012–0815). State of Florida, Department of Citrus, 605 East Main Street, P.O. Box 9010, Bartow, FL 33831–9010, requests to establish tolerances in 40 CFR part 180 for residues of the fungicide 5-chloro-3-methyl-4-nitro-1*H*-pyrazole (CMNP) and its metabolite (5-chloro-4-nitro-1*H*-pyrazol-3-yl)-methanol (CHNP), in or on oranges at 0.80 ppm and its processed commodities: Orange, juice at 0.025 ppm; orange, oil at 0.070 ppm; and orange, dried pulp (also referred to as dried pomace) at 1.80 ppm. In all plant matrices, the residue of concern, parent CMNP and CHNP/CHNP glucoside, can be determined using high performance liquid chromatography/tandem mass spectrometry (HPLC/MS–MS) following sample extraction, hydrolysis (to convert CHNP-glucoside to its aglycone, CHNP) and solid-phase clean up. Contact: Tony Kish, (703) 308–9443, email address: *kish.tony@epa.gov.*

4. *PP 2F8044.* (EPA–HQ–OPP–2012–0876). Bayer CropScience, 2 T.W. Alexander Drive, P.O. Box 12014, Research Triangle Park, NC 27709, requests to establish tolerances in 40 CFR part 180 for residues of the fungicide prothioconazole, 2-[2-(1-chlorocyclopropyl)-3-(2-chlorophenyl-2-hydroxypropyl]-1,2-dihydro-3*H*-1,2,4-triazole-3-thione and its desthio metabolite, in or on bushberry crop subgroup 13–07B at 2.0 ppm; low growing berry crop subgroup 13–07H (except strawberry) at 0.15 ppm; and cucurbit vegetables crop group 9 at 0.3 ppm. The analytical method for determining residues of concern in plants extracts residues of prothioconazole and JAU6476-desthio and converts the prothioconazole to JAU6476-desthio and JAU6476-sulfonic acid. Following the addition of internal standards, the sample extracts are analyzed by LC/MS/MS. The analytical method for analysis of large animal tissues includes extraction of the residues of concern, followed by addition of an internal standard to the extract. The extract is then hydrolyzed to release conjugates, partitioned and analyzed by LC/MS/MS as prothioconazole, JAU6476-desthio and JAU6476–4-hydroxy. The method for analysis of milk eliminated the initial extraction step in the tissue method. Contact: Rosemary Kearns, (703) 305–5611, email address: *kearns.rosemary@epa.gov.*

5. *PP 2F8053.* (EPA–HQ–OPP–2012–0638). BASF Corporation, 26 Davis Drive, P.O. Box 13528, Research Triangle Park, NC 27709–3528, requests to establish tolerances in 40 CFR part 180 for residues of the fungicide fluxapyroxad, (BAS 700 F); 1*H*-Pyrazole-4-carboxamide,3-(difluoromethyl)-1-methyl-*N*-(3′,4′,5′-trifluoro[1,1′-biphenyl]-2-yl)-, its metabolites, and degradates, in or on almond at 0.05 ppm; almond, hulls at 4.0 ppm; berry, low growing, subgroup 13–07G at 4.0 ppm; bushberry, subgroup 13–07B at 6.0 ppm; caneberry, subgroup 13–07A at 6.0 ppm; fruit, small, vine climbing, except fuzzy kiwifruit, subgroup 13–07F at 2.0 ppm; grapes at 2.0 ppm; grapes, raisin at 5.7 ppm; pecans at 0.05 ppm; rice, bran at 8.5 ppm; rice, grain at 5.0 ppm; rice, hulls

at 15.0 ppm; rice, straw at 20.0 ppm; strawberry at 4.0 ppm; sugarcane, cane at 3.0 ppm; vegetable, *Brassica* leafy, group 5 at 3.0 ppm; vegetable, bulb, group 3–07 at 0.8 ppm; vegetable, cucurbit, group 9 at 0.4 ppm; vegetable, leafy, except *Brassica,* group 4 at 15.0 ppm; vegetable, root, except sugar beet, subgroup 1B at 0.7 ppm. Independently validated analytical methods have been submitted for analyzing residues of parent BAS 700 F (fluxapyroxad) plus metabolites M700F008, M700F048 and M700F002 with appropriate sensitivity in all the crop and processed commodities for root and tuber vegetables, subgroups 1A,1C, D, sugar beet tops, legume vegetables including soybean, group 6, foliage of legume vegetables, group 7, fruiting vegetables, group 8, pome fruits, group 11, stone fruits, group 12, cereal grains, group 15, forage, fodder and straw of cereal grains, group 16, cotton, canola, rapeseed, sunflower, and peanut, and in animal meat, fat, liver and kidney matrices, poultry meat, fat, liver and skin, milk, cream and eggs for which tolerances have been established. Contact: Olga Odiott, (703) 308–9369, email address: *odiott.olga@epa.gov.*

6. *PP 2F8067.* (EPA–HQ–OPP–2012–0841). Monsanto Company, 1300 I St., NW., Suite 450 East, Washington, DC 20052, requests to establish tolerances in 40 CFR part 180 for residues of the herbicide dicamba, (3,6-dichloro-*o*-anisic and its metabolites 3,6-dichloro-5-hydroxy-*o*-anisic acid (5–OH dicamba) and 3,6-dichloro-2-hydroxybenzoic acid (DCSA), in or on cotton, undelinted seed at 3 ppm and cotton, gin byproducts at 70 ppm. Adequate enforcement methods are available for the analysis of residues of dicamba and its relevant metabolites in or on plant and livestock commodities. Pesticide Analytical Manual (PAM) Vol. II, lists appropriate analytical methods, based on GC with electron capture detection (GC/ECD), that are sufficient to provide for the enforcement of proposed dicamba tolerances in cottonseed and cotton gin by-products. Contact: Michael Walsh, (703) 308–2972, email address: *walsh.michael@epa.gov.*

7. *PP 2F8076.* (EPA–HQ–OPP–2012–0796). Chemtura Corporation, 199 Benson Rd, Middlebury, CT 06749, requests to establish a tolerance in 40 CFR part 180 for residues of the fungicide ipconazole (2-[(4-chlorophenyl)methyl]-5-(1-methylethyl)-1-(1H–1,2,4-triazole-1-ylmethyl)cyclopentanol) from the treatment of seed prior to planting in or on legume vegetables, succulent or dried, crop group 6 at 0.01 ppm. Analytical methods have been developed, validated (including radiovalidation), and independently validated for the determination of ipconazole, triazolylalanine, triazolylacetic acid and triazolylpyruvate in wheat forage, hay, straw, and grain and in corn forage, cobs and straw using LC–MS/MS. Contact: Dominic Schuler, (703) 347–0260, email address: *schuler.dominic@epa.gov.*

8. *PP 2F8113.* (EPA–HQ–OPP–2012–0885). Syngenta Crop Protection, LLC, 410 Swing Road, P.O. Box 18300, Greensboro, NC 27419–8300, requests to establish tolerances in 40 CFR part 180 for residues of the fungicide sedaxane, *N* -[2-[1,1′-bicyclopropyl]-2-ylphenyl]-3-(difluoromethyl)-1-methyl-1 *H* -pyrazole-4-carboxamide, as the sum of its *cis*- and *trans*- isomers, as a seed treatment in or on potato at 0.02 ppm and potato, wet peel at 0.06 ppm. Various crops were analyzed for sedaxane (parent only) using a procedure for analysis of sedaxane (SYN524464) that can distinguish between its *trans*- and *cis*- isomers (SYN508210 and SYN508211). Plant matrices using method GRM023.01A, or modified method GRM023.01B are taken through an extraction procedure with final determination by high performance liquid chromatography (HPLC) with triple quadrupole MS detection (LC–MS/MS). Contact: Heather Garvie, (703) 308–0034, email address: *garvie.heather@epa.gov.*

Amended Tolerances

1. *PP 2F7992.* (EPA–HQ–OPP–2012–0575). Syngenta Crop Protection, LLC, Regulatory Affairs, P.O. Box 18300, Greensboro, NC 27419–8300, requests to amend the tolerances in § 180.475 for residues of the fungicide difenoconazole, 1 [2-[2-chloro-4-(4-chlorophenoxy)]phenyl-4-methyl-1,3-dioxolan-2-ylmethyl]-1H–1,2,4,-triazole), in or on vegetables, tuberous and corm, subgroup 1C from 0.01 ppm to 4.0 ppm; and by removing the established tolerance in or on the raw agricultural commodity potatoes, processed waste at 0.04 ppm. Syngenta Crop Protection, Inc., has submitted a practical analytical method (AG–575B) for detecting and measuring levels of difenoconazole in or on food with a limit of quantitation (LOQ) that allows monitoring of food with residues at or above the levels set in the proposed tolerances. Residues are qualified by LC/MS/MS; and has submitted a practical analytical method (AG–544A) for detecting and measuring levels of difenoconazole in or on cattle tissues and milk and poultry tissues and eggs, with a LOQ that allows monitoring of food with residues at or above the levels set in the proposed tolerances. Contact: Rosemary Kearns, (703) 305–5611, email address: *kearns.rosemary@epa.gov.*

2. *PP 2F8076.* (EPA–HQ–OPP–2012–0796). Chemtura Corporation, 199 Benson Rd, Middlebury, CT 06749, requests to amend the tolerance in § 180.646 for residues of the fungicide ipconazole, (2-[(4-chlorophenyl)methyl]-5-(1-methylethyl)-1-(1H–1,2,4-triazole-1-ylmethyl)cyclopentanol) by deleting the tolerance for pea and bean, dried shelled, except soybean, subgroup 6C at 0.01 ppm, upon approval of legume vegetables (succulent or dried), crop group 6 at 0.01 ppm under ''New Tolerance'' for *PP 2F8076.* Contact: Dominic Schuler, (703) 347–0260, email address: *schuler.dominic@epa.gov.*

3. *PP 2F8085.* (EPA–HQ–OPP–2012–0843). Dow AgroSciences, LLC, 9330 Zionsville Road, Indianapolis, IN 46268, requests to amend the tolerances in § 180.560 for the combined residues of cloquintocet-mexyl (acetic acid, [(5-chloro-8-quniolinyl)oxy]-, 1-methylhexyl ester) (CAS No. 99607–70–2) and its acid metabolite (5-chloro-8-quinlinoxyacetic acid), when used as an inert ingredient (safener) in pesticide formulations containing the new active ingredient halauxifen-methyl (XDE–729 methyl), in or on barley, grain at 0.1 ppm; barley, hay at 0.1 ppm; barley, straw at 0.1 ppm; wheat, forage at 0.2 ppm; wheat, grain at 0.1ppm; wheat, hay at 0.5 ppm; and wheat, straw at 0.1 ppm. Specifically, this pesticide petition proposes to amend the tolerance expression by adding a reference to the new herbicide active ingredient halauxifen-methyl (XDE–729 methyl). Tolerances are already established for use of cloquintocet-mexyl in conjunction with other herbicides. This petition will not change the established tolerance levels. Adequate enforcement methodology is available to enforce the tolerance expression in the **Federal Register** of June 29, 2011 (76 FR 38035) (FRL–8877–2). There are two enforcement methods available. The HPLC with Ultraviolet Detection (HPLC/UV) method REM 138.01 is for the determination of cloquintocet-mexyl (parent) and the HPLC/UV Method REM 138.10 allows determination of its acid metabolite (also known as CGA–153433). Contact: Mindy Ondish, (703) 605–0723, email address: *ondish.mindy@epa.gov.*

New Tolerance Exemptions

1. *PP 2E8027.* (EPA–HQ–OPP–2012–0777). Honeywell International, Inc., 101 Columbia Road, Morristown, NJ 07962–1053, requests to establish an

exemption from the requirement of a tolerance for residues of trans-1-chloro-3,3,3-trifluoropropene (CAS No. 102687–65–0) under §§ 180.910, 180.930, and 180.940 when used as a pesticide inert ingredient (propellant) in pesticide formulations. No analytical method is included as this is a petition for exemption from the requirements of a tolerance. Contact: Lisa Austin, (703) 305–7894, email address: *austin.lisa@epa.gov.*

2. *PP 2E8082.* (EPA–HQ–OPP–2012–0789). Sekisui Specialty Chemicals, 1501 West, LBJ Freeway, Dallas, TX 75234, requests to establish an exemption from the requirement of a tolerance for residues of 2-pyrrolidone, 1-ethenyl-, polymer with ethenol (CAS No. 26008–54–8) under § 180.960 when used as a pesticide inert ingredient in pesticide formulations for a packaging film for unit dose packaging of pesticides and pool sanitizers. The petitioner believes no analytical method is needed because it is not required for the establishment of a tolerance exemption for inert ingredients. Contact: David Lieu, (703) 305–0079, email address: *lieu.david@epa.gov.*

**List of Subjects**

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: December 11, 2012.

**Lois Rossi,**

*Director, Registration Division, Office of Pesticide Programs.*

[FR Doc. 2012–30450 Filed 12–18–12; 8:45 am]

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 721

**[EPA–HQ–OPPT–2011–0577; FRL–9370–1]**

**RIN 2070–AB27**

## Proposed Significant New Use Rule on Ethoxylated, Propoxylated Diamine Diaryl Substituted Phenylmethane Ester With Alkenylsuccinate, Dialkylethanolamine Salt

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing a significant new use rule (SNUR) under the Toxic Substances Control Act (TSCA) for the chemical substance identified generically as ethoxylated, propoxylated diamine diaryl substituted phenylmethane ester with alkenylsuccinate, dialkylethanolamine salt, which was the subject of premanufacture notice (PMN) P–01–384. This action would require persons who intend to manufacture, import, or process this chemical substance for an activity that is designated as a significant new use by this proposed rule to notify EPA at least 90 days before commencing that activity. The required notification would provide EPA with the opportunity to evaluate the intended use and, if necessary, to prohibit or limit the activity before it occurs.

**DATES:** Comments must be received on or before January 18, 2013.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2011–0577, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* OPPT Document Control Office (DCO), EPA East Bldg., Rm. 6428, 1201 Constitution Ave., NW., Washington, DC. ATTN: Docket ID Number EPA–HQ–OPPT–2011–0577. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564–8930. Such deliveries are only accepted during the DCO's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to docket ID number EPA–HQ–OPPT–2011–0577. EPA's policy is that all comments received will be included in the docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or email. The regulations.gov Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through regulations.gov, your email address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket:* All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available electronically at *http://www.regulations.gov,* or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave. NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

**FOR FURTHER INFORMATION CONTACT:**

*For technical information contact:* Kenneth Moss, Chemical Control Division (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (202) 564–9232; email address: *moss.kenneth@epa.gov.*

*For general information contact:* The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave. Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this action apply to me?*

You may be potentially affected by this action if you manufacture, import, process, or use the chemical substance

generically identified as ethoxylated, propoxylated diamine diaryl substituted phenylmethane ester with alkenylsuccinate, dialkylethanolamine salt (generic). Potentially affected entities may include:

• Manufacturers, importers, or processors of the subject chemical substance (NAICS codes 325 and 324110), e.g., chemical manufacturing and petroleum refineries.

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. To determine whether you or your business may be affected by this action, you should carefully examine the applicability provisions in § 721.5. If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

This action may also affect certain entities through pre-existing import certification and export notification rules under TSCA. Chemical importers are subject to the TSCA section 13 (15 U.S.C. 2612) import certification requirements promulgated at 19 CFR 12.118 through 12.127; see also 19 CFR 127.28. Chemical importers must certify that the shipment of the chemical substance complies with all applicable rules and orders under TSCA. Importers of chemicals subject to a final SNUR must certify their compliance with the SNUR requirements. The EPA policy in support of import certification appears at 40 CFR part 707, subpart B. In addition, any persons who export or intend to export a chemical substance that is the subject of a proposed or final SNUR, are subject to the export notification provisions of TSCA section 12(b) (15 U.S.C. 2611(b)) (see § 721.20), and must comply with the export notification requirements in 40 CFR part 707, subpart D.

*B. What should I consider as I prepare my comments for EPA?*

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

## II. Background

*A. What action is the agency taking?*

EPA is proposing a SNUR under section 5(a)(2) of TSCA for the chemical substance identified generically as ethoxylated, propoxylated diamine diaryl substituted phenylmethane ester with alkenylsuccinate, dialkylethanolamine salt, which was the subject of PMN P–01–384. This SNUR would require persons who intend to manufacture, import, or process the chemical substance for an activity that is designated as a significant new use to notify EPA at least 90 days before commencing that activity.

In the **Federal Register** of April 27, 2012 (77 FR 23236) (FRL–9343–4), EPA issued a direct final rule which established a SNUR for ethoxylated, propoxylated diamine diaryl substituted phenylmethane ester with alkenylsuccinate, dialkylethanolamine salt (generic) in accordance with the procedures at 40 CFR 721.160(c)(3)(i). EPA received notice of intent to submit adverse comments on this SNUR. Therefore, as required by § 721.160(c)(3)(ii), EPA withdrew the direct final SNUR in the **Federal Register** of July 25, 2012 (77 FR 43520) (FRL–9356–1), and is now issuing this proposed rule on the chemical substance. The record for the direct final SNUR on this substance was established as docket EPA–HQ–OPPT–2011–0577. That record includes information considered by the Agency in developing the direct final rule and the notice of intent to submit adverse comments.

*B. What is the agency's authority for taking this action?*

Section 5(a)(2) of TSCA (15 U.S.C. 2604(a)(2)) authorizes EPA to determine that a use of a chemical substance is a ''significant new use.'' EPA must make this determination by rule after considering all relevant factors, including the four bulleted TSCA section 5(a)(2) factors listed in Unit III. Once EPA determines that a use of a chemical substance is a significant new use, TSCA section 5(a)(1)(B) requires persons to submit a significant new use notice (SNUN) to EPA at least 90 days before they manufacture, import, or process the chemical substance for that use. Persons who must report are described in § 721.5.

*C. Applicability of General Provisions*

General provisions for SNURs appear in 40 CFR part 721, subpart A. These provisions describe persons subject to the rule, recordkeeping requirements, exemptions to reporting requirements, and applicability of the rule to uses occurring before the effective date of the rule. Provisions relating to user fees appear at 40 CFR part 700. According to § 721.1(c), persons subject to this SNUR must comply with the same notice requirements and EPA regulatory procedures as submitters of PMNs under TSCA section 5(a)(1)(A). In particular, these requirements include the information submission requirements of TSCA section 5(b) and 5(d)(1), the exemptions authorized by TSCA section 5(h)(1), (h)(2), (h)(3), and (h)(5), and the regulations at 40 CFR part 720. Once EPA receives a SNUN, EPA may take regulatory action under TSCA section 5(e), 5(f), 6, or 7 to control the activities for which it has received the SNUN. If EPA does not take action, EPA is required under TSCA section 5(g) to explain in the **Federal Register** its reasons for not taking action.

## III. Significant New Use Determination

Section 5(a)(2) of TSCA states that EPA's determination that a use of a chemical substance is a significant new

use must be made after consideration of all relevant factors, including:

- The projected volume of manufacturing and processing of a chemical substance.
- The extent to which a use changes the type or form of exposure of human beings or the environment to a chemical substance.
- The extent to which a use increases the magnitude and duration of exposure of human beings or the environment to a chemical substance.
- The reasonably anticipated manner and methods of manufacturing, processing, distribution in commerce, and disposal of a chemical substance.

In addition to these factors enumerated in TSCA section 5(a)(2), the statute authorized EPA to consider any other relevant factors.

To determine what would constitute a significant new use for the chemical substance that is the subject of this proposed SNUR, EPA considered relevant information about the toxicity of the chemical substance, likely human exposures and environmental releases associated with possible uses, and the four bulleted TSCA section 5(a)(2) factors listed in this unit.

## IV. Substance Subject to This Proposed Rule

This proposed SNUR is for a PMN substance which EPA did not find that the use scenario described in the PMN triggered the determinations set forth under TSCA section 5(e). However, EPA does believe that certain changes from the use scenario described in the PMN could result in increased exposures, thereby constituting a ''significant new use.'' These so-called ''non-section 5(e) SNURs'' are promulgated pursuant to § 721.170. EPA has determined that every activity designated as a ''significant new use'' in all non-section 5(e) SNURs issued under § 721.170 satisfies the two requirements stipulated in § 721.170(c)(2), i.e., these significant new use activities, ''(i) are different from those described in the premanufacture notice for the substance, including any amendments, deletions, and additions of activities to the premanufacture notice, and (ii) may be accompanied by changes in exposure or release levels that are significant in relation to the health or environmental concerns identified'' for the PMN substance.

*PMN Number P–01–384*

*Chemical name:* Ethoxylated, propoxylated diamine diaryl substituted phenylmethane ester with alkenylsuccinate, dialkylethanolamine salt (generic).

*CAS number:* Not available.

*Basis for action:* The PMN states that the generic (non-confidential) use of the substance will be as a colorant for aqueous ink applications. Based on ecological structure activity relationship (EcoSAR) analysis of test data on analogous amphoteric dyes, EPA predicts toxicity to aquatic organisms may occur at concentrations that exceed 70 parts per billion (ppb) of the PMN substance in surface waters for greater than 20 days per year. This 20-day criterion is derived from partial life cycle tests (daphnid chronic and fish early-life stage tests) that typically range from 21 to 28 days in duration. EPA predicts toxicity to aquatic organisms may occur if releases of the PMN substance to surface water exceed releases from the use described in the PMN. For the use described in the PMN, environmental releases did not exceed 70 ppb for more than 20 days per year. Therefore, EPA has not determined that the proposed manufacturing, processing, or use of the substance may present an unreasonable risk. EPA has determined, however, that any use of the substance other than as described in the PMN, or any release of a manufacturing waste stream containing the PMN substance into the waters of the United States without prior chemical destruction or conversion, may cause significant adverse environmental effects. Based on this information, the PMN substance meets the concern criteria at § 721.170(b)(4)(ii).

*Recommended testing:* EPA has determined that the results of a fish early-life stage toxicity test (OPPTS Test Guideline 850.1400) and a daphnid chronic toxicity test (OPPTS Test Guideline 850.1300) would help to characterize the environmental effects of the PMN substance.

*CFR citation:* 40 CFR 721.10308.

## V. Rationale and Objectives of the Proposed Rule

### *A. Rationale*

During review of the PMN submitted for the chemical substance generically identified as ethoxylated, propoxylated diamine diaryl substituted phenylmethane ester with alkenylsuccinate, dialkylethanolamine salt, EPA determined that one or more of the criteria of concern established at § 721.170 were met, as discussed in Unit IV.

Based upon comments received on the direct final rule, the proposed SNUR for 40 CFR 721.10308, includes the following changes:

1. Redesignation of paragraph (a)(2)(i) as (a)(2)(ii).
2. Revision of the new paragraph (a)(2)(ii).
3. Addition of new paragraph (a)(2)(i).

### *B. Objectives*

EPA is proposing this SNUR for ethoxylated, propoxylated diamine diaryl substituted phenylmethane ester with alkenylsuccinate, dialkylethanolamine salt, which has undergone PMN review, because the Agency wants to achieve the following objectives with regard to the significant new uses designated in this proposed rule:

- EPA would receive notice of any person's intent to manufacture, import, or process this chemical substance for the described significant new use before that activity begins.
- EPA would have an opportunity to review and evaluate data submitted in a SNUN before the notice submitter begins manufacturing, importing, or processing this chemical substance for the described significant new use.
- EPA would be able to regulate prospective manufacturers, importers, or processors of this chemical substance before the described significant new use of that chemical substance occurs, provided that regulation is warranted pursuant to TSCA sections 5(e), 5(f), 6, or 7.

Issuance of a SNUR for a chemical substance does not signify that the chemical substance is listed on the TSCA Inventory. Guidance on how to determine if a chemical substance is on the TSCA Inventory is available on the Internet at *http://www.epa.gov/opptintr/existingchemicals/pubs/tscainventory/index.html.*

## VI. Applicability of the Proposed Rule to Uses Occurring Before Effective Date of the Final Rule

To establish a significant ''new'' use, EPA must determine that the use is not ongoing. The chemical substance subject to this proposed rule has undergone premanufacture review. EPA is soliciting comments on whether any of the uses proposed as significant new uses are ongoing.

As discussed in the final SNUR rule published in the **Federal Register** issue of April 24, 1990, (55 FR 17376), EPA has decided that the intent of TSCA section 5(a)(1)(B) is best served by designating a use as a significant new use as of the date of publication of the previous direct final rule rather than as of the effective date of this final rule. If uses begun after publication of the direct final were considered ongoing rather than new, it would be difficult for EPA to establish SNUR notice requirements because a person could

defeat the SNUR by initiating the significant new use before this final rule became effective, and then argue that the use was ongoing before the effective date of the rule. Thus, persons who begin commercial manufacture, import, or processing of the chemical substances regulated through this SNUR will have to cease any such activity before the effective date of this rule. To resume their activities, these persons would have to comply with all applicable SNUR notice requirements and wait until the notice review period, including any extensions, expires.

EPA has promulgated provisions to allow persons to comply with this SNUR before the effective date. If a person meets the conditions of advance compliance under § 721.45(h), the person is considered exempt from the requirements of the SNUR.

## VII. Test Data and Other Information

EPA recognizes that TSCA section 5 does not require developing any particular test data before submission of a SNUN. The two exceptions are:

1. Development of test data is required where the chemical substance subject to the SNUR is also subject to a test rule under TSCA section 4 (see TSCA section 5(b)(1)).

2. Development of test data may be necessary where the chemical substance has been listed under TSCA section 5(b)(4) (see TSCA section 5(b)(2)).

In the absence of a TSCA section 4 test rule or a TSCA section 5(b)(4) listing covering the chemical substance, persons are required only to submit test data in their possession or control and to describe any other data known to or reasonably ascertainable by them (see § 720.50). However, upon review of PMNs and SNUNs, the Agency has the authority to require appropriate testing. In cases where EPA issued a TSCA section 5(e) consent order that requires or recommends certain testing, Unit IV. would list those tests. Descriptions of tests are provided for informational purposes. EPA strongly encourages persons, before performing any testing, to consult with the Agency pertaining to protocol selection. To access the OCSPP test guidelines referenced in this document electronically, please go to *http://www.epa.gov/ocspp* and select ''Test Methods and Guidelines.''

The recommended tests specified in Unit IV. may not be the only means of addressing the potential risks of the chemical substance. However, submitting a SNUN without any test data may increase the likelihood that EPA will take action under TSCA section 5(e), particularly if satisfactory test results have not been obtained from a prior PMN or SNUN submitter. EPA recommends that potential SNUN submitters contact EPA early enough so that they will be able to conduct the appropriate tests.

SNUN submitters should be aware that EPA will be better able to evaluate SNUNs which provide detailed information on the following:

- Human exposure and environmental release that may result from the significant new use of the chemical substance.
- Potential benefits of the chemical substance.
- Information on risks posed by the chemical substance compared to risks posed by potential substitutes.

## VIII. SNUN Submissions

According to § 721.1(c), persons submitting a SNUN must comply with the same notice requirements and EPA regulatory procedures as persons submitting a PMN, including submission of test data on health and environmental effects as described in § 720.50. SNUNs must be submitted on EPA Form No. 7710–25, generated using e-PMN software, and submitted to the Agency in accordance with the procedures set forth in §§ 721.25 and 720.40. E–PMN software is available electronically at *http://www.epa.gov/opptintr/newchems.*

## IX. Economic Analysis

EPA has evaluated the potential costs of establishing SNUN requirements for potential manufacturers, importers, and processors of the chemical substance during the development of the direct final rule. EPA's complete economic analysis is available in the docket under docket ID number EPA–HQ–OPPT–2011–0577.

## X. Statutory and Executive Order Reviews

### *A. Executive Order 12866*

This proposed rule would establish a SNUR for one chemical substance that was the subject of a PMN. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993).

### *B. Paperwork Reduction Act*

According to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* an Agency may not conduct or sponsor, and a person is not required to respond to a collection of information that requires OMB approval under PRA, unless it has been approved by OMB and displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in Title 40 of the CFR, after appearing in the **Federal Register**, are listed in 40 CFR part 9, and included on the related collection instrument or form, if applicable. EPA is amending the table in 40 CFR part 9 to list the OMB approval number for the information collection requirements contained in this proposed rule. This listing of the OMB control numbers and their subsequent codification in the CFR satisfies the display requirements of PRA and OMB's implementing regulations at 5 CFR part 1320. This Information Collection Request (ICR) was previously subject to public notice and comment prior to OMB approval, and given the technical nature of the table, EPA finds that further notice and comment to amend it is unnecessary. As a result, EPA finds that there is ''good cause'' under section 553(b)(3)(B) of the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(B), to amend this table without further notice and comment.

The information collection requirements related to this action have already been approved by OMB pursuant to PRA under OMB control number 2070–0012 (EPA ICR No. 574). This action would not impose any burden requiring additional OMB approval. If an entity were to submit a SNUN to the Agency, the annual burden is estimated to average between 30 and 170 hours per response. This burden estimate includes the time needed to review instructions, search existing data sources, gather and maintain the data needed, and complete, review, and submit the required SNUN.

Send any comments about the accuracy of the burden estimate, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques, to the Director, Collection Strategies Division, Office of Environmental Information (2822T), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001. Please remember to include the OMB control number in any correspondence, but do not submit any completed forms to this address.

### *C. Regulatory Flexibility Act*

On February 18, 2012, EPA certified pursuant to RFA section 605(b) (5 U.S.C. 601 *et seq.*), that promulgation of a SNUR does not have a significant economic impact on a substantial number of small entities where the following are true:

1. A significant number of SNUNs would not be submitted by small entities in response to the SNUR.

2. The SNUR submitted by any small entity would not cost significantly more than $8,300.

A copy of that certification is available in the docket for this proposed rule.

This proposed rule is within the scope of the February 18, 2012 certification. Based on the Economic Analysis discussed in Unit IX. and EPA's experience promulgating SNURs (discussed in the certification), EPA believes that the following are true:

- A significant number of SNUNs would not be submitted by small entities in response to the SNUR.
- Submission of the SNUN would not cost any small entity significantly more than $8,300.

Therefore, the promulgation of the SNUR would not have a significant economic impact on a substantial number of small entities.

*D. Unfunded Mandates Reform Act (UMRA)*

Based on EPA's experience with proposing and finalizing SNURs, State, local, and Tribal governments have not been impacted by these rulemakings, and EPA does not have any reasons to believe that any State, local, or Tribal government would be impacted by this proposed rule when promulgated as final. As such, EPA has determined that this proposed rule, when promulgated as final, would not impose any enforceable duty, contain any unfunded mandate, or otherwise have any effect on small governments subject to the requirements of sections 202, 203, 204, or 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4).

*E. Executive Order 13132*

This action would not have a substantial direct effect on 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, entitled ''Federalism'' (64 FR 43255, August 10, 1999).

*F. Executive Order 13175*

This proposed rule would not have Tribal implications because it is not expected to have substantial direct effects on Indian Tribes. This proposed rule would not significantly nor uniquely affect the communities of Indian Tribal governments, nor would it involve or impose any requirements that affect Indian Tribes. Accordingly, the requirements of Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), do not apply to this proposed rule.

*G. Executive Order 13045*

This action is not subject to Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because this is not an economically significant regulatory action as defined by Executive Order 12866, and this action does not address environmental health or safety risks disproportionately affecting children.

*H. Executive Order 13211*

This proposed rule is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001), because this action is not expected to affect energy supply, distribution, or use and because this action is not a significant regulatory action under Executive Order 12866.

*I. National Technology Transfer and Advancement Act*

Since this action does not involve any technical standards, section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, (15 U.S.C. 272 note), does not apply to this action.

*J. Executive Order 12898*

This action does not entail special considerations of environmental justice related issues as delineated by Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

**List of Subjects in 40 CFR Part 721**

Environmental protection, Chemicals, Hazardous substances, Reporting and recordkeeping requirements.

Dated: December 10, 2012.

**Maria J. Doa,**

*Director, Chemical Control Division, Office of Pollution Prevention and Toxics.*

Therefore, it is proposed that 40 CFR part 721 be amended as follows:

## PART 721—[AMENDED]

1. The authority citation for part 721 continues to read as follows:

**Authority:** 15 U.S.C. 2604, 2607, and 2625(c).

2. Add § 721.10308 to subpart E to read as follows:

**§ 721.10308 Ethoxylated, propoxylated diamine diaryl substituted phenylmethane ester with alkenylsuccinate, dialkylethanolamine salt (generic).**

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as ethoxylated, propoxylated diamine diaryl substituted phenylmethane ester with alkenylsuccinate, dialkylethanolamine salt (PMN P–01–384) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(j).

(ii) *Release to water.* Requirements as specified in § 721.90(a)(2)(v).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a), (b), (c), (i), and (k) are applicable to manufacturers, importers, and processors of the substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

[FR Doc. 2012–30355 Filed 12–18–12; 8:45 am]

BILLING CODE 6560–50–P

## DEPARTMENT OF DEFENSE

## GENERAL SERVICES ADMINISTRATION

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

## 48 CFR Parts 12, 32, and 52

**[FAR Case 2012–031; Docket 2012–0031, Sequence 1]**

**RIN 9000–AM37**

## Federal Acquisition Regulation; Accelerated Payments to Small Business Subcontractors

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Proposed rule.

**SUMMARY:** DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement the temporary policy provided by Office of Management and Budget (OMB) Policy Memorandum M–12–16, dated July 11, 2012, by adding a

new clause to provide for the accelerated payments to small business subcontractors.

**DATES:** Interested parties should submit written comments to the Regulatory Secretariat at one of the addresses shown below on or before February 19, 2013 to be considered in the formation of the final rule.

**ADDRESSES:** Submit comments in response to FAR Case 2012–031 by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching for ''FAR Case 2012–031''. Select the link ''Submit a Comment'' that corresponds with FAR Case 2012–031. Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''FAR Case 2012–031'' on your attached document.
- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1275 First Street NE., 7th Floor, Washington, DC 20417.

*Instructions:* Please submit comments only and cite FAR case 2012–031, in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

**FOR FURTHER INFORMATION CONTACT:** Mr. Edward N. Chambers, Procurement Analyst, at 202–501–3221 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755. Please cite FAR Case 2012–031.

**SUPPLEMENTARY INFORMATION:**

## I. Background

DoD, GSA, and NASA are proposing to revise the FAR to implement a temporary policy that will provide for the acceleration of payments to small business subcontractors. On July 11, 2012, OMB released Policy Memorandum M–12–16, Providing Prompt Payment to Small Business Subcontractors, that outlined steps agencies shall take to ensure that prime contractors pay their small business subcontractors as promptly as possible. The temporary OMB policy of accelerating payments ends on July 10, 2013.

## II. Discussion and Analysis

The proposed rule establishes a new FAR clause at 52.232–XX, Providing Accelerated Payments to Small Business Subcontractors, which will require the prime contractor, upon receipt of accelerated payments from the Government, to make accelerated payments to small business subcontractors, to the maximum extent practicable, after receipt of a proper invoice and all proper documentation from small business subcontractors. The clause will be inserted into all new solicitations issued after the effective date of the final rule and resultant contracts, including solicitations and contracts for the acquisition of commercial items. This proposed rule does not provide any new rights under the Prompt Payment Act and does not affect the application of the Prompt Payment Act late payment interest provisions.

## III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 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). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

## IV. Regulatory Flexibility Act

The change may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because small business subcontractors should be paid more expeditiously by their prime contractors, improving small business cash flow overall. Therefore, an Initial Regulatory Flexibility Analysis (IRFA) has been prepared consistent with 5 U.S.C. 603, and is summarized as follows:

This proposed rule implements the temporary policy provided by OMB Policy Memorandum M–12–16, Providing Prompt Payment to Small Business Subcontractors, dated July 11, 2012, which is designed to accelerate payment from Federal contractors to their small business subcontractors. The rule imposes no reporting, recordkeeping, or other information collection requirements. The rule does not duplicate, overlap, or conflict with any other Federal rules, and there are no known significant alternatives to the rule.

The Regulatory Secretariat will be submitting a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by this proposed rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR case 2012–031) in correspondence.

## V. Paperwork Reduction Act

The proposed rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

## List of Subjects in 48 CFR Parts 12, 32, and 52

Government procurement.

Dated: December 14, 2012.

**Laura Auletta,**

*Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.*

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 12, 32, and 52 as set forth below:

1. The authority citation for 48 CFR parts 12, 32, and 52 are revised or continue to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; 42 U.S.C. 2473(c); and 51 U.S.C. 20113.

## PART 12—ACQUISITION OF COMMERCIAL ITEMS

2. Amend section 12.301 by adding paragraph (d)(4) to read as follows:

### 12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(d) * * *

(4) Insert the clause at 52.232–XX, Providing Accelerated Payments to Small Business Subcontractors, as prescribed in 32.009–2.

* * * * *

## PART 32—CONTRACT FINANCING

### 32.002 [Amended]

3. Amend section 32.002 by removing from paragraph (a)(1) ''32.005'' and adding ''32.009'' in its place.

4. Add section 32.009 to read as follows:

**32.009 Providing accelerated payments to small business subcontractors.**

**32.009–1 General.**

Pursuant to the policy provided by OMB Memorandum M–12–16, Agencies shall take measures to ensure that prime contractors pay small business subcontractors on an accelerated timetable to the maximum extent practicable, and upon receipt of accelerated payments from the Government. This acceleration does not provide any new rights under the Prompt Payment Act and does not affect the application of the Prompt Payment Act late payment interest provisions.

**32.009–2 Contract clause.**

Insert clause 52.232–XX, Providing Accelerated Payments to Small Business Subcontractors, in all solicitations and contracts.

## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. Amend section 52.213–4 by—

a. Revising the date of the clause;

b. Redesignating paragraphs (a)(2)(v) through (vii) as paragraphs (a)(2)(vi) through (viii), respectively; and

c. Adding a new paragraph (a)(2)(v).

The revision and addition read as follows:

**52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).**

* * * * *

**Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (Date)**

(a) * * *

(2) * * *

(v) 52.232–XX, Providing Accelerated Payments to Small Business Subcontractors (DATE).

* * * * *

6. Add section 52.232–XX to read as follows:

**52.232–XX Providing Accelerated Payments to Small Business Subcontractors.**

As prescribed in 32.009–2, insert the following clause:

**Providing Accelerated Payments to Small Business Subcontractors (Date)**

(a) Upon receipt of accelerated payments from the Government, the Contractor shall make accelerated payments to a small business subcontractor, to the maximum extent practicable and prior to when such payment is otherwise required under the applicable contract or subcontract, after receipt of a proper invoice and all other required documentation from the small business subcontractor.

(b) The acceleration of payments under this clause does not provide any new rights under the Prompt Payment Act.

(c) Include the substance of this clause, including this paragraph (c), in all subcontracts with small business concerns, including subcontracts with small business concerns for the acquisition of commercial items.

(End of Clause)

[FR Doc. 2012–30550 Filed 12–18–12; 8:45 am]

BILLING CODE 6820–EP–P

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### 50 CFR Part 17

**[Docket No. FWS–R1–ES–2012–0097; FXES11130900000C2–123–FF09E32000]**

## Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To Delist the Southern Selkirk Mountains Population of Woodland Caribou

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of 90-day petition finding and initiation of status review.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to delist the southern Selkirk Mountains population of woodland caribou (*Rangifer tarandus caribou*) from the Federal List of Endangered and Threatened Wildlife and Plants as determined under the Endangered Species Act of 1973, as amended (Act). Based on our review, we find that the petition presents substantial information indicating that delisting this population of the woodland caribou subspecies may be warranted. Therefore, with the publication of this notice, we initiate a review of the status of the subspecies to determine if delisting the southern Selkirk Mountains population of woodland caribou is warranted. To ensure that this status review is comprehensive, we are requesting scientific and commercial data and other information regarding the status of the woodland caribou subspecies (*Rangifer tarandus caribou*), the southern Selkirk Mountains population of woodland caribou, the mountain ecotype of the woodland caribou, and other possible woodland caribou distinct population segment configurations. Based on the status review, we will issue a 12-month finding on the petition, which will address whether the petitioned action is warranted, as provided in section 4(b)(3)(B) of the Act.

**DATES:** We request that we receive scientific and commercial data and other information pertinent to the petitioned action and the rangewide status review of the subspecies on or before January 18, 2013. The deadline for submitting information using the Federal eRulemaking Portal (see the **ADDRESSES** section below) is 11:59 p.m. Eastern Time on this date. After January 18, 2013, you must submit information directly to the Division of Policy and Directives Management (see the **ADDRESSES** section below). Please note that we might not be able to consider information that we receive after the above requested date.

**ADDRESSES:** You may submit information by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* Search for FWS–R1–ES–2012–0097, which is the docket number for this action. You may submit information for the status review by clicking on ''Comment Now!''

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R1–ES–2012–0097; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM: Arlington, VA 22203.

We will not accept emails or faxes. We will post all information we receive on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Request for Information section below for more details).

**FOR FURTHER INFORMATION CONTACT:** Brian Kelly, State Supervisor, Idaho Fish and Wildlife Office, 1387 S. Vinnell Way, Room 368, Boise, Idaho 83709; by telephone at 208–378–5243; or by facsimile at 208–378–5262. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

**SUPPLEMENTARY INFORMATION:**

### Request for Information

When we make a finding that a petition presents substantial information indicating that listing, delisting, or reclassifying a species may be warranted, we are required to promptly initiate review of the status of the species (status review). For the status review to be complete and based on the best available scientific and commercial information, we request information on the woodland caribou subspecies (*Rangifer tarandus caribou*), including the southern Selkirk Mountains population and the mountain ecotype to which this

population belongs, from governmental agencies, Native American tribes, the scientific community, industry, and any other interested parties. We seek information on:

(1) The subspecies' biology, range, and population trends, including:

(a) Habitat requirements for feeding, breeding, and sheltering;

(b) Genetics and taxonomy;

(c) Historical and current range, including distribution patterns;

(d) Historical and current population levels, and current and projected trends; and

(e) Past and ongoing conservation measures for the species, its habitat, or both.

(2) Information relevant to whether the southern Selkirk Mountains population of woodland caribou is in need of protections from the Act and can be considered discrete and significant to the woodland subspecies.

(3) Information relevant to whether some other subset of the woodland caribou subspecies (for example, the mountain ecotype) is in need of protections under the Act, and can be considered discrete and significant to the subspecies.

Please include sufficient supporting documentation with your submission (such as maps, scientific journal articles, or other publications) to allow us to verify any scientific or commercial information you provide.

Submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination. Section 4(b)(1)(A) of the Act directs that determinations as to whether any species is an endangered or threatened species must be made ''solely on the basis of the best scientific and commercial data available.''

You may submit your information concerning this status review by one of the methods listed in the **ADDRESSES** section. If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this personal identifying information from public review. However, we cannot guarantee that we will be able to do so.

Information and supporting documentation that we received and used in preparing this finding is available for review at *http://www.regulations.gov* at Docket No. FWS–R1–ES–2012–0097 or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service's Idaho Fish and Wildlife Office (see the **FOR FURTHER INFORMATION CONTACT** section above).

## Background

Section 4(b)(3)(A) of the Act (16 U.S.C. 1531 *et seq.*) requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. We are to base this finding on information provided in the petition, supporting information submitted with the petition, and information otherwise available in our files. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition and publish our notice of the finding promptly in the **Federal Register**.

Our standard for substantial scientific or commercial information within the Code of Federal Regulations (CFR) with regard to a 90-day petition finding is ''that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted'' (50 CFR 424.14(b)). If we find that substantial scientific or commercial information was presented, we are required to promptly initiate a species status review, which we subsequently summarize in our 12-month finding.

### *Petition History*

On May 14, 2012, we received a petition dated May 9, 2012, from the Pacific Legal Foundation, representing Bonner County, Idaho, and the Idaho State Snowmobile Association, requesting that the southern Selkirk Mountains population of woodland caribou (*Rangifer tarandus caribou*) be removed from the Federal List of Endangered and Threatened Wildlife and Plants. The petition clearly identified itself as such and included the requisite identification information for the petitioners, as required by 50 CFR 424.14(a).

The petition asserted that we did not correctly apply the 1996 distinct population segment (DPS) policy in our 2008 5-year status review of the southern Selkirk Mountains population. Specifically, the petition questioned the analysis of discreteness and significance of this population to the mountain ecotype of woodland caribou, not the woodland caribou subspecies (i.e., the taxon to which it belongs), which the petitioners assert would be the appropriate interpretation of the DPS policy. As such, the petition asserted that the southern Selkirk Mountains DPS is not a listable entity, and therefore our listing of the population violates the Act. We acknowledge that information provided in the petition on the appropriateness of our DPS analysis in our 2008 status review warrants a more thorough review.

### *Distinct Population Segment Policy*

Section 3(15) of the Act defines a ''species'' to include ''* * * any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.'' The National Marine Fisheries Service (NMFS) and the Service published a joint policy defining the phrase ''distinct population segment'' on February 7, 1996 (61 FR 4722) (DPS policy). According to the DPS policy, two elements must be satisfied in order for a population segment to qualify as a DPS: discreteness and significance. If a population segment qualifies as a DPS, the conservation status of that DPS is evaluated to determine whether it is threatened or endangered.

A population segment of a vertebrate species may be considered discrete if it satisfies either one of the following conditions: (1) It is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors; or (2) it is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act.

If a population is found to be discrete, then it is evaluated for significance under the DPS policy on the basis of its importance to the taxon to which it belongs. This consideration may include, but is not limited to, the following: (1) Persistence of the discrete population segment in an ecological setting unusual or unique to the taxon, (2) evidence that loss of the discrete population segment would result in a significant gap in the range of a taxon, (3) evidence that the population represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside of its historical range, or (4) evidence that the population differs markedly from other populations of the species in its genetic characteristics.

If a population segment is both discrete and significant (i.e., it is a DPS) its evaluation for endangered or threatened status is based on the Act's definitions of those terms and a review

of the factors listed in section 4(a) of the Act. According to our DPS policy, it may be appropriate to assign different classifications to different DPSs of the same vertebrate taxon.

*Previous Federal Actions*

The southern Selkirk Mountains population of woodland caribou was emergency listed as endangered in northeastern Washington, northern Idaho, and southeastern British Columbia under the Act on January 14, 1983 (48 FR 1722). A second emergency rule to extend emergency protection was published in the **Federal Register** on October 25, 1983 (48 FR 49245). Final listing as endangered occurred on February 29, 1984 (49 FR 7390).

Notices of 90-day findings on two previous petitions to delist the southern Selkirk Mountains population of woodland caribou were published in the **Federal Register** on November 29, 1993 (58 FR 62623), and November 1, 2000 (65 FR 65287). Our response to both petitions stated that the petitions did not present substantial scientific or commercial information indicating that delisting of the population may be warranted.

Based on a stipulated settlement agreement resulting from a complaint on a petition we received to designate critical habitat for the endangered southern Selkirk Mountains population of woodland caribou (*Defenders of Wildlife et al.,* v. *Salazar,* CV–09–15–EFS), we proposed critical habitat on November 30, 2011 (76 FR 74018). Our substantial 90-day finding on the current petition to delist the southern Selkirk Mountains population of woodland caribou does not affect the current listing status or our current process underway to determine critical habitat for the species at this time.

## Finding

On the basis of our determination under section 4(b)(3)(A) of the Act, we find that the petition presents substantial information that the currently listed southern Selkirk Mountains population of woodland caribou may not be a listable entity under our 1996 DPS policy. We will reevaluate the significance of the southern Selkirk Mountains population to the taxon as a whole (i.e., the woodland caribou subspecies), and if necessary, the configuration and status of any distinct population segments.

The ''substantial information'' standard for a 90-day finding, under section 4(b)(3)(A) of the Act and 50 CFR 424.14(b) of our regulations, differs from the Act's ''best scientific and commercial data'' standard that applies to a status review to determine whether a petitioned action is warranted. A 90-day finding does not constitute a status review under the Act. In a 12-month finding, we will determine whether a petitioned action is warranted after we have completed a thorough status review of the species, which is conducted following a substantial 90-day finding. Because the Act's standards for 90-day and 12-month findings are different, as described above, a substantial 90-day finding does not necessarily mean that the 12-month finding will conclude that the petitioned action is warranted. In other words, we might determine that the southern Selkirk Mountains population is a valid DPS. However, if the 12-month finding concludes that the petitioned action is warranted, we would then need to publish a proposed rule, subject to peer review and public comment, to initiate any change in the Federal listing status of the current DPS. In summary, the outcome of our status review could result in: (1) No change in the species' listing status; (2) a recommendation to delist the southern Selkirk Mountains population; or (3) a recommendation to list some different configuration of the woodland caribou subspecies.

With this substantial 90-day finding, we initiate a status review of the woodland caribou subspecies, and once it is completed, we will make a finding on whether delisting the southern Selkirk Mountains population of woodland caribou is warranted. Our review will also evaluate the status of the subspecies throughout its range and assess whether alternative DPS configurations of the subspecies are warranted. This finding fulfills any obligation under 16 U.S.C. 1533(b)(3)(A) and the regulations at 50 CFR 424.14(b).

## Author

The primary authors of this notice are staff of the Idaho Fish and Wildlife Office (see the **FOR FURTHER INFORMATION CONTACT** section above).

## Authority

The authority for this action is section 4 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: December 10, 2012.

**Daniel M. Ashe,**

*Director, U.S. Fish and Wildlife Service.*

[FR Doc. 2012–30554 Filed 12–18–12; 8:45 am]

BILLING CODE 4310–55–P

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 622**

**[Docket No. 120404257–2692–01]**

**RIN 0648–BB58**

# Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Fishery Off the Southern Atlantic States; Amendment 18B

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

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS proposes regulations to implement Amendment 18B to the Fishery Management Plan (FMP) for the Snapper-Grouper Fishery of the South Atlantic Region (Amendment 18B), as prepared and submitted by the South Atlantic Fishery Management Council (Council). If implemented, this rule would establish a longline endorsement program for the commercial golden tilefish component of the snapper-grouper fishery; establish initial eligibility requirements for a golden tilefish longline endorsement; establish an appeals process; allocate the commercial golden tilefish annual catch limit (ACL) among gear groups; establish a procedure for the transfer of golden tilefish endorsements; modify the golden tilefish trip limits; and establish a trip limit for commercial fishermen who do not receive a golden tilefish longline endorsement. The intent of this rule is to reduce overcapacity in the commercial golden tilefish component of the snapper-grouper fishery.

**DATES:** Written comments must be received on or before January 18, 2013.

**ADDRESSES:** You may submit comments on the proposed rule identified by ''NOAA–NMFS–2012–0177'' by any of the following methods:

- *Electronic submissions:* Submit electronic comments via the Federal e-Rulemaking Portal: *http://www.regulations.gov*. Follow the ''Instructions'' for submitting comments.
- *Mail:* Karla Gore, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

*Instructions:* All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.)

voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter N/A in the required field if you wish to remain anonymous).

To submit comments through the Federal e-Rulemaking Portal: *http://www.regulations.gov,* enter ''NOAA–NMFS–2012–0177'' in the search field and click on ''search.'' After you locate the proposed rule, click the ''Submit a Comment'' link in that row. This will display the comment web form. You can then enter your submitter information (unless you prefer to remain anonymous), and type your comment on the web form. You can also attach additional files (up to 10 MB) in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Comments received through means not specified in this rule will not be considered.

For further assistance with submitting a comment, see the ''Commenting'' section at *http://www.regulations.gov/#!faqs* or the Help section at *http://www.regulations.gov*.

Electronic copies of Amendment 18B may be obtained from the Southeast Regional Office Web site at *http://sero.nmfs.noaa.gov/sf/SASnapperGrouperHomepage.htm*. Amendment 18B includes a draft environmental assessment, an Initial Regulatory Flexibility Act Analysis (IRFA), a Regulatory Impact Review, and a Fishery Impact Statement.

Comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule may be submitted in writing to Anik Clemens, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701; and OMB, by email at *OIRA Submission@omb.eop.gov,* or by fax to 202–395–7285.

**FOR FURTHER INFORMATION CONTACT:** Karla Gore, Southeast Regional Office, NMFS, telephone: 727–824–5305; email: *Karla.Gore@noaa.gov.*

**SUPPLEMENTARY INFORMATION:** The snapper-grouper fishery off the southern Atlantic states includes golden tilefish and is managed under the FMP for the Snapper-Grouper Fishery of the South Atlantic Region. The FMP was prepared by the Council and is implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

**Background**

Recent amendments to the FMP have imposed more restrictive harvest limitations on snapper-grouper fishermen. In an effort to identify other species to harvest, more fishermen may target golden tilefish. Increased effort for golden tilefish would intensify derby fishing, or the ''race to fish,'' that already exists, which has resulted in a shortened fishing season for the last 6 years. The longline endorsement program would limit participation and reduce overcapacity in the commercial golden tilefish component of the snapper-grouper fishery, thereby easing derby conditions, which have occurred in recent years.

*Management Measures Contained in This Proposed Rule*

This proposed rule would: Establish a longline endorsement program for the commercial golden tilefish component of the snapper-grouper fishery; establish initial eligibility requirements for a golden tilefish longline endorsement; establish an appeals process; allocate the commercial golden tilefish ACL among gear groups; establish a procedure for the transfer of golden tilefish endorsements; modify the golden tilefish trip limits; and establish a trip limit for commercial fishermen who do not receive a golden tilefish longline endorsement. These actions are further addressed below.

*Longline Endorsement Program for Golden Tilefish*

This rule proposes to establish a longline endorsement program for the commercial golden tilefish component of the snapper-grouper fishery. The endorsement program would limit participation and reduce excess capacity in the fishery. This rule would establish eligibility criteria for the endorsement program based on an individual's golden tilefish landings using longline gear averaging at least 5,000 lb (2,268 kg), gutted weight, for the best 3 years within the period 2006 through 2011. In 2011, there were 753 Snapper-Grouper Unlimited Permits and trip-limited permits combined, and 28 vessels fished for golden tilefish using longline gear. Establishment of this endorsement program would reduce the number of potential longline participants from 753 to 23.

*Establish an Appeals Process*

The rule proposes to establish an appeals process for fishermen who might have been incorrectly excluded from receiving a golden tilefish longline endorsement. The appeals process would provide an appeal period of 90 days, starting on the effective date of the final rule. The National Appeals Office, a division of NMFS'Office of Management and Budget within NOAA, would review, evaluate, and render recommendations on appeals to the Regional Administrator (RA). The RA would review, evaluate, and render a final decision on each appeal. Hardship arguments would not be considered. The RA would determine the outcome of appeals based on NMFS' logbooks. If NMFS' logbooks are not available, the RA may use state landings records. Appellants would have to submit NMFS' logbooks or state landings records to support their appeal.

*Allocate Commercial Golden Tilefish ACL Among Gear Groups*

This rule proposes an allocation of the golden tilefish commercial ACL between the longline and hook-and-line components. Seventy-five percent of the ACL, or 405,971 lb (184,145 kg), gutted weight, would be allocated to the longline component and 25 percent of the ACL, or 135,324 lb (61,382 kg), gutted weight, would be allocated to the hook-and-line component.

*Allow Transfer of Golden Tilefish Endorsements*

This rule would establish a procedure to transfer a golden tilefish endorsement to an individual or entity that holds or simultaneously obtains a South Atlantic Unlimited Snapper-Grouper Permit. To be transferred, a golden tilefish endorsement must be valid or renewable. Golden tilefish endorsements may be transferred independently from the South Atlantic Unlimited Snapper-Grouper Permit with which it is associated. Landings history would not be transferred with the endorsement. NMFS would attribute golden tilefish landings to the associated South Atlantic Unlimited Snapper-Grouper Permit regardless of whether the landings occurred before or after the endorsement was issued. Golden tilefish endorsements would not be renewed automatically with the South Atlantic Unlimited Snapper-Grouper Permit with which it is associated. The endorsement would be renewed separately from the permit on the Federal Permit Application for Vessels Fishing in the Exclusive Economic Zone (EEZ). The provision to allow the transfer of an endorsement would be effective upon the effective date of the final rule.

*Modify the Golden Tilefish Trip Limits*

Based on current regulations, at the start of the fishing year (January 1), the trip limit is 4,000 lb (1,814 kg), gutted

weight, for the commercial sector. If 75 percent of the ACL is reached before September 1 of the fishing year, the trip limit is reduced to 300 lb (136 kg), gutted weight. The step-down trip limit was originally intended to allow hook-and-line fishermen access to golden tilefish in the fall. In recent years, a derby fishery has developed for golden tilefish and the ACL has been met so rapidly that the 300-lb (136-kg), gutted weight, trip limit has not been triggered. Therefore, the 300-lb (136-kg), gutted weight, trip limit is not having its intended effect of extending the fishing season. Moreover, having separate allocations and ACLs for longline and hook-and-line gear makes the 300-lb (136-kg), gutted weight, trip limit unnecessary. The amendment would eliminate the step-down trip limit and the commercial trip limit of 4,000 lb (1,814 kg), gutted weight, would remain. Hook-and-line fishermen would still be able to harvest golden tilefish under the hook-and-line ACL.

*Establish a Trip Limit for Commercial Fishermen Who Do Not Receive a Golden Tilefish Longline Endorsement*

This rule proposes to establish a trip limit of 500 lb (227 kg), gutted weight, for the golden tilefish component of the snapper-grouper fishery for commercial fishermen who do not receive a longline endorsement. A vessel with a golden tilefish longline endorsement would not be eligible to fish under this trip limit with other gear (*i.e.,* hook-and-line).

*Other Changes Proposed in This Rule That Are Not Contained in Amendment 18B*

Amendment 17B was approved by the Secretary of Commerce on December 21, 2010. The final rule for Amendment 17B to the FMP (75 FR 82280, December 30, 2012), implemented ACLs and accountability measures (AMs) for eight snapper-grouper species in the FMP that are undergoing overfishing, and for black grouper, which was recently assessed and determined to not be undergoing overfishing or overfished; modified management measures to limit total mortality of those species to the ACL; and added ACLs, annual catch targets (ACTs), and AMs to the list of management measures that may be amended via the framework process. In that final rule for Amendment 17B, NMFS inadvertently neglected to list all of the framework revisions from Amendment 17B in the regulatory text. NMFS did not include, in paragraph (f) of 50 CFR part 622.48, the entire list of the items that may be established or modified in accordance with the FMP's updated framework procedure. The addition of these items to the FMP's framework procedure has already been subject to public comment during the public comment period for Amendment 17B. The Notice of Availability for Amendment 17B published on September 22, 2010 (75 FR 57734). These changes to paragraph (f) of 50 CFR part 622.48, were not included in the proposed or final rule for Amendment 17B, however, they were included in Amendment 17B. Thus, NMFS proposes to amend 50 CFR part 622.48, paragraph (f), to include the missing items from the list of the items that may be established or modified in accordance with the framework procedures in the FMP. This rule proposes to add the maximum sustainable yield proxy, optimum yield, a quota of zero, ACTs, maximum fishing mortality threshold, minimum stock size threshold, size limits, fishing year, and rebuilding plans to the list of items that can be established or modified in accordance with the framework procedure.

Additionally, on March 16, 2012, NMFS published the final rule to implement the Comprehensive Annual Catch Limit Amendment (Comprehensive ACL Amendment) to the Snapper-Grouper FMP, the Golden Crab Fishery of the South Atlantic Region FMP, the Dolphin and Wahoo Fishery off the Atlantic States FMP, and the Pelagic Sargassum Habitat of the South Atlantic Region FMP (77 FR 15916, March 16, 2012). In part, the Comprehensive ACL Amendment revised commercial AMs for many snapper-grouper species. During that revision, NMFS inadvertently failed to use language in the revised AMs similar to that contained in the quota closure provisions for South Atlantic snapper-grouper species. The South Atlantic snapper-grouper closure provisions regarding bag and possession limits, specified at 622.43(a)(5), contain both commercial and charter vessel/headboats in this provision. NMFS included charter vessel/headboats in regulatory text implementing the affected commercial AMs; however, NMFS inadvertently did not also include the term ''commercial'' at the time. Therefore, NMFS proposes to revise the phrase ''Federal charter vessel/headboat permit'' to read ''Federal commercial or charter vessel/headboat permit'', specifically in 50 CFR 622.49, paragraphs (b)(4)(i)(A), (b)(7)(i)(A), (b)(8)(i)(A), (b)(9)(i)(A), (b)(10)(i)(A), (b)(13)(i)(A), (b)(14)(i)(A), (b)(15)(i)(A), (b)(16)(i)(A), (b)(17)(i)(A), (b)(19)(i)(A), (b)(20)(i)(A), (b)(21)(i)(A), (b)(23)(i)(A), (b)(24)(i)(A), (e)(1), (f)(1).

**Classification**

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the Assistant Administrator has determined that this proposed rule is consistent with Amendment 18B, the Magnuson-Stevens Act and other applicable law, subject to further consideration after public comment.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

NMFS prepared an IRFA for this rule, as required by section 603 of the Regulatory Flexibility Act, 5 U.S.C. 603. The IRFA describes the economic impact that this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the objectives of and legal basis for this action are contained at the beginning of this section in the preamble and in the **SUMMARY** section of the preamble. A copy of the full analysis is available from the NMFS (see **ADDRESSES**). A summary of the IRFA follows.

The Magnuson-Stevens Act provides the statutory basis for this rule. No duplicative, overlapping, or conflicting Federal rules have been identified.

The only new reporting, record-keeping, or other compliance requirements that would result from this proposed rule would be the requirement to have a commercial golden tilefish longline endorsement to fish for golden tilefish in the South Atlantic EEZ using longline gear or possess golden tilefish on a vessel in the South Atlantic EEZ with longline gear aboard. The initial endorsement will be sent directly to those qualifying for the endorsement. Renewals and transfers of endorsements are subject to the same fees as permits. Because the endorsement would be received through completion of the normal permitting process, no special professional skills would be required to satisfy this new compliance requirement.

NMFS expects the proposed rule to directly affect commercial fishermen in the South Atlantic snapper-grouper fishery. The Small Business Administration established size criteria for all major industry sectors in the U.S. including fish harvesters. A business involved in fish harvesting is classified as a small business if independently owned and operated, is not dominant in its field of operation (including its affiliates), and its combined annual receipts are not in excess of $4.0 million (NAICS code 114111, finfish fishing) for all of its affiliated operations worldwide.

During 2005–2011, a total of 142 hook-and-line vessels with valid permits to operate in the commercial snapper-grouper fishery landed golden tilefish. These vessels generated annual average dockside revenues of approximately $69,000 (2010 dollars) from golden tilefish, or $603,000 (2010 dollars) from all species, inclusive of golden tilefish, caught in the same trips as golden tilefish. On average, each of these vessels generated about $4,246 (2010 dollars) in gross revenues. During the same period, a total of 43 longline vessels with valid permits to operate in the commercial snapper-grouper fishery landed golden tilefish. Their annual average revenues were about $835,000 (2010 dollars) from golden tilefish, or $1,218,000 (2010 dollars) from all species, inclusive of golden tilefish, caught in the same trips as golden tilefish. Each of these vessels, therefore, generated an average of approximately $28,330 (2010 dollars) in gross revenues.

Based on revenue information, all commercial vessels affected by this proposed rule can be considered small entities.

NMFS expects the proposed rule to directly affect all federally permitted commercial vessels harvesting golden tilefish and for-hire vessels that operate in the South Atlantic snapper-grouper fishery. All directly affected entities have been determined, for the purpose of this analysis, to be small entities. Therefore, NMFS determined that the proposed action would affect a substantial number of small entities.

Because NMFS determined all entities expected to be affected by the actions in this proposed rule are small entities, the issue of disproportional effects on small versus large entities does not arise in the present case.

Establishing a longline endorsement system would limit the expansion of capital and effort in the longline component of the commercial sector for golden tilefish. Because this component is by far the dominant component in the commercial harvest of golden tilefish, an endorsement system could extend the commercial fishing season, thereby providing the industry opportunities to remain profitable. However, unlike the case with a management system that assigns harvesting privileges to fishermen, an endorsement system would not eliminate the underlying incentive to ''race to fish.'' With this incentive remaining intact, effort and capital stuffing (increasing vessel capacity, speed or fishing accessories) would continue to increase over time and eventually shorten the fishing season.

Under the proposed criteria, 24 vessels that used longline gear during 2006–2011 would qualify for a longline endorsement; 19 vessels that used longline gear during the time period would not qualify for an endorsement. Qualifying vessels generated revenues of about $788,000 (2010 dollars) annually from golden tilefish while non-qualifying vessels generated an average of about $47,000 (2010 dollars) in annual revenues from golden tilefish. The decrease in revenues to non-qualifying vessels would be about 17 percent of their total revenues. Non-qualifying vessels could switch gear and recoup part of their losses; nonetheless, their short-term profits would still likely suffer. However, relative to the total profits of commercial vessels in the snapper-grouper fishery, revenue and profit reductions to non-qualifying vessels would not be significant. In terms of revenues, a loss of $47,000 (2010 dollars) would be about 3 percent of total revenues by vessels landing golden tilefish and less than 1 percent of total revenues by all commercial vessels in the South Atlantic. Moreover, revenue and profit losses to non-qualifying vessels would likely be gained by qualifying vessels. Considering the fishing season closures in recent years, qualifying vessels would most likely harvest whatever is forgone by non-qualifying vessels. This would increase the revenues and possibly the profits of qualifying vessels, and would decrease the profits of non-qualifying vessels. Whether this would increase overall industry profits cannot be ascertained based on available information. It is possible that short-term industry profits would increase or at least not dissipate quickly. With fewer participants in the longline component, and noting that the longline component is by far the dominant component in the commercial harvest of golden tilefish, the fishing season for the longline component could lengthen and thereby qualifying vessels could command better prices. These effects, however, would be transitory. The incentive to ''race to fish'' is still intact so that effort from qualifying vessels could increase in the medium- and long-term, eventually erasing any profit gains from establishing the endorsement.

Establishing an appeals process for fishermen initially excluded from the golden tilefish longline endorsement would provide opportunities for those legitimately qualified to receive their endorsement. Given the narrow basis for appeals (e.g., landings reported on NMFS logbook records or state landing records), only a limited number of appeals would likely be successful.

Establishing a 75-percent longline and 25-percent hook-and-line allocation of the golden tilefish commercial ACL would ensure the continued presence of the hook-and-line component in the commercial harvest of golden tilefish. Relative to the baseline, this allocation ratio would redistribute the harvest of golden tilefish from the longline component to the hook-and-line component. This, in theory, would result in negative effects on the longline component and positive effects on the hook-and-line component. However, because the commercial quota is increased well above the baseline landings of both components, this allocation ratio would yield positive revenue effects to both components. Revenue gains would be $302,000 (2010 dollars) to the entire hook-and-line component and $271,000 (2010 dollars) to the entire longline component, or total revenue effects of about $573,000 (2010 dollars) for the whole commercial sector. NMFS expects that these positive revenue effects would translate to positive profit effects on both components.

Allowing the transfer of golden tilefish longline endorsements between individuals or entities with South Atlantic Unlimited Snapper-Grouper Permits would open opportunities for increasing the value of the endorsement asset and for the more efficient operators to engage in the fishery. Such opportunities, however, would still be limited by the requirement that transfers of endorsements be made between individuals/entities possessing South Atlantic Snapper-Grouper Unlimited Permits. These permits are under a limited entry program.

Eliminating the 300-lb (136-kg), gutted weight, commercial trip limit when 75 percent of the commercial ACL is taken would benefit longline vessels. This ratcheting down of the trip limit was intended to preserve the presence of the hook-and-line component, but is now unnecessary because the hook-and-line component has a separate allocation. Thus, this alternative would allow the longline component, whose trips would likely be unprofitable under a trip limit of 300 lb (136 kg), gutted weight, to efficiently use its capacity and maximize its revenues and likely profits as well.

Establishing a 500-lb (223-kg), gutted weight, trip limit for commercial fishermen who would not receive a longline endorsement would affect 14 out of 249 trips based on average 2005–2011 data. This trip limit would reduce per trip landings, and it is also expected

to reduce total landings at least in its first year of implementation. Total landings would be reduced by about 24,000 lb (10,886 kg), gutted weight, worth $69,000 (2010 dollars). The effects of a trip limit are generally temporary; vessels incurring revenue reductions due to a trip limit could recoup their losses by taking more trips so long as those trips remain profitable. Considering the relatively few trips that would be affected, this trip limit would likely not be too constraining as to reduce the sector's overall profits.

The following discussion analyzes the alternatives that were not chosen as preferred by the Council.

Two alternatives, including the preferred alternative that would establish an endorsement system, were considered for limiting participation in the golden tilefish component of the snapper-grouper fishery through an endorsement system. The only other alternative is the no action alternative. This would not limit effort in the commercial harvest of golden tilefish and thus would not address the evolving derby (race to fish) in the commercial sector.

Two alternatives were considered for establishing eligibility requirements for the longline endorsement. The first alternative, the no action alternative, would make the endorsement system ineffective in addressing increasing effort in the commercial sector because everyone with valid permits could receive an endorsement. The second alternative consists of 9 sub-alternatives, including the preferred sub-alternative, with each providing for an endorsement eligibility based on minimum amount of golden tilefish landings using longline gear during a given period. The first sub-alternative would require a minimum of 2,000 lb (907 kg), gutted weight, total longline landings during 2006–2008. The second sub-alternative would require a minimum of 5,000 lb (2,268 kg), gutted weight, total longline landings during 2006–2008. The third sub-alternative would require a minimum of 5,000 lb (2,268 kg), gutted weight, average longline landings during 2006–2008. The fourth sub-alternative would require a minimum of 5,000 lb (2,268 kg), gutted weight, average longline landings during 2007–2009. The fifth sub-alternative would require a minimum of 10,000 lb (4,536 kg), gutted weight, average longline landings during 2007–2009. The sixth sub-alternative would require a minimum of 5,000 lb (2,268 kg), gutted weight, average longline landings for the best 3 years during 2006–2010. The seventh sub-alternative would require a minimum of 5,000 lb (2,268 kg), gutted weight, average longline landings for the best 3 years during 2006–2011. The eighth sub-alternative would require a minimum of 10,000 lb (4,536 kg), gutted weight, average longline landings for the best 3 years during 2006–2011. Each of these sub-alternatives would qualify fewer entities for the endorsement and thus would result in greater forgone revenues than the preferred sub-alternative.

Three alternatives, including the preferred alternative, were considered for establishing an appeals process for fishermen initially excluded from the endorsement program. The first alternative, the no action alternative, would not establish an appeals process. This alternative has the potential to unduly penalize participants, mainly due to errors in data reporting or recording. The second alternative is the same as the preferred alternative, except it would additionally establish a special board composed of state directors/designees that would review, evaluate, and make individual recommendations to the RA. This alternative would introduce an additional administrative burden that may not improve the appeals process considering that the only major issue subject to appeals is the landings record.

Four alternatives, including the preferred alternative, were considered for allocating the commercial golden tilefish ACL among gear groups. The first alternative, the no action alternative, would not specify an allocation among gear groups. With this alternative, the already diminished share of the hook-and-line component in the harvest of golden tilefish could further decline. Consequently, further reductions in the component's revenues and profits could occur, negating the Council's intent to minimize negative economic impacts on this component. The second alternative would establish an 85 percent longline and 15 percent hook-and-line allocation, and the third alternative, a 90 percent longline and 10 percent hook-and-line allocation. These two other alternatives would favor the longline component, but would allow the hook-and-line component to continue its operations. Similar to the preferred alternative, the effects of these alternatives on overall industry profits cannot be determined based on available information.

Two alternatives, including the preferred alternative, were considered for allowing transferability of longline endorsements. The first alternative, the no action alternative, would not allow transfers of endorsements. This alternative would limit the value of the endorsement asset and hinder the participation of potentially more efficient operators. The second alternative (preferred) includes two sub-alternatives, of which one is the preferred sub-alternative that would allow transfers of endorsements upon implementation of the program. The other sub-alternative would not allow transfers of endorsements during the first 2 years of the program. This sub-alternative would mainly delay the entrance of more efficient operators and the generation of higher-valued endorsement assets.

Three alternatives, including the preferred alternative, were considered for modifying the golden tilefish trip limit. The first alternative, the no action alternative, would retain the 4,000-lb (1,814-kg), gutted weight, trip limit that would be reduced to 300 lb (136 kg), gutted weight, if 75 percent of the commercial ACL is reached by September 1. The trip limit reduction to 300 lb (136 kg), gutted weight, which was partly established to preserve the presence of the hook-and-line component, is no longer necessary with the establishment of a separate allocation for each gear group. The second alternative would prohibit longline fishing for golden tilefish when 75 percent of the commercial ACL is reached. This alternative is not necessary with the establishment of a separate allocation for each gear group. In addition, this would constrain the profits longline vessels could derive from the harvest of golden tilefish.

Six alternatives, including the preferred alternative, were considered for establishing a trip limit for commercial fishermen who do not receive a longline endorsement. The first alternative, the no action alternative, would retain the 4,000-lb (1,814-kg), gutted weight, trip limit that would be reduced to 300 lb (136 kg), gutted weight, when 75 percent of the commercial ACL is reached. The second alternative would establish a 300-lb (136-kg), gutted weight, trip limit; the third alternative, a 400-lb (181-kg), gutted weight, trip limit; the fourth, a 100-lb (45-kg), gutted weight, trip limit; and, the fifth alternative, a 200-lb (91-kg), gutted weight, trip limit. Relative to the preferred alternative, all these other trip limits would be more restrictive and thus would likely result in larger reductions in vessel revenues and profits per trip.

In addition to the actions considered in Amendment 18B included in this proposed rule, this proposed rule would make additional changes to the regulatory text in 50 CFR parts 622.48 and 622.49. These proposed changes are described under the heading ''Other

Changes Proposed in this Rule that are not Contained in Amendment 18B'' in the preamble of this proposed rule. These changes are either clerical or simply clarify language associated with prior regulatory action. As a result, none of these proposed changes in the regulatory text would be expected to result in any reduction in profits to any small entities.

Notwithstanding any other provision of law, no person is required to respond to, nor shall a person be subject to a penalty for failure to comply with, a collection-of-information subject to the requirements of the Paperwork Reduction Act (PRA), unless that collection-of-information displays a currently valid Office of Management and Budget (OMB) control number.

This proposed rule contains collection-of-information requirements subject to the PRA. NMFS estimates the requirement for South Atlantic Unlimited Snapper-Grouper Permit holders to submit their logbook information if they are appealing their landings data for a golden tilefish longline endorsement to average 2 hours per response. NMFS estimates the requirement to check boxes on the Federal Permit Application Form for a new endorsement, renewal, or transfer of the golden tilefish endorsement to average 1 minute per response. These estimates of the public reporting burden include the time for reviewing instructions, gathering and maintaining the data needed, and completing and reviewing the collection-of-information.

These requirements have been submitted to OMB for approval. NMFS seeks public comment regarding: Whether this proposed collection-of-information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection-of-information, including through the use of automated collection techniques or other forms of information technology. Send comments regarding the burden estimate or any other aspect of the collection-of-information requirement, including suggestions for reducing the burden, to NMFS and to OMB (see **ADDRESSES**).

**List of Subjects in 50 CFR Part 622**

Fisheries, Fishing, Puerto Rico, Reporting and recordkeeping requirements, Virgin Islands.

Dated: December 13, 2012.

**Alan D. Risenhoover,**

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

For the reasons set out in the preamble, 50 CFR part 622 is proposed to be amended as follows:

## PART 622—FISHERIES OF THE CARIBBEAN, GULF, AND SOUTH ATLANTIC

1. The authority citation for part 622 continues to read as follows:

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

2. In § 622.4, paragraph (a)(2)(vi) is revised, paragraph (a)(2)(xvi) is added, and the first sentence in paragraph (g)(1) is revised to read as follows:

**§ 622.4 Permits and fees.**

(a) * * *

(2) * * *

(vi) *South Atlantic snapper-grouper.* For a person aboard a vessel to be eligible for exemption from the bag limits for South Atlantic snapper-grouper in or from the South Atlantic EEZ, to sell South Atlantic snapper-grouper in or from the South Atlantic EEZ, to engage in the directed fishery for golden tilefish in the South Atlantic EEZ, to use a longline to fish for South Atlantic snapper-grouper in the South Atlantic EEZ, or to use a sea bass pot in the South Atlantic EEZ between 35°15.19′ N. lat. (due east of Cape Hatteras Light, NC) and 28°35.1′ N. lat. (due east of the NASA Vehicle Assembly Building, Cape Canaveral, FL), either a commercial vessel permit for South Atlantic Unlimited Snapper-Grouper Permit or a trip-limited permit for South Atlantic snapper-grouper must have been issued to the vessel and must be on board. A vessel with a trip-limited commercial permit is limited on any trip to 225 lb (102.1 kg) of snapper-grouper. See § 622.18 for limitations on the use, transfer, and renewal of a commercial vessel permit for South Atlantic snapper-grouper.

* * * * *

(xvi) *South Atlantic golden tilefish longline endorsement.* For a person aboard a vessel, for which a valid commercial vessel permit for South Atlantic snapper-grouper unlimited has been issued, to fish for or possess golden tilefish in the South Atlantic EEZ using longline gear, a South Atlantic golden tilefish longline endorsement must have been issued to the vessel and must be on board. A permit or endorsement that has expired is not valid. This endorsement must be renewed annually and may only be renewed if the associated vessel has a valid commercial vessel permit for South Atlantic snapper-grouper unlimited or if the endorsement and associated permit are being concurrently renewed. The RA will not reissue this endorsement if the endorsement is revoked or if the RA does not receive a complete application for renewal of the endorsement within 1 year after the endorsement's expiration date.

(A) *Initial eligibility.* To be eligible for an initial South Atlantic golden tilefish longline endorsement, a person must have been issued and must possess a valid or renewable commercial vessel permit for South Atlantic snapper-grouper unlimited that has golden tilefish landings using longline gear averaging at least 5,000 lb (2,268 kg), gutted weight, over the best 3 years within the period 2006–2011. Excluded from this eligibility, are trip-limited permits (South Atlantic snapper-grouper permits that have a 225-lb (102.1-kg) limit of snapper-grouper). NMFS will attribute all applicable golden tilefish landings associated with a current South Atlantic snapper-grouper unlimited permit for the applicable landings history, to the current permit owner, including golden tilefish landings reported by a person(s) who held the permit prior to the current permit owner. Only legal landings reported in compliance with applicable state and Federal regulations are acceptable.

(B) *Initial issuance.* On or about [*date of publication of final rule in the* **Federal Register**], the RA will mail each eligible permittee a golden tilefish longline endorsement via certified mail, return receipt requested, to the permittee's address of record as listed in NMFS' permit files. An eligible permittee who does not receive an endorsement from the RA, must contact the RA no later than [*date 30 days after date of publication of final rule in the* **Federal Register**], to clarify his/her endorsement status. A permittee who is denied an endorsement based on the RA's initial determination of eligibility and who disagrees with that determination may appeal to the RA.

(C) *Procedure for appealing golden tilefish longline endorsement eligibility and/or landings information.* The only items subject to appeal are initial eligibility for a golden tilefish longline endorsement based on ownership of a qualifying snapper-grouper permit, the accuracy of the amount of landings, and the correct assignment of landings to the permittee. Appeals based on hardship factors will not be considered. Appeals

must be submitted to the RA postmarked no later than [*date 120 days after publication of final rule in the* **Federal Register**], and must contain documentation supporting the basis for the appeal. The National Appeals Office will review, evaluate, and render recommendations on appeals to the RA. The RA will then review each appeal, render a final decision on each appeal, and advise the appellant of the final NMFS decision.

(*1*) *Eligibility appeals.* NMFS' records of snapper-grouper permits are the sole basis for determining ownership of such permits. A person who believes he/she meets the permit eligibility criteria based on ownership of a vessel under a different name, for example, as a result of ownership changes from individual to corporate or vice versa, must document his or her continuity of ownership and must submit that information with their appeal.

(*2*) *Landings appeals.* Determinations of appeals regarding landings data for 2006 through 2011 will be based on NMFS' logbook records, submitted on or before October 31, 2012. If NMFS' logbooks are not available, the RA may use state landings records or data for the period 2006 through 2011 that were submitted in compliance with applicable Federal and state regulations on or before October 31, 2012.

(D) *Transferability.* A valid or renewable golden tilefish endorsement may be transferred between any two entities that hold, or simultaneously obtain, a valid South Atlantic snapper-grouper unlimited permit. An endorsement may be transferred independently from the South Atlantic snapper-grouper unlimited permit. NMFS will attribute golden tilefish landings to the associated South Atlantic Unlimited Snapper-Grouper Permit regardless of whether the landings occurred before or after the endorsement was issued. Only legal landings reported in compliance with applicable state and Federal regulations are acceptable.

(E) *Fees.* No fee applies to the initial issuance of a golden tilefish longline endorsement. NMFS charges a fee for each renewal or replacement or transfer of such endorsement and calculates the amount of each fee in accordance with the procedures of the NOAA Finance Handbook for determining the administrative costs of each special product or service. The handbook is available from the RA. The appropriate fee must accompany each application for renewal or replacement or transfer.

* * * * *

(g) * * *

(1) * * * A vessel permit, license, or endorsement or a dealer permit or endorsement issued under this section is not transferable or assignable, except as provided in paragraph (m) of this section for a commercial vessel permit for Gulf reef fish, in paragraph (o) of this section for a king mackerel gillnet permit, in paragraph (q) of this section for a commercial vessel permit for king mackerel, in paragraph (r) of this section for a charter vessel/headboat permit for Gulf coastal migratory pelagic fish or Gulf reef fish, in paragraph (s) of this section for a commercial vessel moratorium permit for Gulf shrimp, in § 622.17(c) for a commercial vessel permit for golden crab, in § 622.18(b) for a commercial vessel permit for South Atlantic snapper-grouper, in § 622.19(b) for a commercial vessel permit for South Atlantic rock shrimp, in § 622.4(a)(2)(xiv)(D) for an eastern Gulf reef fish bottom longline endorsement, in § 622.4(a)(2)(xv)(D) for a South Atlantic black sea bass pot endorsement, in § 622.4(a)(2)(xvi)(D) for a South Atlantic golden tilefish longline endorsement. * * *

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3. In § 622.41, paragraph (d)(6) is revised to read as follows:

**§ 622.41 Species specific limitations.**

* * * * *

(d) * * *

(6) *Longline species limitation.* A vessel that has on board a valid Federal commercial permit for South Atlantic snapper-grouper, excluding wreckfish, that fishes in the EEZ on a trip with a longline on board, may possess only the following South Atlantic snapper-grouper: snowy grouper, yellowedge grouper, misty grouper, golden tilefish, blueline tilefish, and sand tilefish. See § 622.4(a)(2)(xvi) for the requirement to possess a valid South Atlantic golden tilefish longline endorsement to fish for golden tilefish in the South Atlantic EEZ using longline gear. For the purpose of this paragraph, a vessel is considered to have a longline on board when a power-operated longline hauler, a cable of diameter suitable for use in the longline fishery on any reel, and gangions are on board. Removal of any one of these three elements constitutes removal of a longline.

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4. In § 622.42, paragraph (e)(2) is revised to read as follows:

**§ 622.42 Quotas.**

* * * * *

(e) * * *

(2) *Golden tilefish.* (i) *Longline and hook-and-line components combined*—541,295 lb (245,527 kg).

(ii) *Hook-and-line component*—135,324 lb (61,382 kg).

(iii) *Longline component*—405,971 lb (184,145 kg).

* * * * *

5. In § 622.44, paragraph (c)(2) is revised to read as follows:

**§ 622.44 Commercial trip limits.**

* * * * *

(c) * * *

(2) *Golden tilefish*—(i) *South Atlantic snapper-grouper unlimited permit holders, with a longline endorsement, using longline gear.* Until the quota specified in § 622.42(e)(2)(iii) is reached, 4,000 lb (1,814 kg), gutted weight; 4,480 lb (2,032 kg), round weight.

(ii) *South Atlantic snapper-grouper unlimited permit holders, without a longline endorsement, using hook-and-line gear.* Until the quota specified in § 622.42(e)(2)(ii) is reached, the trip limit for golden tilefish is 500 lb (227 kg), gutted weight; 560 lb (254 kg), round weight. Vessels with golden tilefish longline endorsements are not eligible to fish for golden tilefish using hook-and-line gear under this 500-lb (227-kg) trip limit.

(iii) See § 622.43(a)(5) for the limitations regarding golden tilefish after the applicable commercial quota is reached.

* * * * *

6. In § 622.48, paragraph (f) is revised to read as follows:

**§ 622.48 Adjustment of management measures.**

* * * * *

(f) *South Atlantic snapper-grouper and wreckfish.* Biomass levels, age-structured analyses, target dates for rebuilding overfished species, MSY (or proxy), OY, ABC, TAC, quotas (including a quota of zero), annual catch limits (ACLs), annual catch targets (ACTs), AMs, maximum fishing mortality threshold (MFMT), minimum stock size threshold (MSST), trip limits, bag limits, size limits, gear restrictions (ranging from regulation to complete prohibition), seasonal or area closures, fishing year, rebuilding plans, definitions of essential fish habitat, essential fish habitat, essential fish habitat HAPCs or Coral HAPCs, and restrictions on gear and fishing activities applicable in essential fish habitat and essential fish habitat HAPCs.

* * * * *

7. In § 622.49, paragraph (b)(1)(i) is revised and the last sentence of paragraphs (b)(4)(i)(A), (b)(7)(i)(A), (b)(8)(i)(A), (b)(9)(i)(A), (b)(10)(i)(A), (b)(13)(i)(A), (b)(14)(i)(A), (b)(15)(i)(A), (b)(16)(i)(A), (b)(17)(i)(A), (b)(19)(i)(A),

(b)(20)(i)(A), (b)(21)(i)(A), (b)(23)(i)(A), (b)(24)(i)(A), (e)(1), (f)(1) are revised to read as follows:

**§ 622.49 Annual catch limits (ACLs), annual catch targets (ACTs), and accountability measures (AMs).**

* * * * *

(b) * * *

(1) * * *

(i) *Commercial sector*—(A) *Hook-and-line component.* If commercial landings, as estimated by the SRD, reach or are projected to reach the commercial ACL (commercial quota) specified in § 622.42(e)(2)(ii), the AA will file a notification with the Office of the Federal Register to close the hook-and-line component of the commercial sector for the remainder of the fishing year.

(B) *Longline component.* If commercial landings, as estimated by the SRD, reach or are projected to reach the commercial ACL (commercial quota) specified in § 622.42(e)(2)(iii), the AA will file a notification with the Office of the Federal Register to close the longline component of the commercial sector for the remainder of the fishing year. After the commercial ACL for the longline component is reached or projected to be reached, golden tilefish may not be fished for or possessed by a vessel with a golden tilefish longline endorsement.

* * * * *

(4) * * *

(i) * * *

(A) * * * This bag and possession limit applies in the South Atlantic on board a vessel for which a valid Federal commercial or charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, without regard to where such species were harvested, *i.e.,* in state or Federal waters.

* * * * *

(6) * * *

(i) * * *

(A) * * * This bag and possession limit applies in the South Atlantic on board a vessel for which a valid Federal commercial or charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, without regard to where such species were harvested, *i.e.,* in state or Federal waters.

* * * * *

(7) * * *

(i) * * *

(A) * * * This bag and possession limit applies in the South Atlantic on board a vessel for which a valid Federal commercial or charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, without regard to where such species were harvested, *i.e.,* in state or Federal waters.

* * * * *

(8) * * *

(i) * * *

(A) * * * This bag and possession limit applies in the South Atlantic on board a vessel for which a valid Federal commercial or charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, without regard to where such species were harvested, *i.e.,* in state or Federal waters.

* * * * *

(9) * * *

(i) * * *

(A) * * * This bag and possession limit applies in the South Atlantic on board a vessel for which a valid Federal commercial or charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, without regard to where such species were harvested, *i.e.,* in state or Federal waters.

* * * * *

(10) * * *

(i) * * *

(A) * * * This bag and possession limit applies in the South Atlantic on board a vessel for which a valid Federal commercial or charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, without regard to where such species were harvested, *i.e.,* in state or Federal waters.

* * * * *

(12) * * *

(i) * * *

(A) * * * This bag and possession limit applies in the South Atlantic on board a vessel for which a valid Federal commercial or charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, without regard to where such species were harvested, *i.e.,* in state or Federal waters.

* * * * *

(13) * * *

(i) * * *

(A) * * * This bag and possession limit applies in the South Atlantic on board a vessel for which a valid Federal commercial or charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, without regard to where such species were harvested, *i.e.,* in state or Federal waters.

* * * * *

(14) * * *

(i) * * *

(A) * * * This bag and possession limit applies in the South Atlantic on board a vessel for which a valid Federal commercial or charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, without regard to where such species were harvested, *i.e.,* in state or Federal waters.

* * * * *

(15) * * *

(i) * * *

(A) * * * This bag and possession limit applies in the South Atlantic on board a vessel for which a valid Federal commercial or charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, without regard to where such species were harvested, *i.e.,* in state or Federal waters.

* * * * *

(16) * * *

(i) * * *

(A) * * * This bag and possession limit applies in the South Atlantic on board a vessel for which a valid Federal commercial or charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, without regard to where such species were harvested, *i.e.,* in state or Federal waters.

* * * * *

(17) * * *

(i) * * *

(A) * * * This bag and possession limit applies in the South Atlantic on board a vessel for which a valid Federal commercial or charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, without regard to where such species were harvested, *i.e.,* in state or Federal waters.

* * * * *

(19) * * *

(i) * * *

(A) * * * This bag and possession limit applies in the South Atlantic on board a vessel for which a valid Federal commercial or charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, without regard to where such species were harvested, *i.e.,* in state or Federal waters.

* * * * *

(20) * * *

(i) * * *

(A) * * * This bag and possession limit applies in the South Atlantic on board a vessel for which a valid Federal commercial or charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, without regard to where such species were harvested, *i.e.,* in state or Federal waters.

* * * * *

(21) * * *

(i) * * *

(A) * * * This bag and possession limit applies in the South Atlantic on board a vessel for which a valid Federal commercial or charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, without regard to where such species were harvested, *i.e.,* in state or Federal waters.

* * * * *

(23) * * *

(i) * * *

(A) * * * This bag and possession limit applies in the South Atlantic on board a vessel for which a valid Federal commercial or charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, without regard to where such species were harvested, *i.e.,* in state or Federal waters.

* * * * *

(24) * * *

(i) * * *

(A) * * * This bag and possession limit applies in the South Atlantic on board a vessel for which a valid Federal commercial or charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, without regard to where such species were harvested, *i.e.,* in state or Federal waters.

* * * * *

(e) * * *

(1) * * * This bag and possession limit applies in the South Atlantic on board a vessel for which a valid Federal commercial or charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, without regard to where such species were harvested, *i.e.,* in state or Federal waters.

* * * * *

(f) * * *

(1) * * * This bag and possession limit applies in the South Atlantic on board a vessel for which a valid Federal commercial or charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, without regard to where such species were harvested, *i.e.,* in state or Federal waters.

* * * * *

[FR Doc. 2012–30566 Filed 12–18–12; 8:45 am]

BILLING CODE 3510–22–P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 660

**[Docket No. 120813333–2647–01]**

**RIN 0648–BC28**

## Fisheries Off West Coast States; West Coast Salmon Fisheries; Amendment 17 to the Salmon Fishery Management Plan

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

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS proposes regulations to implement Amendment 17 to the Pacific Coast Salmon Fishery Management Plan for Commercial and Recreational Salmon Fisheries off the Coasts of Washington, Oregon, and California (Salmon FMP). Amendment 17, which was transmitted by the Pacific Fishery Management Council (Council) on November 5, 2012, to the Secretary of Commerce (Secretary) for review and approval, revises the maximum fishing mortality threshold (MFMT) for Quillayute fall coho, revises the FMP to correct typographical errors, updates reporting measures to reflect new technology, and updates or removes other obsolete or unnecessary language. The Northwest Regional Administrator has determined that the actions of Amendment 17 have all either been previously analyzed in a NEPA document or qualify for categorical exclusion (CE) from further NEPA analysis under NAO 216–6. NMFS also proposes minor updates to regulations unrelated to Amendment 17.

**DATES:** Written comments on this proposed rule must be received on or before January 8, 2013.

**ADDRESSES:** You may submit comments, identified by NOAA–NMFS–2012–0192, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal e-Rulemaking Portal *http://www.regulations.gov.* To submit comments via the e-Rulemaking Portal, enter NOAA–NMFS–2012–0192 in the search box. Locate the document you wish to comment on from the resulting list and click on the ''Comment Now'' icon on the right of that line.
- *Mail:* William W. Stelle, Jr., Regional Administrator, Northwest Region, NMFS, 7600 Sand Point Way NE., Seattle, WA 98115–0070 or to Rod McInnis, Regional Administrator, Southwest Region, NMFS, 501 West Ocean Boulevard, Suite 4200, Long Beach, CA 90802–4213.
- *Fax:* 206–526–6736 Attn: Peggy Mundy, or 562–980–4047 Attn: Heidi Taylor.

*Instructions:* Comments must be submitted by one of the above methods to ensure that they are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on *http://www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter N/A in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Information relevant to this proposed rule, which includes a CE, a regulatory impact review (RIR), and an initial regulatory flexibility analysis (IRFA) are available for public review during business hours at the office of the Pacific Fishery Management Council (Council), at 7700 NE Ambassador Place, Portland, OR 97220, phone: 503–820–2280, and are posted on its Web site (*www.pcouncil.org*). These documents are also linked on the NMFS Northwest Region Web site (*www.nwr.noaa.gov*). Copies of additional reports referred to in this document may also be obtained from the Council.

**FOR FURTHER INFORMATION CONTACT:** Peggy Mundy at 206–526–4323, or Heidi Taylor at 562–980–4039.

**SUPPLEMENTARY INFORMATION:**

### Background

In 2011, NMFS partially approved Amendment 16 to the Salmon FMP. Amendment 16 established status determination criteria (SDC), and other management metrics, for stocks managed under the Salmon FMP. Regulatory changes to implement the approved portions of Amendment 16 were made effective in a Final Rule (76 FR 81851, December 29, 2011). In a letter to the Council, dated December 11, 2011, NMFS detailed the disapproval of one SDC, the proposed maximum fishing mortality threshold (MFMT) for Quillayute fall coho, and recommended that the Council submit an FMP amendment to address this item. In the course of reviewing Amendment 16, a variety of other, unconnected, issues were identified as needing revision in the FMP, largely to correct typographical errors, update notification and reporting measures to reflect new technology, and respond to a regulatory procedure issue in the schedule for annual management measures. However, these were identified after the Council had transmitted Amendment 16 to NMFS for approval. Amendment 17 has been developed to address the Quillayute fall coho MFMT and 14 other issues.

The Council transmitted the amendment to NMFS on November 5, 2012. NMFS published a Notice of Availability in the **Federal Register** (77 FR 67327, November 9, 2012) to notify

the public of the availability of the amendment and invite comments.

This proposed rule identifies changes to the regulations under 50 CFR 660 subpart H to implement Amendment 17. The Council has deemed the proposed regulations to be necessary and appropriate as required by section 303(c) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA). This proposed rule also updates regulations under the same subpart, unrelated to Amendment 17, to remove obsolete text and update terminology.

**Components of Amendment 17**

The issues addressed by Amendment 17 are described below, in the order in which they affect the FMP.

*FMP Chapter 3—Conservation*

Amendment 17 Issue #1. Quillayute fall coho has an undefined MFMT, as shown in FMP table 3–1. This occurred because NMFS disapproved of the MFMT recommended by the Council under Amendment 16. Under Amendment 16, the Council recommended adopting an MFMT of 0.65 for all Washington Coast coho, to be consistent with the maximum exploitation rate allowed under the Pacific Salmon Treaty 2002 Southern Coho Management Plan. However, the Council had already accepted the Scientific and Statistical Committee approved estimate of 0.59 as the best estimate of $F_{MSY}$ for Quillayute fall coho, as presented in Appendix E of the Amendment 16 Environmental Assessment. Because MFMT cannot exceed $F_{MSY}$, that element of Amendment 16 was not approved and therefore, MFMT is currently undefined for Quillayute fall coho in the FMP. Amendment 17 adopts 0.59 for the value of MFMT for Quillayute fall coho.

Amendment 17 Issues #2 and #3. Amendment 17 corrects typographic errors for six Chinook salmon stocks listed in FMP Table 3–1, including erroneous inclusion in the Far North Migrating Coastal Chinook stock complex of two Columbia River Chinook stocks (Columbia River Upper River Bright Fall and Columbia Upper River Summer), and erroneous MFMT values for four stocks (Smith River, Southern Oregon, Central and Northern Oregon, and Quillayute Spring/Summer).

*FMP Chapter 5—Harvest*

Amendment 17 Issue #4. A description of Endangered Species Act (ESA) listed Chinook salmon is corrected to include federal ESA listing of two stocks.

Amendment 17 Issue #5. The description of methodology to estimate abundance for Oregon Production Index (OPI) coho is updated to reflect recent changes in scientific methodology.

Amendment 17 Issue #6. The discussion of management considerations for coho salmon north of Cape Falcon is updated to reflect recent consideration of impacts to two coho stocks.

Amendment 17 Issue #7. The description of impacts to pink salmon from the ocean fishery is updated to reflect recent analyses of exploitation rate for pink salmon, conducted since the Council adopted Amendment 16.

*FMP Chapter 6—Measures To Manage the Harvest*

Amendment 17 Issue #9. The discussion of minimum size limits is updated to better describe recent trends in how these management measures are used.

Amendment 17 Issue #10. The terminology for mark-selective fisheries is updated.

*FMP Chapter 7—Data Needs, Data Collection Methods, and Reporting Requirements*

Amendment 17 Issues #11 and #12. Amendment 17 updates technology used to collect and report data from the fishery.

*FMP Chapter 9—Schedule and Procedures for Preseason Modification of Regulations*

Amendment 17 Issue #8. Amendment 17 removes mention of a public comment period after final management measures are published in the **Federal Register**. Annual management measures for the salmon fishery are published in the **Federal Register** as a final rule; public comment periods are not applied to final rules. The public has an opportunity to comment throughout the Council's process of setting annual management measures, which includes two Council meetings and public hearings held in Washington, Oregon, and California. The Council publishes a notice in the **Federal Register** each December that details the process for setting the next year's annual management measures and solicits comments. The Council's notice provides the schedule for Council meetings and public hearings, as well as the schedule of availability of planning documents, including Preseason Report II which contains the salmon management alternatives the Council adopts in March for further consideration at its April meeting where it adopts a final recommendation for the fishing season. The Council's notice informs the public of how to request copies of the preseason planning documents, how to view the documents online, and how to submit comments to the Council by mail, fax, email, or the Federal Rulemaking Portal: *www.regulations.gov*. All comments received are reviewed by both the Council and NMFS.

*FMP Chapter 10—Inseason Management Actions and Procedures*

Amendment 17 Issues #13 and #14. The language regarding notification and procedures for inseason actions is updated to reflect current technology and policies.

*FMP Chapter 11—Schedule and Procedures for FMP Amendment and Emergency Regulations*

Amendment 17 Issue #15. The procedures for FMP amendment and emergency regulations are updated to be consistent with the MSA.

Changes to Regulations

This proposed rule includes changes to the existing regulations at 50 CFR 660.401 *et seq.,* to implement Amendment 17, and to make additional updates. These are described below.

- Definitions (§ 660.402)

The definition of ''Dressed, head-off length'' of salmon is updated to remove reference to Figure 3 which no longer appears in the regulations. This is a general correction, not a component of Amendment 17.

- Exempted Fishing (§ 660.406)

The reference to ''Regional Director'' is updated to the current term ''Regional Administrator.'' This is a general correction, not a component of Amendment 17.

- Annual Actions (§ 660.408)

The references to ''Regional Director'' are updated to the current term ''Regional Administrator,'' and the word Chinook is capitalized. These are general corrections, not components of Amendment 17.

- Notification and Publication Procedures (§ 660.411)

Language providing for a public comment period after an action is effective is removed., and information on availability of data is updated.

**Classification**

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent

with Amendment 17, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

The Northwest Regional Administrator has determined that the actions of Amendment 17 have all either been previously analyzed in a NEPA document or qualify for categorical exclusion from further NEPA analysis under NAO 216–6.

An initial regulatory flexibility analysis (IRFA) was prepared, as required by section 603 of the Regulatory Flexibility Act (RFA). The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained in the **SUMMARY** and Classification sections of this proposed rule. A copy of the IRFA is available from NMFS (see **ADDRESSES**). The IRFA is expected to provide a: (1) Description of the reasons why action by the agency is being considered; (2) succinct statement of the objectives of, and legal basis for, the proposed rule; (3) description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply; (4) description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and (5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule. The IRFA is also to expected to contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.

Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as: (1) Establishing differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) clarifying, consolidating, or simplifying compliance and reporting requirements under the rule for such small entities; and (3) using performance rather than design standards; and (4) exempting from coverage of the rule, or any part thereof, such small entities.

The reasons for why this action is being considered and the statement of objectives and legal basis for the proposed rule are discussed above in the **SUMMARY** and Classification sections of this proposed rule. The number of small entities that are affected is discussed below along with the other IRFA requirements.

The commercial entities directly regulated by the Pacific Council's Fishery Management Plan are non-tribal commercial trollers, tribal commercial trollers, and charterboats. During 2011, the most recent year for which NMFS has data, these fleets consisted of estimated 802 non-tribal trollers, 40 to 50 tribal trollers, and 438–495 charterboats. Accordingly, NMFS estimates this rule, if implemented, will impact approximately 1,300 small entities involved in the fishery.

Based on Pacific Coast Fisheries Information Network (PacFIN) data, a total of 802 non-tribal vessels participated in the West Coast commercial salmon fishery in 2011. This figure is 25 percent more than participated in 2010 (642), two-and-a-half times the number that participated in 2009 (313), and three-and-a-half times the number participating in 2008 (221). Total 2011 ex-vessel value of the Council-managed non-Indian commercial salmon fishery was $9.2 million, an increase of 26 percent over the prior year (adjusted for inflation). Ex-vessel value was nearly six times above its 2009 level ($1.6 million) and 85 percent lower than the 1979 through 1990 inflation-adjusted average of $60.7 million, and 41 percent above the recent five-year (2006–2010) inflation-adjusted average of $6.5 million. In 2011, the coastwide average inflation-adjusted ex-vessel value of salmon landings increased slightly compared to 2010, to $10,500 per non-tribal vessel (approximately 385 of these trollers account for 90% of the revenues for an average revenue of $22,000). Treaty Indian commercial fisheries off Washington operate under regulations established by the Council. While some of the treaty Indian harvest is for ceremonial and subsistence purposes, the vast majority of the catch is sold commercially. Commercial treaty Indian fisheries provide food to consumers and generate income in local and state economies through expenditures on harvesting, processing, and marketing of the catch. According to a Northwest Indian Fisheries Commission representative, the tribal fleet consists of 40 to 50 trollers. For 2011 the preliminary ex-vessel value of Chinook and coho landed in the treaty Indian ocean troll fishery was $1.7 million, compared with inflation-adjusted ex-vessel values of $1.37 million in 2010 and $1.0 million in 2009 (values based on PacFIN data). During 2011, the tribal troll harvest was worth $1.7 million exvessel, implying that the average revenue per tribal troller ranges from $34,000 to $42,500.

A fish-harvesting business is considered a ''small'' entity by the Small Business Administration (SBA) if it has annual receipts not in excess of $4.0 million. For marinas and charter/party boats, a small entity is one with annual receipts not in excess of $6.5 million. All of the businesses that would be affected by this action are considered small under SBA guidance. Average 2011 tribal and non-tribal vessel revenues are approximately $13,000 per vessel. Charterboats participating in the recreational salmon fishery in 2000 had average revenues ranging from $7,000 to $131,000, depending on vessel size class (Pacific States Marine Fisheries Commission study). These figures remain low, and NMFS has no information suggesting that these vessels have received annual revenues since 2000 such that they should be considered ''large'' entities under the RFA. As these average revenues are far below SBA's thresholds for small entities, NMFS has determined that all of these entities are small entities under SBA's definitions.

There are no new reporting or recordkeeping requirements. There are no relevant Federal rules that may duplicate, overlap, or conflict with this action. As the proposed regulations are administrative in nature, there are no significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and that minimize any of the significant economic impact of the proposed rule on small entities. NMFS estimates that this rule will affect approximately 1,300 small entities. Under the RFA, an agency does not need to conduct an IRFA and/or Final Regulatory Flexibility Analysis (FRFA), if an agency can certify that the proposed rule will not have a significant economic impact on a substantial number of small entities. The regulations being proposed are administrative in nature. Consequently, NMFS believes that this rule does not meet any of the tests of having a ''significant'' economic impact on a ''substantial number'' of small entities, nor does NMFS believe that this rule will place a substantial number of small entities at a significant competitive disadvantage compared to large entities. Nonetheless, NMFS has prepared an IRFA. Through the rulemaking process associated with this action, we are

requesting comments on this conclusion.

The proposed rule is administrative in nature and does not affect ESA listed species. However, NMFS has issued a number of ESA biological opinions that address the impacts of the Council managed salmon fisheries on listed salmonids as follows: March 8, 1996 (Snake River spring/summer and fall Chinook and sockeye), April 28, 1999 (Oregon Coast natural coho, Southern Oregon/Northern California coastal coho, Central California coastal coho), April 28, 2000 (Central Valley spring Chinook), April 27, 2001 (Hood Canal summer chum 4(d) limit), April 30, 2004 (Upper Willamette Chinook, Upper Columbia spring Chinook, Lake Ozette sockeye, Columbia River chum), April 30, 2004 Puget Sound Chinook, June 13, 2005 (California coastal Chinook), April 28, 2008 (Lower Columbia River natural coho), and April 30, 2010 (Sacramento River winter Chinook, and listed Puget Sound yelloweye rockfish, canary rockfish, and bocaccio), and April 26, 2012 (Lower Columbia River Chinook). NMFS reiterates its consultation standards for all ESA-listed salmon and steelhead species in their annual Guidance letter to the Council. In 2009, NMFS consulted on the effects of fishing under the Salmon FMP on the endangered Southern Resident Killer Whale Distinct Population Segment (SRKW) and concluded the salmon fisheries were not likely to jeopardize SRKW (biological opinion dated May 5, 2009).

Pursuant to Executive Order 13175, this proposed rule was developed after meaningful consultation and collaboration with Tribal officials from the area covered by the FMP. Under the Magnuson-Stevens Act at 16 U.S.C. 1852(b)(5), one of the voting members of the Pacific Council must be a representative of an Indian Tribe with Federally recognized fishing rights from the area of the Council's jurisdiction.

**List of Subjects in 50 CFR Part 660**

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: December 14, 2012.

**Alan D. Risenhoover,**

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

For the reasons set out in the preamble, 50 CFR part 660 is proposed to be amended as follows:

## PART 660—FISHERIES OFF WEST COAST STATES

1. The authority citation for part 660 continues to read as follows:

**Authority:** 16 U.S.C. 1801 *et seq.* and 16 U.S.C. 773 *et seq.*

2. In § 660.402, revise the definition for ''Dressed, head-off length of salmon'' to read as follows:

### § 660.402 Definitions.

* * * * *

*Dressed, head-off length of salmon* means the shortest distance between the midpoint of the clavicle arch and the fork of the tail, measured along the lateral line while the fish is lying on its side, without resort to any force or mutilation of the fish other than removal of the head, gills, and entrails.

* * * * *

3. In § 660.406, revise paragraph (c) to read as follows:

### § 660.406 Exempted fishing.

* * * * *

(c) Each vessel participating in any exempted fishery recommended by the Council and allowed by NMFS is subject to all provisions of this subpart, except those portions which relate to the purpose and nature of the exempted fishery. These exceptions will be specified in a permit issued by the Regional Administrator to each vessel participating in the exempted fishery and that permit must be carried aboard each participating vessel.

* * * * *

4. In § 660.408, revise paragraphs (d)(1)(vii) and (d)(2)(v) to read as follows:

### § 660.408 Annual actions.

* * * * *

(d) * * *

(1) * * *

(vii) *Other inseason provisions.* Any increase or decrease in the recreational or commercial allowable ocean harvest resulting from an inseason restructuring of a fishery or other inseason management action does not require reallocation of the overall non-treaty allowable ocean harvest north of Cape Falcon between the recreational and commercial fisheries. Inseason redistribution of subarea quotas within the recreational fishery or the distribution of allowable coho catch transfers from the commercial fishery among subareas may deviate from the preseason distribution. Inseason management actions may be taken by the Regional Administrator to assure meeting the primary objective of achieving all-species fisheries without imposing Chinook restrictions in each of the recreational subareas north of Cape Falcon. Such actions might include, but are not limited to: Closure from 0 to 3, 0 to 6, 3 to 200, or 5 to 200 nm from shore; closure from a point extending due west from Tatoosh Island for 5 nm, then south to a point due west of Umatilla Reef Buoy, then due east to shore; closure from North Head at the Columbia River mouth north to Leadbetter Point; change in species that may be landed; or other actions as prescribed in the annual management measures.

* * * * *

(2) * * *

(v) *Inseason reallocation.* No later than August 15 each year, the Salmon Technical Team will estimate the number of coho salmon needed to complete the recreational seasons. Any coho salmon allocated to the recreational fishery that are not needed to complete the recreational seasons will be reallocated to the commercial fishery. Once reallocation has taken place, the remaining recreational quota will change to a harvest guideline. If the harvest guideline for the recreational fishery is projected to be reached on or before Labor Day, the Regional Administrator may allow the recreational fishery to continue through the Labor Day weekend only if there is no significant danger of impacting the allocation of another fishery or of failing to meet an escapement goal.

* * * * *

5. In § 660.411, revise paragraphs (b) and (c) to read as follows:

### § 660.411 Notification and publication procedures.

* * * * *

(b) *Public comment.* If time allows, NMFS will invite public comment prior to the effective date of any action published in the **Federal Register**.

(c) Availability of data. The Regional Administrator will compile in aggregate form all data and other information relevant to the action being taken and will make them available for public review upon request, contact information will be published annually in the **Federal Register** and announced on the telephone hotline. For actions affecting fisheries occurring primarily or exclusively in the fishery management area seaward of California, information relevant to the action also will be made available upon request by the Southwest Region, NMFS.

* * * * *

[FR Doc. 2012–30598 Filed 12–18–12; 8:45 am]

BILLING CODE 3510–22–P

# Notices

Federal Register

Vol. 77, No. 244

Wednesday, December 19, 2012

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

## AGENCY FOR INTERNATIONAL DEVELOPMENT

### Notice of Public Information Collections Being Reviewed by the U.S. Agency for International Development; Comments Requested

**SUMMARY:** U.S. Agency for International Development (USAID) is making efforts to reduce the paperwork burden. USAID invites the general public and other Federal agencies to take this opportunity to comment on the following proposed and/or continuing information collections, as required by the Paperwork Reduction Act for 1995. Comments are requested concerning: (a) Whether the proposed or continuing collections of information are necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

**DATES:** Submit comments on or before February 19, 2013.

**FOR FURTHER INFORMATION CONTACT:** Sylvia Joyner, Bureau for Management, Office of Management Services, Information and Records Division, U.S. Agency for International Development, Room 2.07C, RRB, Washington, DC 20523, (202) 712–5007 or via email *sjoyner@usaid.gov.*

**ADDRESSES:** Send comments via email at *tdebnam@usaid.gov*, United States Agency for International Development, Office of Security, Ronald Reagan Building, 1300 Pennsylvania Avenue NW., Room 2.06–012, Washington, DC 20523, 202–712–1752.

**SUPPLEMENTARY INFORMATION:**

*OMB No:* OMB 0412–0549.

*Form No.:* AID 566–01, AID 566–02, AID 566–03, AID 566–04, and AID 566–05,

*Title:* Residence, Employment, and Personal Reference Inquiry Type of Review: Reinstatement of Information Collection.

*Purpose:* USAID is required by Executive order that Background investigations be conducted on all persons entering Federal Service. 5 U.S.C. 3301 and 5 CFR 5.2 require that investigations and determinations be made concerning the qualifications and fitness of applicants for federal employment. A National Agency Check and written inquiries are the minimum investigation required for employment in any department or agency of the Government as prescribed in Section 3(a) of the Executive Order 10450.

**Annual Reporting Burden**

*Respondents:* 8976.

*Total annual responses:* 6552.

*Total annual hours requested:* 46 hours.

Dated December 11, 2012.

**Lynn Winston,**

*Division Chief Bureau for Management, Office of Management Services, Information and Records Division.*

[FR Doc. 2012–30612 Filed 12–18–12; 8:45 am]

**BILLING CODE 6116–01–P**

## DEPARTMENT OF AGRICULTURE

### Advisory Committee on Beginning Farmers and Ranchers; Intent To Renew and Request for Nominations

**AGENCY:** Office of Advocacy and Outreach, USDA.

**ACTION:** Notice of intent and request for nominations.

**SUMMARY:** We are giving notice that the Secretary of Agriculture intends to renew the charter of the Advisory Committee on Beginning Farmers and Ranchers (the ''Committee'') for an additional term of 2 years through December 14, 2014. We are also giving notice that the Secretary is soliciting nominations for membership for this Committee.

**DATES:** Consideration will be given to nominations received on or before December 31, 2012.

**FOR FURTHER INFORMATION CONTACT:** Mrs. R. J. Cabrera, Designated Federal Official, USDA OAO, 1400 Independence Avenue, Room 520–A, Washington, DC 20250–0170; Telephone (202) 720–6350; Fax (202) 720–7704; Email: *rj.cabrera@osec.usda.gov.*

**ADDRESSES:** Nomination packages may be sent by postal mail or commercial delivery to: Mrs. R.J. Cabrera, Designated Federal Official, USDA OAO, 1400 Independence Avenue, Room 520–A, Washington, DC 20250–0170. Nomination packages may also be faxed to (202) 720–7704.

**SUPPLEMENTARY INFORMATION:** Pursuant to the Federal Advisory Committee Act (FACA, 5 U.S.C. App.), notice is hereby given that the Secretary of Agriculture intends to renew the Advisory Committee on Beginning Farmers and Ranchers for 2 years. Members of the current Committee may be appointed for an additional term of 1 or 2 years; new members will serve for 2 years in remaining roles adhering to the statutory guidelines of representation required.

The Committee advises the Secretary of Agriculture on matters broadly affecting new farmers and ranchers including strategies, policies, and programs that will enhance opportunities and create new farming and ranching operations. The Committee will consider Department goals and objectives necessary to implement prior recommendations. The Committee will develop and recommend an overall framework and strategies to encompass principles that leverage and maximize existing programs, and create and test new program opportunities.

In this notice, we are soliciting nominations from interested organizations and individuals from among ranching and farming producers (industry), related government, State, and Tribal agricultural agencies, academic institutions, commercial banking entities, trade associations, and related nonprofit enterprises. An organization may nominate individuals from within or outside its membership; alternatively, an individual may nominate herself or himself. Nomination packages should include a nomination form along with a cover letter or resume that documents the nominee's background and experience. Nomination forms are available on the Internet at *http://www.ocio.usda.gov/*

*forms/doc/AD–755.pdf* or may be obtained from Mrs. R. J. Cabrera at the address or telephone number noted above.

The Secretary will select up to 20 members from among those organizations and individuals solicited, in order to obtain the broadest possible representation on the Committee, in accordance with the FACA and U.S. Department of Agriculture (USDA) Regulation 1041–001. Equal opportunity practices, in line with the USDA policies, will be followed in all appointments to the Committee. To ensure that the recommendations of the Committee have taken into account the needs of the diverse groups served by the Department, membership should include, to the extent practicable, individuals with demonstrated ability to represent minorities, women, and persons with disabilities.

**Dexter L. Pearson,**

*Associate Director, Office of Advocacy and Outreach.*

[FR Doc. 2012–30471 Filed 12–18–12; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

### Agency Information Collection Activities: Proposed Collection; Comment Request—Summer Food Service Program

**AGENCY:** Food and Nutrition Service, USDA.

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice invites the general public and other public agencies to comment on the Agency's proposed information collection for the Summer Food Service Program. This collection is a revision of a currently approved information collection.

**DATES:** Written comments must be received on or before February 19, 2013.

**ADDRESSES:** Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the Agency's functions, including whether the information will have practical utility; (2) the accuracy of the Agency's estimate of the proposed information collection burden, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments may be sent to Jon Garcia, Program Analysis and Monitoring Branch, Child Nutrition Division, 3101 Park Center Drive, Alexandria, VA 22302. Comments will also be accepted through the Federal eRulemaking Portal. Go to *http://www.regulations.gov,* and follow the online instructions for submitting comments electronically.

All responses to this notice will be summarized and included in the request for Office of Management and Budget (OMB) approval. All comments will also become a matter of public record.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of this information collection should be directed to Jon Garcia, Program Analysis and Monitoring Branch, Child Nutrition Division, 3101 Park Center Drive, Alexandria, VA 22302.

**SUPPLEMENTARY INFORMATION:**

*Title:* Information Collection for the Summer Food Service Program (SFSP).

*OMB Number:* 0584–0280.

*Form Number:* FNS–418.

*Expiration Date:* February 28, 2013.

*Type of Request:* Revision of a currently approved collection.

*Abstract:* SFSP is authorized under section 13 of the Richard B. Russell National School Lunch Act (NSLA) (42 U.S.C. 1761). The SFSP is directed toward children in low-income areas when school is not in session and is operated locally by approved sponsors. Local sponsors may include public or private non-profit school food authorities (SFAs), public or private non-profit residential summer camps, units of local, municipal, county or State governments, or other private non-profit organizations that develop a special summer program and provide meal service similar to that available to children during the school year under the National School Lunch Program (NSLP) and the School Breakfast Program (SBP). Program operators submit monthly claims using FNS–418 to its administering agency to receive reimbursement.

This is a revision of a currently approved collection. It revises reporting burden as a result of program changes and corrections to the recordkeeping burden hours. Current OMB inventory for this collection includes only reporting burden and that consists of 182,683 hours. As a result of program changes and reevaluation of existing program tasks, the reporting burden was significantly reduced by 42,693 hours since last renewal. However, as a result of reinstating the recordkeeping burden, this reduction is estimated at 7,291 hours. No substantive revisions have occurred to the form (FNS–418). The average burden per response and the annual burden hours for reporting and recordkeeping are explained below and summarized in the charts which follow.

*Affected Public:* State agencies, camps and other sites and households.

*Estimated Number of Respondents:* 106,187.

*Estimated Number of Responses per Respondent:* 6.417593.

*Estimated Total Annual Responses:* 681,465.

*Estimate Time per Response:* 0.257373.

*Estimated Total Annual Burden:* 175,392.

*Current OMB Inventory:* 182,683 (Reporting burden only).

*Difference (Burden Revisions Requested):* −7,291.

Refer to the table below for estimated total annual burden for each type of respondent.

| Affected public | Estimated number of respondents | Number of responses per respondent | Total annual responses | Estimated total hours per response | Estimated total burden |
|---|---|---|---|---|---|
| **Reporting** | | | | | |
| State Agencies | 53 | 381 | 20,193 | 0.722441 | 14,588 |
| Sponsors | 4,754 | 2.80963 | 13,357 | 3.725527 | 49,762 |
| Camps and Other Sites | 791 | 1 | 791 | .25 | 198 |
| Households | 100,589 | 2 | 201,178 | .375 | 75,442 |
| Total Estimated Reporting Burden | 106,187 | | 235,519 | | 139,990 |

| Affected public | Estimated number of respondents | Number of responses per respondent | Total annual responses | Estimated total hours per response | Estimated total burden |
|---|---|---|---|---|---|
| **Recordkeeping** | | | | | |
| State Agencies | 53 | 131 | 6,943 | .080000 | 555.4 |
| Sponsors | 4,754 | 91 | 432,614 | .08 | 34,609 |
| Camps and Other Sites | 791 | 1 | 791 | .3 | 237.3 |
| Total Estimated Record keeping Burden | 5,598 | ..... | 440,348 | ..... | 35,402 |
| **Total of Reporting and Recordkeeping** | | | | | |
| Reporting | 106,187 | 2.217965 | 235,519 | .594388 | 139,990 |
| Recordkeeping | 5,598 | 78.66166 | 440,348 | .0803952 | 35,402 |
| Total | 106,187 | 6.417593 | 681,465 | .257375 | 175,392 |

Dated: December 10, 2012.

**Audrey Rowe**

*Administrator, Food and Nutrition Service.*

BILLING CODE 3410–30–P

FNS-418 and Instructions

FORM APPROVED OMB. NO. 0584-0280
Expiration Date: XX/XX/XXXX

U.S. DEPARTMENT OF AGRICULTURE
FOOD AND NUTRITION SERVICE

**REPORT OF THE SUMMER FOOD SERVICE PROGRAM FOR CHILDREN**

*State Agency: Submit report according to the instructions 30 and 90 days following the month being reported. Send original to the Regional Administrator, Food and Nutrition Service.*

1. STATE

2. CALENDAR YEAR

3. MONTH

4A. TYPE OF SUBMISSION *("X" ONE)*

A. ☐ 30 - Day
B. ☐ 60 - Day *(Optional)*
C. ☐ 90 - Day
D. ☐ 90 - Day
Revision No. ____ ( 1 = 1st rev; 2 = 2nd, etc.)
E. ☐ Closeout
F. ☐ Other _____

4B. LAST REPORTING MONTH OF FISCAL YEAR?
☐ YES
☐ NO

**FOR FNS USE ONLY**

STATE CODE

CAL. YEAR | MONTH | TYPE

FNS REGIONAL OFFICE USE
☐ **REVEIWED**

DATE

SIGNATURE OF FNS OFFICIAL

*According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB Control Number. The valid OMB Control Number for this information collection is 0584-0280. The time required to complete this information collection is estimated to average 2 hours per response, including the time to review instructions, search existing data resources, gather the data needed, and complete and review the information collection.*

**PART A - MEALS SERVED**

| MEAL TYPE | | | TOTAL MEALS - ALL SPONSORS Report every month | |
|---|---|---|---|---|
| | | | SELF-PREP/RURAL SITES (A) | OHTER SITES (B) |
| BREAKFASTS | ACTUAL | 5. | | |
| | ESTIMATED | 6. | | |
| | TOTAL | 7. | | |
| LUNCHES | ACTUAL | 8. | | |
| | ESTIMATED | 9. | | |
| | TOTAL | 10. | | |
| SUPPERS | ACTUAL | 11. | | |
| | ESTIMATED | 12. | | |
| | TOTAL | 13. | | |
| SUPPLEMENTS | ACTUAL | 14. | | |
| | ESTIMATED | 15. | | |
| | TOTAL | 16. | | |
| TOTAL | ACTUAL | 17. | | |
| | ESTIMATED | 18. | | |
| | TOTAL | 19. | | |

I CERTIFY that this report is true and correct to the best of my knowledge and belief.

| 20. SIGNATURE | 21. TITLE | 22. DATE SIGNED |
|---|---|---|
| | 23. ADMINISTERING AGENCY | |

FORM FNS-418 (07-12) Previous Editions Obsolete **SBU** Electronic Form Version Designed in Adobe 9.1 Version

*NO FURTHER MONIES OR OTHER BENEFITS MAY BE PAID OUT UNDER THESE PROGRAMS UNLESS THIS REPORT IS COMPLETE AND FILED AS REQUESTED BY EXISTING REGULATIONS (7 C.F.R. 225)*

**PART B - COMMODITIES**

(Complete for 90-Day report for last reporting month of the fiscal year.)

| | |
|---|---|
| 24. CUMULATIVE MEALS (All Types) ACTUALLY SERVED BY SPONSORS ELIGIBLE TO RECEIVE USDA DONATED COMMODITIES. *(If no sponsors are eligible to receive commodities, enter "X".)* | |

**PART C - MEALS SERVED**

(Complete according to instructions for July 90-Day Report Only)

| MEAL TYPE (Actual Meals Served) | SCHOOL SPONSORS (A) | GOVERNMENT SPONSORS (B) | RESIDENTIAL CAMPS (C) | NATIONAL YOUTH SPORTS PROGRAM (D) | NON-PROFIT PRIVATE SPONSORS (E) | TOTAL (F) |
|---|---|---|---|---|---|---|
| BREAKFASTS 25. | | | | | | |
| LUNCHES 26. | | | | | | |
| SUPPERS 27. | | | | | | |
| SUPPLEMENTS 28. | | | | | | |
| TOTAL 29. | | | | | | |

**PART D - PARTICIPATION - JULY 90-DAY REPORT ONLY**

| | | | | | | |
|---|---|---|---|---|---|---|
| NO. OF SPONSORS 30. | | | | | | |
| NO. OF SITES 31. | | | | | | |
| NO. OF RURAL SITES 32. (Include in 31 above) | | | | | | |
| ADA OF SPONSORS REPORTED LINE 30 33. | | | | | | |

34. REMARKS

**INSTRUCTIONS**

(All items self-explanatory unless noted below)

**DEFINITIONS**

1. "Actual" - Meals for which claims have been approved for reimbursement for the month.

2. "Estimated" - Projection of the number of meals that were served and are expected to be approved for reimbursement for which claims have not seem received or approved by the reporting due date.

3. "Total" - The sum of ACTUAL and ESTIMATED data.

4. "ADA" - SFSP average daily attendance rate (ADA) is calculated by taking the total number of meals served in a **sponsor's primary meal service (usually lunch)** during the claim period and dividing that number by the number of **operating or meal service days** for that claim period. This results in the ADA for a sponsor on an average day during the claim period.

**TYPE OF SUBMISSION**

4A. "30-Day Report" - Due in FNS Regional Offices on the last day of the month following the month being reported. This report may contain ACTUAL and ESTIMATED data.

4B. "60-Day Report" - A 60-Day Report is not required.

4C. "90-Day Report" - The 90-Day Report must be submitted to the FNS Regional Office within ninety days following the month being reported. This is a "final" report and must consist of ACTUAL data only.

4D. "Revised 90-Day Report" - Submit revisions to the latest 90-Day Report in accordance with FNS instructions.

4E. "Closeout Report" - Submit the Annual Financial Reconciliation (***Closeout***) of Program Grants Report in accordance with FNS instructions.

4F. "Other Reports" - Submit other reports in accordance with FNS instructions. Use the "Remarks" section if necessary to describe the purpose of the report.

**PART A - (Lines 5-19)**

***Note: For each reporting month, complete Columns A and B.***

**COLUMN A**

Enter the ACTUAL, ESTIMATED, AND TOTAL number of BREAKFASTS, LUNCHES, SUPPERS, and SUPPLEMENTS served in self-prep and/or rural sites operating under all sponsor types.

**COLUMN B**

Enter the ACTUAL, ESTIMATED, and TOTAL number of BREAKFASTS, LUNCHES, SUPPERS, and SUPPLEMENTS served in all other sites operating under all sponsor types.

**PART B - (Line 24)**

***Complete for 90-Day Report for the Last Operating Month of the Fiscal Year***

Sponsors eligible to receive commodities in the Summer Food Service Program are self-preparation sponsors and those sponsors which contract with a school or with a school district for the preparation of meals, and school food authority sponsors procuring meals from a food service management company as provided by Program regulations.

Report the total number of ACTUAL meals served by all sponsors ***eligible*** to receive USDA donated commodities whether or not those sponsors actually received commodities. This is a cumulative number of meals (all types) for the entire Summer Food Service Program. For summer camps, this would include both the reimbursable meals served to needy children and at the State's option, actual counts of non-reimbursable meals served to non-needy children. Submit this information on the 90-Day Report for the last operating month.

***(EXAMPLE: If all meal service concluded in the month of August, then line 24 would be completed on the August 90-Day Report.)***

**PART C - (Lines 25-29)**

**Complete for July 90-Day Report ONLY**

**COLUMNS A-E**

Enter the ACTUAL number of BREAKFASTS, LUNCHES, SUPPERS, AND SUPPLEMENTS served by each of the indicated sponsor types.

**COLUMN F**

Enter the total number of BREAKFASTS, LUNCHES, SUPPERS, and SUPPLEMENTS served by all sponsors.

**PART D - (Lines 30-33)**

**Complete for July 90-Day Report ONLY**

Line 30 - Enter the number of sponsors by type that operated during the month of July.

Line 31 - Enter the number of sites that operated under each sponsor type during the month of July.

Line 32 - Enter the number of sites from Line 31 which are rural sites. Include these sites on Line 31 above.

Line 33 - Enter the Average Daily Attendance (ADA) for each type of sponsor entered on Line 30 for the month of July. This is the sum of the average daily attendance figures reported by each type of sponsor.

[FR Doc. 2012–30543 Filed 12–18–12; 8:45 am]

**BILLING CODE 3410–30–C**

## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

### Agency Information Collection Activities: Proposed Collection; Comment Request—Generic Clearance To Conduct Formative Research

**AGENCY:** Food and Nutrition Service (FNS), USDA.

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice invites the general public and other interested parties to comment on a proposed information collection. This collection is an extension, without change, of a currently approved collection. This information collection will conduct research in support of FNS' goal of delivering science-based nutrition education to targeted audiences. From development through testing of materials and tools with the target audience, FNS plans to conduct data collections that involve formative research including focus groups, interviews (dyad, triad, telephone, *etc.*), surveys and Web-based collection tools.

**DATES:** Written comments must be received on or before February 19, 2013.

**ADDRESSES:** Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments may be sent to Judy F. Wilson, Senior Nutrition Advisor, Food

and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 1012, Alexandria, VA 22302. Comments may also be faxed to the attention of Judy F. Wilson at (703) 305–2576 or emailed to *judy.wilson@fns.usda.gov.* Comments will also be accepted through the Federal eRulemaking Portal. Go to *http://www.regulations.gov* and follow the online instructions for submitting comments electronically.

All written comments will be open for public inspection at the Office of the Food and Nutrition Service during regular business hours (8:30 a.m. to 5 p.m., Monday through Friday) at 3101 Park Center Drive, Alexandria, Virginia 22302, Room 1012.

All responses to this notice will be summarized and included in the request for Office of Management and Budget (OMB) approval. All comments will be a matter of public record.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information should be directed to Judy F. Wilson at (703) 305–2017.

**SUPPLEMENTARY INFORMATION:**

*Title:* Generic Clearance to Conduct Formative Research for Development of Nutrition Education and Promotion Materials and Related Tools for FNS Population Groups.

*OMB Number:* 0584–0524.

*Expiration Date:* April 30, 2013.

*Type of Request:* Revision of previously approved information collection.

*Abstract:* This information collection is based on Section 19 of the Child Nutrition Act of 1966 (42 U.S.C. 1787), Section 5 of the Richard B. Russell National School Lunch Act (42 U.S.C. 1754) and Section 11(f) of the Food and Nutrition Act of 2008 (7 U.S.C. 2020). This request for approval of information collection is necessary to obtain input into the development of nutrition education interventions for population groups served by the U.S. Department of Agriculture, Food and Nutrition Service (USDA–FNS).

Interventions need to be designed so that they can be delivered through different types of media and in a variety of formats for diverse audiences.

FNS develops a variety of resources to support nutrition education and promotion activities. These resources are designed to convey science-based, behavior-focused nutrition messages about healthy eating and physical activity to children and adults eligible to participate in FNS nutrition assistance programs and to motivate them to consume more healthful foods as defined by the Dietary Guidelines for Americans (DGA). This includes education materials, messages, promotion tools and interventions for the diverse population served by the Federal nutrition programs including WIC, Team Nutrition, Food Distribution and other programs.

Obtaining formative input and feedback is fundamental to FNS' success in delivering science-based nutrition messages and reaching diverse segments of the population in ways that are meaningful and relevant. This includes conferring with the target audience, individuals providing service to the target audience, and key stakeholders on the communication strategies and interventions that will be developed and on the delivery approaches that will be used to reach consumers. The formative research and testing activities described will help in the development of effective education and promotion tools and communication strategies. Collection of this information will increase FNS' ability to formulate nutrition education interventions that resonate with the intended target population, in particular low-income families.

Formative research methods and information collection will include focus groups, interviews (dyad, triad, telephone, *etc.*), surveys and Web-based data collection. The data obtained will provide input regarding the potential use of materials and products during both the developmental and testing stages. In order to determine future nutrition education needs, tools and dissemination strategies, key informant interviews will be conducted. This task involves collecting a diverse array of information from a variety of groups including: People familiar with the target audiences; individuals delivering nutrition education interventions and projects; program providers at State and local levels; program participants; and other relevant informants associated with FNS programs.

Findings from all data collection will be included in summary reports submitted to USDA–FNS. The reports will describe the data collection methods, findings, conclusions, implications, and recommendations for the development and effective dissemination of nutrition education materials and related tools for FNS population groups. There will be no specific quantitative analysis of data. No attempt will be made to generalize the findings to be nationally representative or statistically valid.

**Reporting Burden**

*Affected Public:* State, Local and Tribal Government; Individual/Households; and Business or Other for Profit.

*Estimated Number of Respondents:* 102,500 respondents.

*Estimated Number of Responses per Respondent:* 1 response.

*Estimated Total Annual Responses:* 102,500.

*Estimate of Time per Respondent:* .468 hours.

*Estimated Total Annual Reporting Burden Hours:* 48,000 hours.

*Current OMB Inventory:* 33,016.

*Difference (Burden Revisions Requested):* 14,984.

REPORTING BURDEN

| Collection instruments | Estimated number respondents | Responses annually per respondent | Total annual responses | Estimated average number of hours per response | Estimated total hours |
|---|---|---|---|---|---|
| Focus Group Screeners | 10,000 | 1 | 10,000 | 0.17 | 1,666.67 |
| Interview Screeners/Surveys | 5,000 | 1 | 5,000 | 0.17 | 833.33 |
| Focus Groups | 5,500 | 1 | 5,500 | 2.00 | 11,000.00 |
| Intercept Interviews | 5,000 | 1 | 5,000 | 0.50 | 2,500.00 |
| Dyad/Triad Interviews | 2,000 | 1 | 2,000 | 1.00 | 2,000.00 |
| Telephone Interviews | 10,000 | 1 | 10,000 | 0.25 | 2,500.00 |
| Surveys | 10,000 | 1 | 10,000 | 0.50 | 5,000.00 |
| Web-based Collections | 40,000 | 1 | 40,000 | 0.50 | 20,000.00 |
| Confidentiality Agreements | 15,000 | 1 | 15,000 | 0.17 | 2,500.00 |
| Total Reporting Burden | 102,500 | 1 | 102,500 | .468 | 48,000 |

Dated: December 10, 2012.

**Audrey Rowe,**

*Administrator, Food and Nutrition Service.*

[FR Doc. 2012–30549 Filed 12–18–12; 8:45 am]

**BILLING CODE 3410–30–P**

## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

### Agency Information Collection Activities: Existing Collection; Comment Request—Forms FNS–806–A, Claim for Reimbursement (National School Lunch and School Breakfast Programs), and FNS–806–B, Claim for Reimbursement (Special Milk Program for Children)

**AGENCY:** Food and Nutrition Service (FNS), USDA.

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice invites the general public and other public agencies to comment on this existing information collection. This collection is a renewal of a currently approved collection for reporting school programs data on a monthly basis for the National School Lunch Program, the School Breakfast Program, and the Special Milk Program.

**DATES:** Written comments must be received on or before February 19, 2013.

**ADDRESSES:** Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions that were used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments may be sent to Jon Garcia, Acting Branch Chief, Program Analysis and Monitoring Branch, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 640, Alexandria, VA 22302. Comments will also be accepted through the Federal eRulemaking Portal. Go to *http://www.regulations.gov,* and follow the online instructions for submitting comments electronically.

All written comments will be open for public inspection at the office of the Food and Nutrition Service during regular business hours (8:30 a.m. to 5 p.m., Monday through Friday) at 3101 Park Center Drive, Room 640, Alexandria, Virginia 22302.

All responses to this notice will be summarized and included in the request for Office of Management and Budget approval. All comments will be a matter of public record.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of this information collection should be directed to Jon Garcia at (703) 305–2600.

**SUPPLEMENTARY INFORMATION:**

*Title:* 7 CFR Part 210 National School Lunch Program, Part 220 School Breakfast Program, and Part 215 Special Milk Program.

*Form Number:* FNS–806–A and FNS–806–B.

*OMB Number:* 0584–0284.

*Expiration Date:* 03/31/2013.

*Type of Request:* Revision of a currently approved collection.

*Abstract:* The National School Lunch Program (NSLP) and School Breakfast Program (SBP), and School Milk Program (SMP) Claim for Reimbursement, Forms FNS–806–A and FNS–806–B, respectively, are used to collect meal and milk data from school food authorities whose participation in these programs are administered directly by the Food and Nutrition Service (FNS) Regional Offices (Regional Office Administered Programs, or ROAP). The FNS Regional Office directly administers the NSLP, SMP, and/or SBP programs in Virginia, Georgia, and Colorado. In order to determine the amount of reimbursement for meals and milk served, the school food authorities are required to complete these forms. The completed forms are either sent to the Child Nutrition Payments Center at the FNS Mid-Atlantic Regional Office where they are entered into a computerized payment system or submitted electronically via the Internet directly into the Child Nutrition Payments Center. The payment system computes earned reimbursement. Earned reimbursement in the NSLP, SBP and SMP is based on performance that is measured as an assigned rate per meal or half pint of milk served. To fulfill the earned reimbursement requirements set forth in NSLP, SBP and SMP regulations issued by the Secretary of Agriculture (7 CFR 210.8 and 220.11; and 215.10), the meal and milk data must be collected on Forms FNS–806–A and FNS–806–B, respectively. These forms are an intrinsic part of the accounting system currently being used by the subject programs to ensure proper reimbursement. The burden hours have decreased from the previously approved burden (1,398) due to a reduction in the number of respondents, School Food Authorities, from 233 to 210.

*Affected Public:* State and local governments participating in the NSLP, SBP, and SMP under the auspices of the FNS ROAP.

*Estimated Number of Respondents:* 210 School Food Authorities.

*Estimated Number of Responses per Respondent:* 12 (Each State agency will submit a 30-day report.)

*Estimated Total Annual Responses:* 2,520.

*Reporting Time per Response:* .5 hours.

*Estimated Annual Reporting Burden:* 1,260 hours.

See the table below for estimated total annual burden for each type of respondent.

| Affected public | (b) Form number | (c) Number of respondents | (d) Number responses per respondent | (e) Estimated total annual responses (cxd) | (f) Hours per response | (g) Total burden (exf) |
|---|---|---|---|---|---|---|
| School Food Authority | FNS 806A | 133 | 12 | 1596 | .5 | 798 |
| School Food Authority | FNS 806B | 77 | 12 | 924 | .5 | 462 |
| Total Annual Burden Estimates | | 210 | 12 | 2,520 | .5 | 1,260 |

Dated: December 10, 2012.

**Audrey Rowe,**

*Administrator, Food and Nutrition Service.*

Attachments:

**BILLING CODE 3410–30–P**

# Appendix A

## Sample Version of the Proposed FNS-806A and Instructions

OMB APPROVED NO. 0584-0284
Expiration Date: XX/XX/XXXX

**U.S. Department of Agriculture Food and Nutrition Service**

School Lunch/Breakfast Claim for Reimbursement

**Please read the instructions on page 2 carefully before completing form.**

| | | | | | |
|---|---|---|---|---|---|
| Sponsor Number: | | Claim Month/Year | | | ☐ Amended |
| Sponsor Name: | | Phone: | | Region #: | |
| Address: | | Fax: | | County: | |
| | | E-Mail: | | | |
| City: | State: Zip: | Person Preparing Claim: | | | |

| **1. General Data** | **Lunch** | **Reg Brk** | **SN Brk** | **Supplements** | | |
|---|---|---|---|---|---|---|
| a. Number of schools participating | | | | | d. Average Daily Attendance | |
| b. Number of days meals served | | | | | e. Number Approved for Free | |
| c. Enrollment | | | | | f. Number Approved for Reduced | |

| **2. Student Lunch Participation and Reimbursement** | | | | | | |
|---|---|---|---|---|---|---|
| **Lunch** | **Meals Served** | | **Rates** | | | |
| a. Paid | | X | | = | | |
| b. Reduced | | X | | = | | |
| c. Free | | X | | = | | |
| d. Total Student Lunches | | | | | **Subtotal** | |

| **3. Student Breakfast Participation and Reimbursement** | | | | | | |
|---|---|---|---|---|---|---|
| **Regular Breakfast** | **Meals Served** | | **Rates** | | | |
| a. Paid | | X | | = | | |
| b. Reduced | | X | | = | | |
| c. Free | | X | | = | | |
| **Severe Need Breakfast** | **Meals Served** | | **Rates** | | **Subtotal** | |
| a. Paid | | X | | = | | |
| b. Reduced | | X | | = | | |
| c. Free | | X | | = | | |
| d. Total Student Breakfasts | | | | | **Subtotal** | |
| **4. Student Supplements Participation and Reimbursement** | | | | | **Subtotal** | |
| **Supplements** | **Meals Served** | | **Rates** | | | |
| a. Paid | | X | | = | | |
| b. Reduced | | X | | = | | |
| c. Free | | X | | = | | |
| d. Total Student Supplements | | | | | **Subtotal** | |
| **5. Total Reimbursement** | | | | | **Totals** | |
| **6. Total Cost for School Lunch and Breakfast Programs** | | | | | | |

I CERTIFY THAT TO THE BEST OF MY KNOWLEDGE AND BELIEF, THIS CLAIM IS TRUE AND CORRECT IN ALL RESPECTS, THAT RECORDS ARE AVAILABLE TO SUPPORT THIS CLAIM; THAT IT IS IN ACCORDANCE WITH THE TERMS OF EXISTING AGREEMENT(S); AND THAT PAYMENT THEREFORE HAS NOT BEEN RECEIVED; I RECOGNIZE THAT I WILL BE FULLY RESPONSIBLE FOR ANY EXCESS AMOUNTS WHICH MAY RESULT FROM ERRONEOUS OR NEGLECTFUL REPORTING HEREIN.

| Signature of Authorized Representative | Date of Preparation |
|---|---|
| | |

| **Notes** | |
|---|---|

FORM FNS-806A (12-09) Previous Editions Obsolete **SBU** Electronic Form Version Designed in Adobe 10.0 Version

**Claim Submission Instructions**

SPECIAL NOTE: AN ADJUSTED CLAIM completely voids all previous claims for the same month. Therefore, you should include ALL of your reporting data for the entire month's operations.

General

You should use this claim form to report information for the National School Lunch and Breakfast Programs which are administered by the Food and Nutrition Service, USDA. This information should cover activities during one calendar month; however, you may include up to 10 operating days of the month after the last full month of operation. The amount of money you receive will be based on reimbursement rates in affect for the month being reported.

Complete only those sections of the claim form that apply to your operation. This claim will be returned to you and no payment will be made if your claim is not properly completed. Therefore, be sure you sign and date this claim before submitting it to our Regional Office.

If you have any questions about how to complete an item on this claim form, please contact your Regional Office for assistance immediately. An improperly completed form will delay processing of your reimbursement check.

SPECIFIC ITEMS Information at top of claim form - Check to be sure if the pre-printed information is correct. If the sponsor number or your name and address are missing, please put in the proper information. If either or both are incorrect, immediately contact your Regional Office to get corrections made. Enter the month and year that this claim covers. For example, January 1999 would be entered as 01 99. If this is a revision of a previous claim, check the box marked "Amended".

General Data

1a., b., c. Enter the requested data for each program for which you participate and has been approved on your application approval.

1d. - Average daily attendance (ADA) can be determined as follows:
This is calculated by dividing Total Student Attendance for this Month by Days of Operation (NOTE: Use actual attendance counts. Do NOT USE meal counts to determine attendance.)

1e., f. - Enter the number of children who had approved applications on file during the reporting month. (NOTE: Use the highest number of children eligible for any given day of the month.) Make every effort to ensure this information is complete and accurate.

NOTE: For items 2 through 4 it is only necessary to enter the number of meals served by category. The rates, reimbursement by category, total student lunches and total reimbursement will automatically be calculated.

2a., b., c. - Enter the number of lunches served for each category.

3a., b., c. - Enter the number of breakfasts served for each category for sites that are not approved for the Severe Need Breakfast Program according to your application approval.

3d., e., f. - Enter the number of breakfasts served for each category for sites that are approved for the Severe Breakfast Program according to your application approval. If no sites were approved for Severe Need this section should be blank.

4a., b., c - If you are approved to be reimbursed for supplements on your application approval, enter the number of supplements served by category.

5. Total Reimbursement will be automatically calculated.

6. To be completed only if you have an approved severe need breakfast program. Enter the allowable costs for operating the National School Lunch and School Breakfast Programs in your school or institution. Determine your costs in accordance with your Regional Office's Financial Management instructions.

Sign and date the claim. An unsigned claim cannot be processed and payment will not be made.

Please mail to: National Child Nutrition Payment Center
USDA, Food and Nutrition Service
Mercer Corporate Park
300 Corporate BLVD.
Robbinsville, NJ 08691-1598

Public reporting burden for this collection of information is estimated to average .5 hours per response including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

# Appendix B

## Sample Version of the Proposed FNS-806B and Instructions

OMB APPROVED NO. 0584-0284
Expiration Date: XX/XX/XXXX

**U.S. Department of Agriculture Food and Nutrition Service**

**Milk Claim for Reimbursement**

Please read the instructions on page 2 carefully before completing form.

| **1. Name and Address of Sponsor** | | | |
|---|---|---|---|
| Name 1 | | | |
| Addr 1 | | | |
| Addr 2 | | | |
| City | | | |
| State | | Zip | |
| County | | | |
| Contact | | | |
| Tel | | Fax | |
| E-Mail | | | |

| **2. Agreement Number** | | | |
|---|---|---|---|
| **3. Report Period** | Month | | Year |
| **4. Number of Operating Days** | | | |
| **5. Claim Data** | | | |
| a. Number of sites participating | | | |
| b. Number of days milk served | | | |
| c. Enrollment | | | |
| d. Average Daily Attendance | | | |
| e. Number of Free Approved | | | |

☐ Amended

| | |
|---|---|
| 6. Number of half-pints served TO CHILDREN that were paid for by children in pricing program and / or served at no charge to children in non-pricing program. | |
| 7. Number of half-pints served free TO CHILDREN eligible for free milk in pricing program. | |
| 8. Total number of ALL half-pints of milk purchased. | |
| 9. Total cost of ALL half-pints of milk purchased and reported in item 8 (round to the nearest dollar). | |
| 10. Average dairy cost (Item 8 / Item 9). | |
| 11. Total earning (Item 6 * Paid Rate + Item 7 * Item 10)(Automatically calculated). | |

I CERTIFY THAT TO THE BEST OF MY KNOWLEDGE AND BELIEF, THIS CLAIM IS TRUE AND CORRECT IN ALL RESPECTS, THAT RECORDS ARE AVAILABLE TO SUPPORT THIS CLAIM; THAT IT IS IN ACCORDANCE WITH THE TERMS OF EXISTING AGREEMENT(S); AND THAT PAYMENT THEREFORE HAS NOT BEEN RECEIVED; I RECOGNIZE THAT I WILL BE FULLY RESPONSIBLE FOR ANY EXCESS AMOUNTS WHICH MAY RESULT FROM ERRONEOUS OR NEGLECTFUL REPORTING HEREIN.

| Signature | | Title | | Preparation | |
|---|---|---|---|---|---|

| **FNS USE ONLY** | | | | | |
|---|---|---|---|---|---|
| Date | | Date Processed | | Approval Serial Number | |
| Entry Date | | Paylist Date | | Paylist Number | |

*Public reporting burden for this collection of information is estimated to average .5 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

FORM FNS-806B (12-09) Previous Editions Obsolete **SBU** Electronic Form Version Designed in Adobe 10.0 Version

**U.S. Department of Agriculture Food and Nutrition Service**

**Milk Claim for Reimbursement**

INSTRUCTIONS TO COMPLETE THE SPECIAL MILK CLAIM FOR REIMBURSEMENT.

SPECIAL NOTE: AN ADJUSTED CLAIM completely voids all previous claims for the same month. Therefore, you should include ALL of your reporting data for the entire month's operations.

GENERAL

The information for the claim should cover activities during the calendar month; however, you may include up to 10 operating days of the month before the first full month of operation and/or up to 10 operating days of the month after the last full month of operation. The only EXCEPTION would be between school years. Since the SCHOOL YEAR starts on July 1 of each year, the June claim should not include data for July of the following school year, and the July claim should not include data for June of the previous school year. If the number of operating days exceeds 31, please contact your Regional office for assistance.

The amount of money you receive will be based on reimbursement rates in effect for the month being reported.

If you have any questions about completing the claim form, please contact your Regional office for assistance. An improperly completed form will delay processing of your reimbursement by electronic funds transfer (EFT).

SPECIFIC ITEMS

Check to be sure that all the information that automatically appears on the claim is correct. If the sponsor number or name and address are missing or incorrect, immediately contact your Regional office to get corrections made.

3. Enter the month and year that this claim covers. For example, January 1999 would be entered as: Month 1 Year 1999

4. Enter the number of operating days in the month.

5.a. Enter the number of sites that are approved to participate in the milk program.

5.b. Enter the number of days milk was served in the claim month.

5.c. Enter the highest number of students enrolled in the institution for the month.

5.d. Average daily attendance (ADA) can be determined as follows: Total Daily Attendance for the Month / Days of Operation (reported in item 4)

5.e. Enter the number of students approved for Free Milk.
SPECIAL NOTE: Use the highest number of children eligible for any given day of the month.

Items 6. - 11.

6. Enter the number of half-pints of milk you served at no charge to children in a non-pricing program, or served to children not eligible for free milk in a pricing program during the month. DO NOT include half-pints of milk served to children eligible for free milk according to your FREE MILK policy statement.

7. Enter the number of half-pints of milk served at no charge to children eligible for free milk in a pricing program. DO NOT include milk served in a non-pricing program.

8. Enter the cost of ALL milk purchased for the claim month. This is the purchase price you paid to the milk supplier for ALL milk delivered to your school/institution. DO NOT include any amount paid to the milk supplier for servicing, rental or installment payments of milk service equipment.

9. Enter the total number of ALL half-pints of milk purchased during the claim month.

10. DO NOT enter information, it will be automatically calculated.

11. DO NOT enter information, it will be automatically calculated.

The claim must be signed and the Date of Preparation must be completed for payment to be disbursed.

[FR Doc. 2012–30556 Filed 12–18–12; 8:45 a.m.]
BILLING CODE 3410–30–C

## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

### Agency Information Collection Activities: Proposed Collection; Comment Request—Federal Claims Collection Methods for Supplemental Nutrition Assistance Program Recipient Claims

**AGENCY:** Food and Nutrition Service, USDA.

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this Notice invites the general public and other public agencies to comment on proposed information collections. This Notice of Proposed Information Collection announces the intent of the Food and Nutrition Service to revise and extend the information collection requirements associated with initiating and conducting Federal collection actions against households with delinquent Supplemental Nutrition Assistance Program (SNAP) recipient debts.

**DATES:** Written comments must be submitted on or before February 19, 2013 to be assured consideration.

**ADDRESSES:** Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate, automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Send comments to Jane Duffield, Chief, State Administration Branch, Supplemental Nutrition Assistance Program, Food and Nutrition Service, USDA, 3101 Park Center Drive, Room 818, Alexandria, Virginia 22302. Comments may also be submitted via fax to the attention of Jane Duffield at 703–605–0795. Comments will also be accepted through the Federal eRulemaking Portal. Go to *http://www.regulations.gov* and follow the online instructions for submitting comments electronically.

All written comments will be open for public inspection at the office of the Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Alexandria, Virginia 22302, Room 818.

All comments will be summarized and included in the request for Office of Management and Budget approval of the information collection. All comments will become a matter of public record.

**FOR FURTHER INFORMATION CONTACT:** Debra Utting at (703) 305–2439.

**SUPPLEMENTARY INFORMATION:**

*Title:* Federal Claims Collection Methods for Supplemental Nutrition Assistance Program Recipient Claims

*OMB Number:* 0584–0446

*Form Number:* None

*Expiration Date:* January 31, 2013

*Type of Request:* Revision of a currently approved collection.

*Abstract:* Section 13(b) of the Food Stamp Act of 1977, as amended (7 U.S.C. 2022(b)), and Supplemental Nutrition Assistance Program (SNAP) regulations at 7 CFR 273.18 require State agencies to refer delinquent debtors for SNAP benefit over-issuance to the U.S. Department of the Treasury for collection. The Debt Collection Improvement Act of 1996, 31 U.S.C. 3701, *et seq.,* requires these debts to be referred to Treasury for collection when they are 180 days or more delinquent. Through the Treasury Offset Program (TOP), 31 CFR part 285, payments such as Federal income tax refunds, Federal salaries and other Federal payments payable to these delinquent debtors will be offset and the amount applied to the delinquent debt. TOP places a burden on States agencies and/or former SNAP recipients who owe delinquent debts in three areas: 60-day notices from State agencies to debtors that their debt will be referred to TOP; State-level submissions; and automated data processing (ADP).

**TOP 60-Day Notice Burden**

The burden associated with the information collection involves both the debtors and the State agencies. The TOP 60-day notice notifies the debtor of the proposed referral to TOP and provides the right for review and appeal. The State agency prepares and mails the notices as well as responds to inquiries and appeals. The debtor, in turn, receives and reads the notice and may make an inquiry or appeal the impending action. Based on an average of the number of records for claims the States sent to TOP for calendar years 2009, 2010 and 2011, we estimate that State agencies will produce and send and that debtors will read 240,901 60-day notices. We estimate that the debtors will submit and State agencies will respond to about 16,863 phone and informal inquiries. Debtors will file and the States will respond to an estimated 1,445 appeals each. An additional 3,000 notices will be sent directly from FNS to Federal employees concerning the potential offset of their Federal salary. Historically, 30% of these notices will result in a phone inquiry from a debtor; and approximately 20 will result in a formal appeal to FNS requiring documentation from the State. Thus, the total number of responses for the 60-day notice and debtor inquiry is 522,358 responses (263,129 household responses + 259,229 State Agency responses) per year resulting in an annual reporting burden of 34,510.28 hours. The existing burden for activity relating to the 60-day notice is 36,313.83 hours. The net decrease of 1,803.55 hours is due to a decrease in the number of 60-day notices sent to debtors by State agencies.

**TOP State-Level Submissions**

Treasury prescribes specific processes and file formats for FNS to use to send debts to TOP. FNS provides guidance and file formats to State agencies and monitors their compliance with such. State agencies must submit specified documents and/or information to FNS and FNS sends required information to Treasury. The first document is an annual letter to FNS certifying that all of the debts submitted in the past and all debts to be submitted in the upcoming calendar year by the State agency to TOP are valid and legally enforceable in the amount stated. Secondly, State agencies report TOP collections on the FNS–209 *Status of Claims Against Households* report. (The burden for the remainder of the FNS–209 report is already covered under OMB burden number 0584–0069.) FNS estimates that it will take State agencies a total of 26.5 hours per year for these State submissions. This burden has not changed.

**TOP ADP Burden**

The burden for ADP includes weekly file processing, monthly address requests and system maintenance. Weekly and monthly file processing includes requesting addresses to use to send out 60-day notices, adding and maintaining debts in TOP, correcting errors on unprocessable records, and posting weekly collection files. Much of this activity is completed using automation and involves an estimated 1.4 million records annually. FNS estimates that this activity takes

12,374.82 annual reporting and 689 recordkeeping burden hours. This burden has not changed.

**Summary of Estimated Burden**

The net aggregate change from the existing to the revised annual burden for this entire Information Collection is a decrease of 1,803.55 hours from the previous submission. For the activity relating to the 60-day notice, we are decreasing the estimated annual burden for State agencies and debtors from 36,313.83 hours to 34,510.28 hours to reflect a decrease in the number of notices and the resulting inquiries and appeals. The State-level submissions portion of the reporting and recordkeeping burden is estimated to require the same number of hours as the currently approved collection, 26.5 hours. The annual ADP portion of this burden package is also estimated to require the same number of hours as the currently approved collection, 12,375 reporting and 689 recordkeeping hours. This results in a final total of 47,600.6 annual burden hours.

*Affected Public:* State and local government, and former SNAP households

*Estimated Number of Respondents:* 240,954

*Estimated Number of Responses per Respondent:* 2.21

*Estimated Total Number of Annual Responses:* 531,638

*Estimated Hours per Response:* .09

*Estimated Total Annual Burden:* 47,600.6

Dated: December 10, 2012.

**Audrey Rowe,**

*Administrator, Food and Nutrition Service.*

[FR Doc. 2012–30599 Filed 12–18–12; 8:45 am]

**BILLING CODE 3410–30–P**

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## DEPARTMENT OF AGRICULTURE

### Food Safety and Inspection Service

**[Docket No. FSIS–2012–0051]**

### National Advisory Committee on Meat and Poultry Inspection

**AGENCY:** Food Safety and Inspection Service, USDA.

**ACTION:** Notice of public meeting.

**SUMMARY:** Pursuant to the Federal Advisory Committee Act, the Food Safety and Inspection Service (FSIS) is announcing a meeting of the National Advisory Committee on Meat and Poultry Inspection (NACMPI). The Committee is being convened to review two topics for FSIS. The first is strengthening Agency verification activities and guidance concerning sanitary dressing and antimicrobial interventions at veal slaughter operations. FSIS test results show that the percent positive for Shiga toxin-producing *Escherichia coli* (STEC) from trimmings and ground beef produced from veal are higher than trimmings and ground beef produced from other cattle slaughter classes. FSIS is seeking feedback from NACMPI on improvements FSIS can make to its verification activities related to sanitary dressing and interventions at veal slaughter establishments and improvements it can make to its compliance guidance to address veal slaughter operations.

FSIS is also seeking feedback from NACMPI on the ideal outreach strategy for communicating with the veal industry.

The second topic is a review of criteria for categorizing FSIS regulations as public health regulations. FSIS has revised its criteria for identifying regulations that are most closely related to public health outcomes. FSIS is seeking input from NACMPI on the criteria and feedback on the proposed approach.

**DATES:** The meeting is scheduled for January 16–17, 2013 from 9:00 a.m. to 5:00 p.m. Eastern Time. The committee will meet from 8:00 a.m. to 9:00 a.m. on January 16 for administrative purposes; this portion of the meeting is not open to the public.

**ADDRESSES:** The meetings will be held in the Auditorium at the Patriot Plaza III building, 355 E. Street SW., Washington, DC 20024. The auditorium is located on the first floor. Please note that due to increased security measures at the Patriot Plaza III, all persons wishing to attend are strongly encouraged to RSVP in advance.

**FOR FURTHER INFORMATION CONTACT:** General information about the committee can also be found at *http://www.fsis.usda.gov/About_FSIS/NACMPI/index.asp.* Sally Fernandez, Program Specialist, Designated Federal Officer, at *Sally.Fernandez@fsis.usda.gov* or 202–690–6524 (Phone), or (202) 690–6519 (Fax), may be contacted for specific questions about the committee or this meeting.

**SUPPLEMENTARY INFORMATION:**

**Background**

The purpose of the Committee is to provide advice to the Secretary of Agriculture concerning State and Federal programs with respect to meat, poultry, and processed egg products, inspection, safety, and other matters that fall within the scope of the Federal Meat Inspection Act and the Poultry Products Inspection Act. The Administrator of FSIS is the chairperson of the Committee. Membership of the Committee is drawn from representatives of consumer groups; producers; processors; and marketers from the meat, poultry and egg product industries; State and local government officials; and academia. The current members of the NACMPI are: Patricia K. Buck, Center for Foodborne Illness Research and Prevention; Dr. Fur-Chi Chen, Tennessee State University; Nancy J. Donley, STOP Foodborne Illness; Veneranda Gapud, Fieldale Farms Corporation; Sherika Harvey, Mississippi Department of Agriculture and Commerce; Dr. Heidi Kassenborg, Minnesota Department of Agriculture; Sarah A. Klein, Center for Science in the Public Interest; Dr. Carol L. Lorenzen, Missouri State University; Dr. John A. Marcy, University of Arkansas; Robert G. Reinhard, Sara Lee Corporation; Dr. Michael L. Rybolt, Hillshire Farms; Dr. Craig E. Shultz, Pennsylvania Department of Agriculture; Dr. John D. Tilden, Michigan Department of Agriculture and Rural Development; Steve E. Warshawer, Mesa Top Farm; Dr. J. Byron Williams, Mississippi State University; Christopher A. Waldrop, Consumer Federation of America; and Leonard W. Winchester, Public Health—Seattle & King County.

*Register for the Meeting:* The public is asked to pre-register for the meeting. Your pre-registration must state: The names of each person in your group; organization or interest represented; the number of people planning to give oral comments, if any; and whether anyone in your group requires special accommodations. Submit registrations to (we have to get a mailbox address). FSIS will also accept walk-in registrations. Members of the public requesting to give oral comment to the Committee must sign in at the registration desk.

*Public Comments:* Written public comments may be mailed to USDA/FSIS, 1400 Independence Avenue SW., Mail Stop 3778, Washington, DC 20250 or submitted via fax (202) 690–6519 or by email *NACMPI@fsis.usda.gov.* All written comments must arrive by January 12, 2013. Oral comments are also accepted. To request to give oral comments, see instructions under 'Register for the Meeting' above.

*Availability of Materials for the Meeting:* All written public comments will be compiled into a binder and available for review at the meeting. Duplicate comments from multiple individuals will appear as one comment, with a notation that multiple

copies of the comment were received. Please visit *http://www.fsis.usda.gov/About_FSIS/NACMPI/index.asp* to learn more about the agenda for or reports resulting from this meeting.

*Meeting Accommodations:* USDA is committed to ensuring that all interested persons are included in our events. If you are a person with a disability and request reasonable accommodations to participate in this meeting, please contact Sally Fernandez, Phone (202) 690–6524, Fax (202) 690–6519 or email *Sally.Fernandez@fsis.usda.gov.* All reasonable accommodation requests are managed on a case-by-case basis.

**Additional Public Notification**

FSIS will announce this notice online through the FSIS Web page located at *http://www.fsis.usda.gov/regulations_&_policies/Federal_Register_Notices/index.asp.*

FSIS will also make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to constituents and stakeholders. The Update is communicated via Listserv, a free electronic mail subscription service for industry, trade groups, consumer interest groups, health professionals, and other individuals who have asked to be included. The Update is also available on the FSIS Web page. In addition, FSIS offers an electronic mail subscription service which provides automatic and customized access to selected food safety news and information. This service is available at *http://www.fsis.usda.gov/News_&_Events/Email_Subscription/.* Options range from recalls to export information to regulations, directives, and notices. Customers can add or delete subscriptions themselves, and have the option to password protect their accounts.

**USDA Nondiscrimination Statement**

USDA prohibits discrimination in all its programs and activities on the basis of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, and marital or family status. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, or audiotape.) should contact USDA's Target Center at 202–720–2600 (voice and TTY).

To file a written complaint of discrimination, write USDA, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW., Washington, DC 20250–9410 or call 202–720–5964 (voice and TTY). USDA is an equal opportunity provider and employer.

Done at Washington, DC, on December 13, 2012.

**Alfred V. Almanza,**

*Administrator.*

[FR Doc. 2012–30530 Filed 12–18–12; 8:45 am]

BILLING CODE 3410–DM–P

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Dakota Prairie Grasslands, North Dakota; Oil and Gas Development Supplemental Environmental Impact Statement

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of intent to prepare a supplemental environmental impact statement.

**SUMMARY:** In June of 2003, the Dakota Prairie Grasslands Record of Decision for Oil and Gas Leasing on the Little Missouri and Cedar River National Grasslands was signed. This decision spelled out leasing stipulations, consistent with the Revised Dakota Prairie Grasslands Land and Resource Management Plan, based on the 2001 Northern Great Plains Management Plans Revision FEIS which included a Reasonably Foreseeable Development Scenario (RFDS) for Oil and Gas for the Little Missouri and Cedar River National Grasslands.

In the 11 years since the analysis was completed there has been a change in the manner in which oil and gas development has occurred on the Dakota Prairie Grasslands, primarily that multiple (4–6) wells can be drilled from a single well pad rather than just one; as was most common in the past. The improvements in horizontal drilling and hydraulic fracturing technologies to improve the ability to access oil and gas located deep underground are the primary reasons for these changes in development.

At this time it is necessary to review the analysis to determine whether or not the effects of the changed pattern of oil and gas development are different from those effects considered in the 2001 FEIS, and whether or not there is a need to change Land and Resource Management Plan standards and guidelines (and possibly leasing stipulations) in order to continue oil and gas development on the Little Missouri and Cedar River National Grassland units of the Dakota Prairie Grasslands.

**DATES:** Scoping is not required for supplements to environmental impact statements (40 CFR 1502.9(c)(4)). Review and comments will be solicited once the Draft SEIS is filed with EPA. The draft supplemental environmental impact statement is expected in February, 2013 and the final supplemental environmental impact statement is expected in May, 2013.

**FOR FURTHER INFORMATION CONTACT:** Karen Dunlap, Interdisciplinary Team Leader, at 240 W. Century Avenue, Bismarck, ND 58503, by email at *kdunlap@fs.fed.us* or by phone at 701–250–4463 x105.

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday.

**SUPPLEMENTARY INFORMATION:**

**Purpose and Need for Action**

In light of a changed pattern of oil and gas activity from what was anticipated in the 2001 RFDS, there is a need for the DPG to supplement our analysis to determine if any changes need to be made to the stipulations in the 2003 Oil and Gas Leasing ROD that authorizes oil and gas leasing on the DPG. The purpose of the analysis is to determine whether or not the effects anticipated in the 2001 FEIS are still accurate and, if they are not, whether or not any additional management direction and/or leasing stipulations are necessary to protect National Forest System lands while still allowing for oil and gas development on the DPG on those lands previously determined to be administratively available for leasing.

**Proposed Action**

The Dakota Prairie Grasslands has conducted preliminary analysis of the changed condition and, at this time, proposes no change to management direction in the LRMP or to leasing stipulations from the 2003 ROD. However, consistent with 40 CFR 1502.9(2), we will supplement the FEIS to consider the changed pattern of oil and gas development relative to the updated RFDS. The updated RFDS is available by request at the address below or online at: *http://www.fs.fed.us/nepa/fs-usda-pop.php/?project=40652.*

**Responsible Official**

Dennis Neitzke, Grasslands Supervisor, Dakota Prairie Grasslands,

240 W. Century Avenue, Bismarck, ND 58503.

**Nature of Decision To Be Made**

Based on the supplemented EIS, the Grasslands Supervisor will determine whether or not additional management direction would be incorporated into the Dakota Prairie Grasslands LRMP.

Dated: December 11, 2012.

**Sherri K. Schwenke,**

*Acting Grasslands Supervisor.*

[FR Doc. 2012–30407 Filed 12–18–12; 8:45 am]

**BILLING CODE 3410–11–P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Black Hills National Forest Advisory Board

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The Black Hills National Forest Advisory Board will meet in Rapid City, South Dakota. The Board is established consistent with the Federal Advisory Committee Act of 1972 (5 U.S.C. App. II) (FACA); and the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1600 et.seq.) (RPA); the National Forest Management Act of 1976 (16 U.S.C. 1612) (NFMA), and the Federal Public Lands Recreation Enhancement Act (Pub. L. 108–447) (REA).

The purpose of the Board is to provide advice and recommendations on a broad range of forest issues such as forest plan revisions or amendments, forest health including fire and mountain pine beetle epidemics, travel management, forest monitoring and evaluation, recreation fees, and site-specific projects having forest-wide implications.

The meeting is open to the public. The purpose of the meeting is: (1) To accomplish the required annual Ethics Training; (2) to provide an update on the Sheridan Lake Valve Situation; (3) to provide an update on the Record of Decision for the Mountain Pine Beetle Response Project; and (4) to review Travel Management Plan Goals and Implementation for the purpose of planning fee schedules and program for the year 2014.

**DATES:** The meeting will be held January 2, 2013 at 1:00 p.m.

**ADDRESSES:** The meeting will be held at the Forest Service Mystic Ranger District Office, 8221 South Highway 16, Rapid City, SD 57702. 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 Supervisor's Office, Black Hills National Forest, 1019 North Fifth Street, Custer SD 57730. Please call ahead to Scott Jacobson, Committee Management Officer, at 605–673–9216, to facilitate entry into the building to view comments.

**FOR FURTHER INFORMATION CONTACT:** Scott Jacobson, Committee Management Officer, Black Hills National Forest Supervisor's Office, 605–673–9324, *sjjacobson@fs.fed.us.* Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

**SUPPLEMENTARY INFORMATION:** The following business will be conducted: (1) Annual Ethics Training; (2) update on the Sheridan Lake Valve Situation; (3) update on the Record of Decision for the Mountain Pine Beetle Response Project; and (4) review of Travel Management Plan Goals and Implementation for the purpose of planning fee schedules and program for the year 2014. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before 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 December 26, 2012 to be scheduled on the agenda. Written comments and requests for time for oral comments must be sent to Scott Jacobson, Supervisor's Office, Black Hills National Forest, 1019 North Fifth Street, Custer SD 57730, or by email to *sjjacobson@fs.fed.us,* or via facsimile to 605–673–9208. A summary of the meeting will be posted at *http://www.fs.usda.gov/main/blackhills/workingtogether/advisorycommittees* within 45 days of the meeting.

*Meeting Accommodations:* If you require sign language interpreting, assistive listening devices or other reasonable accommodation please request this in advance of the meeting by contacting the person listed in the section titled For Further Information Contact. All reasonable accommodation requests are managed on a case by case basis.

Dated: December 13, 2012.

**David J. Mertz,**

*Natural Resource Staff Officer and Acting Forest Supervisor.*

[FR Doc. 2012–30586 Filed 12–18–12; 8:45 am]

**BILLING CODE 3410–11–P**

## DEPARTMENT OF AGRICULTURE

### National Agricultural Statistics Service

### Notice of Intent To Request Revision and Extension of a Currently Approved Information Collection

**AGENCY:** National Agricultural Statistics Service, USDA.

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice announces the intention of the National Agricultural Statistics Service (NASS) to request revision and extension of a currently approved information collection, the Generic Clearance for Survey Research Studies. Revision to burden hours will be needed due to changes in the size of the target population, sampling design, and/or questionnaire length.

**DATES:** Comments on this notice must be received by February 19, 2013 to be assured of consideration.

**ADDRESSES:** You may submit comments, identified by docket number 0535–0248, by any of the following methods:

- *Email: ombofficer@nass.usda.gov.* Include docket number above in the subject line of the message.
- *Fax:* (202) 720–6396.
- *Mail:* Mail any paper, disk, or CD–ROM submissions to: David Hancock, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336 South Building, 1400 Independence Avenue SW., Washington, DC 20250–2024.
- *Hand Delivery/Courier:* Hand deliver to: David Hancock, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336 South Building, 1400 Independence Avenue SW., Washington, DC 20250–2024.

**FOR FURTHER INFORMATION CONTACT:** Joseph T. Reilly, Associate Administrator, National Agricultural Statistics Service, U.S. Department of Agriculture, (202) 720–4333.

**SUPPLEMENTARY INFORMATION:**

*Title:* Generic Clearance to Conduct Survey Research Studies.

*OMB Control Number:* 0535–0248.

*Type of Request:* To revise and extend a currently approved information collection for a period of three years.

Abstract: The National Agricultural Statistics Service (NASS) of the United States Department of Agriculture (USDA) will request approval from the Office of Management and Budget (OMB) for generic clearance that will allow NASS to rigorously develop, test, and evaluate its survey instruments and methodologies. The primary objectives of the National Agricultural Statistics Service are to prepare and issue State and national estimates of crop production, livestock production, economic statistics, and environmental statistics related to agriculture and to conduct the Census of Agriculture. This request is part of an on-going initiative to improve NASS surveys, as recommended by both its own guidelines and those of OMB.

In the last decade, state-of-the art techniques have been increasingly instituted by NASS and other Federal agencies and are now routinely used to improve the quality and timeliness of survey data and analyses, while simultaneously reducing respondents' cognitive workload and burden. The purpose of this generic clearance is to allow NASS to continue to adopt and use these state-of-the-art techniques to improve its current data collections on agriculture. They will also be used to aid in the development of new surveys.

NASS envisions using a variety of survey improvement techniques, as appropriate to the individual project under investigation. These include focus groups, cognitive and usability laboratory and field techniques, exploratory interviews, behavior coding, respondent debriefing, pilot surveys, and split-panel tests.

Following standard OMB requirements NASS will submit a change request to OMB individually for each survey improvement project it undertakes under this generic clearance and provide OMB with a copy of the questionnaire (if one is used), and all other materials describing the project.

These data will be collected under the authority of 7 U.S.C. 2204(a). Individually identifiable data collected under this authority are governed by Section 1770 of the Food Security Act of 1985, 7 U.S.C. 2276, which requires USDA to afford strict confidentiality to non-aggregated data provided by respondents. This Notice is submitted in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13) and Office of Management and Budget regulations at 5 CFR part 1320 (60 FR 44978, August 29, 1995). NASS also complies with OMB Implementation Guidance, ''Implementation Guidance for Title V of the E-Government Act, Confidential Information Protection and Statistical Efficiency Act of 2002 (CIPSEA),'' *Federal Register,* Vol. 72, No. 115, June 15, 2007, p. 33362.

*Estimate of Burden:* Public reporting burden for these collections of information is estimated to average from 15 minutes to 1.5 hours per respondent, dependant upon the survey and the technique used to test for that particular survey.

*Respondents: Farmers,* ranchers, farm managers, farm contractors, agri-businesses, and households.

*Estimated Number of Respondents:* 20,000.

*Frequency of Responses:* On occasion.

*Estimated Total Annual Burden:* 10,000 hours.

Copies of this information collection and related instructions can be obtained without charge from David Hancock, NASS Clearance Officer, at (202) 690–2388.

*Comments:* Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, through the use of appropriate automated, electronic, mechanical, technological or other forms of information technology collection methods.

All responses to this notice will become a matter of public record and be summarized in the request for OMB approval.

Signed at Washington, DC, December 3, 2012.

**Joseph T. Reilly,**

*Associate Administrator.*

[FR Doc. 2012–30506 Filed 12–18–12; 8:45 am]

BILLING CODE 3410–20–P

## DEPARTMENT OF AGRICULTURE

### Rural Housing Service

### Notice of Funding Availability: Multi-Family Housing Preservation and Revitalization Demonstration Program—Section 514, 515, and 516 for Fiscal Year 2013

**AGENCY:** Rural Housing Service, USDA.

**ACTION:** Notice.

**SUMMARY:** USDA Rural Development, which administers the programs of the Rural Housing Service (RHS or Agency), announces the availability of up to $19.9 million in program dollars, and the timeframe to submit applications to participate in a demonstration program to preserve and revitalize existing rural rental housing projects under Section 515, Section 514, and Section 516 of the Housing Act of 1949, as amended. Under the demonstration program existing Section 515 Multi-Family Housing (MFH) loans and Section 514/516 Off-Farm Labor Housing loans will be restructured to ensure that sufficient resources are available to preserve the ability of rental projects to provide safe and affordable housing for very low-, low- or moderate-income residents. Projects participating in this program will be expected to be revitalized to extend their affordable use without displacing tenants because of increased rents. No additional Agency Rental Assistance (RA) units will be made available under this program.

**DATES:** Pre-applications in response to this Notice will be accepted until February 28, 2013, 5:00 p.m., Eastern Time. The pre-application closing deadline is firm as to date and hour. The Agency will not consider any pre-application that is received after the closing deadline. Applicants intending to mail pre-applications must allow sufficient time to permit delivery on or before the closing deadline. Acceptance by a post office or private mailer does not constitute delivery. Facsimile (FAX) and postage-due pre-applications will not be accepted.

**FOR FURTHER INFORMATION CONTACT:** Sherry Engel or Tiffany Tietz, at *sherry.engel@wdc.usda.gov* or *tiffany.tietz@wdc.uda.gov,* at (715) 345–7677 or (616) 942–4111, extension 126, Finance and Loan Analyst, Multi-Family Housing Preservation and Direct Loan Division, STOP 0782, (Room 1263–S), U.S. Department of Agriculture, Rural Housing Service, 1400 Independence Avenue SW., Washington, DC 20250–0782. All hard copy pre-applications and required documents (attachments) must be submitted to this address. (*Please note this telephone number is not a toll-free number.*)

**SUPPLEMENTARY INFORMATION:**

#### Paperwork Reduction Act

The information collection requirements contained in this Notice have received approval from the Office of Management and Budget (OMB) under Control Number 0570–0190.

#### Overview Information

*Federal Agency Name:* RHS, USDA.

*Funding Opportunity Title:* Multi-Family Housing Preservation and Revitalization Demonstration Program—Section 514, 515, and 516 for Fiscal Year 2013.

*Announcement Type:* Inviting applications from eligible applicants for Fiscal Year 2013, Funding.

*Catalog of Federal Domestic Assistance Number (CFDA): 10.447*

**DATES:** Pre-applications in response to this Notice will be accepted until February 28, 2013, 5:00 p.m., Eastern Time. The pre-application closing deadline is firm as to date and hour. The Agency will not consider any pre-application that is received after the closing deadline. Applicants intending to mail pre-applications must allow sufficient time to permit delivery on or before the closing deadline. Acceptance by a post office or private mailer does not constitute delivery. Facsimile (FAX) and postage-due pre-applications will not be accepted.

## I. Funding Opportunities Description

The Consolidated and Further Continuing Appropriations Act, 2012 (Pub. L. 112–55) (November 18, 2011) authorized the Agency to conduct a demonstration program for the preservation and revitalization of the Section 515 MFH portfolio and Section 514/516 Off-Farm Labor Housing (FLH) portfolio. Sections 514, 515 and 516 MFH programs are authorized by the Housing Act of 1949, as amended (42 U.S.C. 1484, 1485, 1486) and provide Rural Development with the authority to provide financial assistance for low-income MFH and FLH and related facilities as defined in 7 CFR Part 3560.

This Notice solicits pre-applications from eligible borrowers/applicants to restructure existing MFH projects already participating in the Agency's Section 515 MFH portfolio and Section 514/516 FLH portfolio for the purpose of revitalization and preservation. Eligible borrowers are sometimes referred to in this Notice as ''applicants,'' ''borrowers,'' ''applicant/borrowers,'' or ''owners'' as seems most appropriate for the context of the relevant Notice provision. The demonstration program shall be referred to in this Notice as the Multi-Family Housing Preservation and Revitalization Demonstration program (MPR). Agency regulations for the Section 515 MFH program and the Section 514/516 FLH program are published at 7 CFR part 3560.

The intent of the MPR is to ensure that existing rental projects will continue to deliver decent, safe and sanitary affordable rental housing for 20 years or the remaining term of any Agency loan, whichever ends later. Applications will be selected by the Agency in the process described in this Notice and the selected applicants will be invited to participate in the MPR demonstration program. Upon written notification to the Agency from the selected applicant of acceptance to participate, an independent third-party capital needs assessment (CNA) will be conducted to provide a fair and objective review of projected capital needs. The Agency shall implement the restructuring proposal that may be offered under this Notice through an MPR Conditional Commitment (MPRCC) with the eligible borrower/applicant which will include all the terms and conditions offered by the Agency.

One of the restructuring tools to be used in this program is debt deferral for up to 20 years of the existing Section 514 or 515 loans obligated prior to October 1, 1991. The cash flow from the deferred payment will be deposited, as directed by the Agency, to the reserve account to help meet the future physical needs of the project or to reduce rents. Debt deferral is described as follows:

*MPR Debt Deferral:* A deferral of the existing Section 514 or 515 Agency loan(s), obligated on or before 9/30/1991, for the lesser of the remaining term of the existing 514 or 515 loan or 20 years. All terms and conditions of the deferral will be described in the MPR Debt Deferral Agreement. A balloon payment of principal and accrued interest will be due at the end of the deferral period. Interest will accrue at the promissory note rate and subsidy will be applied as set out in the Agency's Interest Credit and Rental Assistance Agreement, if applicable.

Other Agency MPR tools are as follows:

1. *MPR Grant:* A grant limited to non-profit applicants/borrowers only. The grant will be limited to the cost of correcting health and safety violations or other physical needs of the project identified by the CNA and accepted by the Agency. The grant administration will be in accordance with applicable provisions of 7 CFR parts 3015 and 3019.

2. *MPR Zero Percent Loan:* A loan with zero percent interest.

(a) For Section 515 Rural Rental Housing projects, the maximum term will be 30 years and be amortized over 50 years.

(b) For Section 514/516 projects, the loan will be amortized over a maximum term of 33 years.

3. *MPR Soft-Second Loan:* A loan with a one percent interest rate that will have its accrued interest and principal deferred, to a balloon payment. The balloon payment will be due at the same time the latest maturing Section 514 or Section 515 loan already in place at the time of closing or the maturity date of any current loan being re-amortized as part of the restructuring is due. The term of the soft second loan will not be timed to match the term of any new Section 514 or 515 loan added during the transaction.

4. *Increased Return to Owner (RTO) for Stay-in-Owners:* Section 515 stay-in-owners, who will retain their project and contribute cash, other than proceeds from the sale of Low Income Housing Tax Credits, to fund any hard costs of construction to meet immediate needs identified by the CNA, may receive a Return on Investment (ROI) on those funds provided the Agency determines an increased ROI is financially feasible, and the Agency approves such a return in the revitalization plan. The Agency may also offer that the RTO be included in a ''cash flow split'' agreement as outlined in a MPRCC. The cash flow split, if approved, will allow up to 50 percent of excess cash, generated at the end of the owner's fiscal year end, to be split *equally* between paying down any outstanding deferred Agency loan balances and 50 percent to be returned to the borrower as an increased RTO, subject to the provisions of 7 CFR 3560.68.

MPR funds cannot be used to build community rooms, playgrounds, laundry rooms or additional new units, unless the additional unit(s) are needed for the project to meet the 5 percent fully accessible requirement as defined by Uniform Federal Accessibility Standards (UFAS) and the Agency concurs. However, other funding sources as outlined below in (i) through (vi) can be used either for revitalization or for the improvements listed above.

i. Rural Development Section 515 Rehabilitation loan funds;

ii. Rural Development Section 514/516 Off-Farm rehabilitation loan/grant funds;

iii. Rural Development Section 538 Guaranteed Rural Rental Housing Program financing;

iv. Rural Development Multi-Family Housing Re-Lending Demonstration Program Funds;

v. Third-party loans with below market rates (below the Applicable Federal Rate (AFR)), grants, tax credits and tax-exempt financing; and

vi. Owner-provided capital contributions in the form of a cash infusion. A cash infusion cannot be a loan.

Transfers, subordinations, and consolidations may be approved as part of a MPR transaction in accordance with 7 CFR Part 3560. If a transfer is part of the MPR transaction, the transfer must first meet the requirements of 7 CFR 3560.406 before the MPR transaction is processed.

For the purposes of the MPR, the restructuring transactions will be identified in three categories:

1. ''Simple transactions'' involve no change in ownership.

2. ''Complex transactions'' may consist of a project transfer to a new ownership, processed in accordance with 7 CFR 3560.406, with or without a consolidation, or transactions requiring a subordination agreement as a result of third-party funds. The applicant will submit one pre-application form. If a consolidation is proposed, all projects to be consolidated will be listed on one pre-application form. To be a complex transaction, at the MPR closing, the Agency assumes only one project remains upon completion.

3. A ''Portfolio transaction'' includes two or more projects with one stay-in owner, or two or more projects with multiple project sale transactions to a common purchaser all located in one State. Each project included in the transaction will be submitted on a separate pre-application form unless some projects are being consolidated in which case those projects being consolidated will be listed on the same pre-application form. Each pre-application must have the same Portfolio name. If the owner chooses to remove one or more projects from the proposal, at least two projects must remain in order to be classified as a portfolio transaction. At the end of the transaction, it is assumed there will be two or more projects remaining. The stay-in owner or common purchaser must have at least one general partner in common.

A transaction within each category may utilize any or all restructuring tools. Restructuring tools that may be available to address the capital needs of a project must be used to address preservation and rehabilitation items identified in the CNA.

The liens against the project, with the exception of Agency deferred debt, cannot exceed Agency approved value of the project. All Agency debt, either in first lien position or a subordinated lien position, must be secured by the project, except deferred debt which is not included in the Agency's total lien position for computation of adequate security. Payment of such deferred debt will not be required from normal project operations income, but from excess cash from project operations after all other secured debts are satisfied or as directed by the Agency.

The general steps of the MPR application process are as follows:

1. *Pre-application:* Applicants must submit a pre-application described in Section VI. This pre-application process is designed to lessen the cost burden on all applicants including those who may not be eligible or whose proposals may not be feasible.

**Note:** *If you receive a loan or grant award under this Notice, USDA reserves the right to post all information submitted as part of the pre-application/application package which is not protected under the Privacy Act on a public Web site with free and open access to any member of the public.*

2. *Eligible Projects:* Using criteria described below in Section III, the Agency will conduct an initial screening for eligibility. As described in Section VIII, the Agency will conduct an additional eligibility screening later in the selection process.

3. *Scoring and Ranking:* All complete, eligible and timely-filed pre-applications will be scored, ranked and put in potential funding categories as discussed in Sections VI and VII.

4. *Formal Applications:* Top ranked pre-applicants will receive a letter from the Agency inviting them to submit a formal application. As discussed in Section VIII paragraph (2) of this Notice, the Agency will require the owner to provide a CNA completed in accordance with the Agency's published guidance, (available at *http://www.rurdev.usda.gov/HMF_MPR.html*) in order to underwrite the proposal to determine financial feasibility and to determine the proper combination of tools to be offered to the applicant. When proposals are found to be ineligible or financially infeasible applicants will be informed of this ineligibility or financial infeasibility. Any proposal denied by the Agency will be returned to the applicant and the applicant will be given appeal rights pursuant to 7 CFR part 11.

5. *Financial Feasibility:* Using the results of the CNA to help identify the need for resources and applicant provided information regarding anticipated or available third-party financing, the Agency will determine the financial feasibility of each potential transaction, using restructuring tools available either through existing regulatory authorities or specifically authorized through this demonstration program. A project is financially feasible when it can provide affordable, decent, safe, and sanitary housing for 20 years or the remaining term of any Agency loan, whichever ends later, by using the authorities of this program while minimizing the cost to the Agency, and without increasing rents for eligible tenants or farm laborers, except when necessary to meet normal and necessary operating expenses. If the transaction is determined financially feasible by the Agency, the borrower will be offered a restructuring proposal, if funding is available. This will include a requirement that the borrower will execute, for recordation, an Agency approved restrictive use covenant for a period of 20 years, the remaining term of any loans, or the remaining term of any existing restrictive-use provisions, whichever ends later. The restructuring proposal will be established in the form of the MPRCC.

6. *MPR Agreements:* If the offer is accepted by the applicant, the applicant must accept the MPRCC. By accepting the offer, the applicant must also agree to restrict the project pursuant to the MPRCC. Any third-party lender will be required to subordinate to the Agency's restrictive use covenant unless the Agency determines, on a case-by-case basis, that the lender's refusal to subordinate will not compromise the purpose of the MPR. As part of the MPRCC, the Agency may require the applicant to sign an Agency approved agreement that requires the owner to escrow reserve, tax, and insurance payments in accordance with all pertinent current and future Agency regulations not otherwise inconsistent with this Notice. In addition, the MPRCC may also require the applicant to accept future rent increases based on an Annual Adjustment Factor (AAF) determined by the Secretary. The AAF allows rents to be adjusted by the annual inflation factor as determined by the United States Office of Management and Budget. The exact AAF will be established in the MPRCC.

7. *General Requirements:* The MPR transactions may be conducted with a stay-in owner (simple) or may involve a change in ownership (complex or portfolio). Any housing or related facilities that are constructed or repaired must meet the Agency design and construction standards and the development standards contained in 7 CFR part 1924, subparts A and C, respectively. Once constructed, Section 515 MFH and Section 514/516 FLH projects must be managed in accordance with 7 CFR part 3560. Tenant eligibility will be limited to persons who qualify as an eligible household under Agency regulations. Tenant eligibility requirements are contained in 7 CFR 3560.152.

8. *Voluntary ''Community Market Rent'' Demonstration (available for Section 515 projects only):* In conjunction with this demonstration, the Agency also announces the opportunity for all successful Section 515 applicants to participate on a voluntary basis in a viability test of a 30 percent limitation on tenant rents, as proposed in Section 544 (b)(7) of Saving American's Rural Housing Act of 2006, H.R. 5069, for post-restructured properties. Owners of projects in the Section 515 MPR program may elect to participate in the ''community market rent'' demonstration which will allow an owner to set a rent above the approved basic rent for any unit not currently occupied by a tenant receiving Agency RA. Eligible tenants for these units must have adjusted annual incomes sufficient to allow them to pay the community market rent using less than 30 percent of their adjusted income. With the Agency's consent, up to 50 percent of the difference between the basic rent and the new ''community market rent'' could be retained by the owner as an increased return.

For example, if the basic rent is $350, the owner could create a community market rent at $410, and market the unit to tenants who could pay the $410 rent at less than 30 percent of adjusted income. A percentage of the $60 difference could be retained by the owner, as negotiated with the Agency, up to $30.

Prior to implementation of the community market rent demonstrations, the Agency will issue guidance to successful applicants who have indicated an interest in participating in the demonstration providing further details with respect to the program.

## II. Award Information

The Consolidated and Further Continuing Appropriations Act, 2012 (Pub. L. 112–55), November 18, 2011, appropriated $2,000,000 in budget authority to operate the MPR Demonstration Program. The budget authority is anticipated to make approximately $19.9 million available in program funds depending on the funding tools used. This funding remains available until expended.

All Agency funding of applications submitted under this Notice must be approved no later than September 30, 2013. Applicants are alerted that the Agency has unfunded applications carried over from prior Notices that will receive priority based on that Notice. If funds available for the MPR are fully committed before all eligible pre-applications selected for further processing are funded, the Agency shall suspend further processing of the pre-applications at that time. If additional funding is received during 2013, processing will continue. Any pre-applications or applications that have not been approved by September 30, 2013, will be considered (based on scoring under the prior applicable Notice) with any pre-applications received under any future Notice unless the application is withdrawn. Any pre-applications selected under this Notice, or prior Notices, that are not approved by the Agency prior to September 30, 2014, will be considered withdrawn automatically. However, the applicants may reapply for funding under future Notices.

## III. Eligibility Information

Applicants (and the principals associated with each applicant) must meet the following requirements:

1. Eligibility under applicable provisions of 7 CFR 3560.55 and 3560.555; however, the requirements described in 7 CFR 3560.55(a)(5) pertaining to required borrower contributions and paragraph (a)(6) pertaining to required contributions of initial operating capital are waived for all MPR proposals. Eligibility consideration also includes the continued ability of the borrower/applicant to provide acceptable management and will include an evaluation of any current outstanding deficiencies. Any outstanding violations, recorded in the Agency's Automated MFH Information System (MFIS), will preclude further processing of any MPR applications associated with the borrower or Identity of Interest (IOI) management agent unless there is a current, approved workout plan in place and the plan is being satisfactorily followed as determined by the Agency.

2. For Section 515 Rural Rental Housing (RRH) projects, the average physical vacancy rate for the 12 months preceding the filing of the pre-application can be no more than 10 percent for projects of 16 units or more and no more than 15 percent for projects less than 16 units unless an exception applies under Section VI paragraph (1)(ii) of this Notice. If a project consolidation is involved, the consolidation will remain eligible so long as the average vacancy rate for all the projects involved meets the occupancy standard noted in this paragraph. Projects that do not meet the occupancy threshold at the time of filing the application may be withdrawn by the owner from the application process without jeopardizing the application.

3. For Section 514/516 FLH projects, rather than an average physical vacancy rate as noted in III(2) above, a positive cash flow for the previous full 3 years of operation is required unless an exception applies under Section VI paragraph (1)(ii) of this Notice.

4. Ownership of and ability to operate the project after the transaction is completed. In the event of a transfer, the proposed transferee, with an executed purchase agreement or other evidence of site control, must apply. Purchase agreements that are not executed or are expired will not be accepted.

5. An Agency approved CNA (for guidance refer to *http://www.rurdev.usda.gov/HMF_MPR.html* and an Agency financial evaluation must be conducted to ensure that utilization of the restructuring tools of the MPR program is financially feasible and necessary for the revitalization and preservation of the project for affordable housing. Initial eligibility for processing will be determined as of the date of the pre-application filing deadline. The Agency reserves the right to discontinue processing any application due to material changes in the applicant's status occurring at any time after the initial eligibility determination.

6. Please note that all grant eligible applicants must obtain a Dun and Bradstreet Data Universal Numbering System (DUNS) number and register in the Central Contractor Registration (CCR) prior to submitting a pre-application pursuant to 2 CFR 25.200(b). In addition, an entity applicant must maintain registration in the CCR database at all times during which it has an active Federal award or an application or plan under consideration by the Agency. Similarly, all recipients of Federal Financial Assistance are required to report information about first-tier sub-awards and executive compensation, in accordance with 2 CFR part 17a. So long as an entity applicant does not have an exception under 2 CFR 170.110(b), the applicant must have the necessary processes and systems in place to comply with the reporting requirements should the applicant receive funding. See 2 CFR 170.200(b).

## IV. Equal Opportunity and Nondiscrimination Requirements

USDA is an equal opportunity provider, employer, and lender.

1. Borrowers and applicants will comply with the provisions of 7 CFR 3560.2.

2. All housing must meet the accessibility requirements found at 7 CFR 3560.60(d).

*3.* All MPR participants must submit or have on file a valid Form RD 400–1, ''*Equal Opportunity Agreement*'' and

Form RD 400–4, ''*Assurance Agreement.*''

USDA prohibits discrimination in all its programs and activities on the basis of race, color, national origin, age, disability, sex, marital status, familial status, religion, sexual orientation, or because all or part of an individual's income is derived from any public assistance program. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720–2600 (Voice and TDD). To file a complaint of discrimination, write to USDA, Director, Office of Adjudication and Compliance, 1400 Independence Avenue SW., Washington, DC 20250–9410, or call (800) 795–3272 (Voice) or (202) 720–6382 (TDD).

The policies and regulations contained in 7 CFR Part 1901, Subpart E, apply to this program.

## V. Authorities Available for MPR

MPR tools will be used in accordance with 7 CFR part 3560. The program will be administered within the resources available to the Agency through Public Law 112–55 and any future appropriations for the preservation and revitalization of Section 514/516 and Section 515 financed projects. In the event that any provisions of 7 CFR part 3560 conflict with this demonstration program, the provisions of the MPR will take precedence.

## VI. Application and Submission Information

1. The application submission and scoring process will be completed in two phases in order to avoid unnecessary effort and expense on the part of borrowers/applicants and to allow additional points for applicants that propose a transfer of a troubled project to an eligible owner.

Phase I—The first phase is the pre-application process. The applicant must submit a complete pre-application by the deadline date under the ''**DATES**'' section of this Notice. The applicant's submission will be classified as ''complete'' when the MPR Pre-application form is received in the correct format and place as described in this Notice for each MPR proposal the applicant wishes to be considered in the demonstration. In the event the MPR proposal involves a project consolidation, it will be completed in accordance with 7 CFR 3560.410. One pre-application for the proposed consolidated project is required and must identify each project included in the consolidation. If the MPR proposal involves a portfolio transaction (sale or stay in owner), one pre-application for each project in the portfolio is required and each pre-application must identify each project included in the portfolio transaction. In addition, a synopsis of this program and the pre-application's universal resource locator (URL) will be listed by Catalog of Federal Domestic Assistance Number or at Federal GrantsWire at *http://www.federalgrantswire.com.*

In order for the pre-application to be considered complete, all applicable information requested on the MPR Pre-application form must be provided. Additional information that must be provided with the pre-application, when applicable, includes:

i. A copy of a purchase agreement if a transfer of ownership is proposed.

ii. A market survey for any pre-application project not meeting the occupancy standards cited in Section III (2) and (3) above. The market survey should show there is an overwhelming market demand for the project evidenced by waiting lists and a housing shortage confirmed by local housing agencies and realtors. The market survey must show a clear need and demand for the project once a restructuring transaction is completed. The results of the survey of existing or proposed rental or labor housing, including complex name, location, number of units, bedroom mix, family or elderly type, year built, and rent charges must be provided as well as the existing vacancy rate of all available rental units in the community, their waiting lists and amenities, and the availability of RA or other subsidies. The Agency will determine whether or not the proposal has market feasibility based on the data provided by the applicant. Any costs associated with the completion of the market survey is NOT an eligible program project expense.

Unless an exception under this section applies, the requirements stated in Section III, paragraph (2) and (3) of this Notice must be met.

**Note:** *All documents must be received on or before the pre-application closing deadline to be considered complete and timely filed. Pre-applications that do not include a Purchase Agreement for transfer proposals or market surveys for projects that do not meet the occupancy standards of Section III paragraphs (2) and (3) of this Notice, will be considered incomplete and will be returned to the applicant with appeal rights.*

Phase II—The second phase of the application process will be completed by the Agency based on Agency records and the pre-application information submitted. All complete, eligible, and timely-filed pre-applications will be scored and ranked based on points received during this two-phase application process. Further, the Agency will categorize each MPR proposal as being potentially a Simple, Complex, or a Portfolio transaction based on the information submitted on the pre-application and in accordance with the category description provided in Section I of this Notice.

2. Pre-applications can be submitted either electronically or in hard copy. The Agency will record pre-applications received electronically by the actual date and time received in the MPR Web site mail box. This date may impact ranking of the application as discussed under section VII. For all hard copy pre-applications received, the recorded receipt time will be the close of business time for the day received. Assistance for filing electronic and hard copy pre-applications can be obtained from any Rural Development State Office. A listing of State Offices, their addresses, telephone numbers and person to contact is included under Section X of this Notice.

The pre-application is an Adobe Acrobat format and may be completed as a fillable form. The form contains a button labeled ''Submit by Email.'' Clicking on the button will result in an email containing a completed pre-application being sent to the MPR Web site mail box for consideration. If a purchase agreement or market survey is required, these additional documents are to be attached to the resulting email prior to submission.

Pre-application forms may be downloaded from the Agency's Web site at *http://www.rurdev.usda.gov/RD_NOFAs.html* or obtained by contacting the State Office in the State the project is located. Hard copy pre-applications and additional materials can be mailed to the attention of Sherry Engel or Tiffany Tietz, at *sherry.engel@wdc.usda.gov* or *tiffany.tietz@wdc.uda.gov,* at (715) 345–7677 (616) 942–4111, extension 126, Finance and Loan Analyst, Multi-Family Housing Preservation and Direct Loan Division, STOP 0782 (Room 1263–S), U.S. Department of Agriculture, Rural Housing Service, 1400 Independence Avenue SW., Washington, DC 20250–0781. (Please note this telephone number is not a toll-free number.)

## VII. Selection for Processing

A. Pre-application ranking points will be based on information provided during the submission process and in Agency records. Only timely, complete

pre-applications will be ranked. Points will be awarded as follows:

1. Contribution of other sources of funds. Other funds are those discussed in items (i) through (vi) of Section I of this Notice. Points awarded are to be based on documented written evidence that the funds are *committed.* The maximum points awarded for this criterion is 25 points. These points will be awarded in the following manner:

i. Evidence of a commitment of at least $3,000 to $5,000 per unit per project from other sources—15 points, or

ii. Evidence of a commitment greater than $5,000 per unit per project from other sources—20 points.

iii. Evidence of a commitment greater than $5,000 per unit per project from other sources and a binding written commitment by a third-party to contribute 25 percent or more of any allowable developer fee to the hard costs of construction—25 points.

2. Owner contribution. The maximum points awarded for this criterion is 10 points. These points will be awarded in the following manner:

i. Owner contribution sufficient to pay transaction costs. (These funds cannot be from the project's reserve or operating funds.) Transaction costs are defined as those Agency approved costs required to complete the transaction under this Notice and include, but are not limited to, the CNA, legal and closing costs, appraisal costs and filing/recording fees. The minimum contribution required to receive these points is $10,000 per project and must be deposited into the respective project reserve account prior to closing the MPR transaction from the owner's non-project resources. 5 points

ii. Owner contribution for the hard costs of construction. (These funds cannot be from the project's reserve account or project's general operating account or in the form of a loan.) Hard costs of construction are defined as those costs for materials, equipment, property or machinery required to complete the proposal under this Notice. Hard costs must be itemized on Form RD 1924–13, ''*Estimate and Certificate of Actual Cost.*'' Form RD 1924–13 which can be found at *http://forms.sc.egov.usda.gov/efcommon/eFileServices/eForms/RD1924-13.PDF.* The minimum contribution required to receive these points is $1,000 per unit per project which will be required to be deposited in the project reserve account or a supervised/construction account, as directed by Rural Development, prior to closing. An increased RTO may be budgeted and allowed for funds committed in accordance with 7 CFR 3560.406(d)(14)(ii). 10 points

3. Age of project. For project consolidation (including portfolio transactions) proposals, the project with the earliest operational date (operational date is the date the project initially placed in service and documented in the Agency's Multi-Family Housing Information System (MFIS)) will be used in determining the age of the project. Since the age of the project and the date the project placed in service are directly related to physical needs, a maximum of 25 points will be awarded based on the following criteria:

i. Projects with initial operational dates prior to December 21, 1979—25 points.

ii. Projects with initial operational dates on or after December 21, 1979, but before December 15, 1989—20 points.

iii. Projects with initial operational dates on or after December 15, 1989, but before October 1, 1991—15 points.

iv. Projects with initial operational dates on or after October 1, 1991—0 points.

4. Troubled project points. The Agency may award up to 25 points to pre-applications involving projects that have been adversely impacted by an act of nature or where physical and/or financial deterioration or management deficiencies exist. Projects classified ''B'', ''C'' or ''D'', as defined below, will be considered troubled and points will be awarded in the following manner:

*Class ''D'' Projects*

Class ''D'' projects are in default and may be taken into inventory, be lost to the program or cause the displacement of tenants. Defaults can be monetary or non-monetary. Projects in non-monetary default are those where the Agency has notified the borrower of a violation using the Agency's three processing letter process and the borrower has not addressed the violation to the Agency's satisfaction.

*Class ''C'' Projects*

Class ''C'' projects are projects with identified findings or violations, which are not associated to a workout plan and/or transition plan. This can *include* projects with violations where a servicing letter has been issued but 60 days have not passed.

*Class ''B'' Projects*

Class ''B'' projects indicates that the Agency has taken servicing steps and the borrower is cooperating to resolve identified findings or violations by associating a workout plan and/or transition plan.

For Transfer proposals:

i. For projects classified a ''C'' or ''D'' for 24 months or more—20 points.

ii. For projects classified as a ''C'' or ''D'' for less than 24 months—15 points.

Stay in owner proposals:

i. For projects classified as a ''B'' as a result of a workout plan and/or transition plan approved by the Agency prior to 1/1/2012—25 points.

ii. Projects with an Agency ''C'' classification, for 6 months or longer at the time the MPR pre- application is filed, will not be considered eligible to participate in the MPR.

5. Proposed or Closed Sale of 515 projects to Non-Profit/Public Housing Authority. The Agency will award 20 points for projects that have or will be sold to non-profit organizations under the prepayment process as explained in 7 CFR part 3560, Subpart N. To receive points, the borrower/applicant must provide a copy of the executed purchase agreement (if sale is proposed) or a copy of the purchase agreement and filed deed (if sale is already closed to an eligible non-profit or public body)—20 points.

6. Prior approved CNAs. In the interest of ensuring timely application processing and underwriting, the Agency will award up to 20 points for projects with CNAs already approved by the Agency. ''Approved'' means the initial CNA or an updated CNA was previously reviewed and approved by the Agency. CNAs or updates before October 1, 2010 may not be used for MPR underwriting without an update approved by the Agency. Points will be awarded for:

i. CNAs approved on or after October 1, 2010, but prior to October 1, 2011—10 points.

ii. CNAs approved on or after October 1, 2011, but prior to the publication of this Notice—20 points.

7. Tenant service provision. The Agency will award 5 points for applications that include new services provided by either a for-profit or a non-profit organization, which may include a faith-based organization, or by another Government agency. Such services shall be provided at no cost to the project and shall be made available to all tenants. Examples of such services may include transportation for the elderly, after-school day care services or after-school tutoring.

8. Consolidation of project operations. To encourage post-transaction operational cost savings and management efficiencies, the Agency will award 5 points for pre-applications that include at least two and up to four projects that will consolidate project budget and management operations and 10 points for applicants that include at

least five or more projects that will consolidate project budget and management operations. Consolidations must meet the requirements of 7 CFR 3560.401. (5 or 10 points.)

For portfolio sales and project consolidations, the Agency will calculate the average score for each project within the portfolio or consolidation.

9. Energy Conservation, Energy Generation, and Green Property Management. Under the MPR Energy Initiatives, projects may receive a maximum of 42 points under three categories: Energy Conservation, Energy Generation and Green Property Management.

i. *Energy Conservation*—30 points.

Pre-applications for rehabilitation and preservation of projects may be eligible to receive a maximum of 30 points for the following energy conservation measures.

(a) Participation in the Green Communities program by the Enterprise Community Partners, *http://www.enterprisecommunity.com/solutions-and-innovation/enterprise green-communities,* or an equivalent Agency approved program will be awarded 30 points for any project that qualifies for the program. At least 30 percent of the points needed to qualify for the Green Communities program must be earned under the Energy Efficiency section of the Green Communities qualification program. Green Communities has an initial checklist indicating prerequisites for participation. Each applicant must provide a checklist establishing that the prerequisites for each program's participation will be met. Additional points will be awarded for checklists that achieve higher levels of energy efficiency certification as set forth below. All checklists must be accompanied by a signed affidavit by the project architect or engineer stating that the goals are achievable.

(b) If you are not enrolling in the Green Communities program, then points can be accumulated for each of the following items up to a total of 20 points. Provide documentation to substantiate your answers below:

i. This proposal includes the replacement of heating, ventilation and air conditioning (HVAC) equipment with Energy Star qualified heating, ventilation and air conditioning equipment. 3 points.

ii. This proposal includes the replacement of windows and doors with Energy Star qualified windows and doors. 3 points.

iii. This proposal includes additional attic and wall insulation that exceeds the required R-Value of these building elements for your areas as per the International Energy Conservation Code 2009. Two points will be awarded if all exterior walls exceed insulation code, and 1 point will be awarded if attic insulation exceeds code for a maximum of 3 points.

iv. This proposal includes the reduction in building shell air leakage by at least 15 percent as determined by pre- and post-rehab blower door testing on a sample of units. Building shell air leakage may be reduced through materials such as caulk, spray foam, gaskets and house-wrap. Sealing of duct work with mastic, foil-backed tape, or aerosolized duct sealants can also help reduce air leakage. 3 points.

v. This proposal includes 100 percent of installed appliances and exhaust fans that are Energy Star qualified. 2 points

vi. This proposal includes 100 percent of installed water heaters that are Energy Star qualified. 2 points.

vii. This proposal included replacement of 100 percent of toilets with flush capacity of more than 1.6 gallon flush capacity with new toilets having 1.6 gallon flush capacity or less, and with Environment Protection Agency (EPA) Water Sense label. 1 point.

viii. This proposal includes 100 percent of new showerheads with EPA Water Sense label. 1 point.

ix. This proposal included 100 percent of new faucets with WPA Water Sense label. 1 point.

x. This proposal included 100 percent energy-efficient lighting including Energy Star qualified fixtures, compact fluorescent replacement bulbs in standard incandescent fixtures and Energy Star ceiling fans. 1 point.

And

(c) Participation in local green/energy efficient building standards. Applicants, who participate in a city, county or municipality program, will receive an additional 2 points. The applicant should be aware and look for additional requirements that are sometimes embedded in the third-party program's rating and verification systems. 2 points.

10. Energy Generation (maximum 5 points).

Pre-applications which participate in the Green Communities program by the Enterprise Community Partners or an equivalent Agency approved program or receive at least 8 points for Energy Conservation measures are eligible to earn additional points for installation of on-site renewable energy sources. Renewable, on-site energy generation will complement a weather-tight, well insulated building envelope with highly efficient mechanical systems. Possible renewable energy generation technologies include, but are not limited to: wind turbines and micro-turbines, micro-hydro power, photovoltaic (capable of producing a voltage when exposed to radiant energy, especially light), solar hot water systems and biomass/biofuel systems that do not use fossil fuels in production. Geo-exchange systems are highly encouraged as they lessen the total demand for energy and, if supplemented with other renewable energy sources, can achieve zero energy consumption more easily.

Points under this paragraph will be awarded as follows. Projects with preliminary or rehabilitation building plans and energy analysis propose a 10 percent to 100 percent energy generation commitment (where generation is considered to be the total amount of energy needed to be generated on-site to make the building a net-zero consumer of energy) may be awarded points corresponding to their percent of commitment as follows:

(a) 0 to 9 percent commitment to energy generation receives 0 points;

(b) 10 to 29 percent commitment to energy generation receives 1 point;

(c) 30 to 49 percent commitment to energy generation receives 2 points;

(d) 50 to 69 percent commitment to energy generation receives 3 points;

(e) 70 to 89 percent commitment to energy generation receives 4 points;

(f) 90 percent or more commitment to energy generation receives 5 points.

In order to receive more than 1 point for this energy generation paragraph, an accurate energy analysis prepared by an engineer will need to be submitted with the pre-application. Energy analysis of preliminary building plans using industry-recognized simulation software must document the projected total energy consumption of the building, the portion of building consumption which will be satisfied through on-site generation, and the building's Home Energy Rating System (HERS) score.

11. *Green Property Management Credentials (5 points).*

Pre-applications may be awarded an additional 5 points if the designated property management company or individuals that will assume maintenance and operations responsibilities upon completion of construction work have a Credential for Green Property Management. Credentialing can be obtained from the National Apartment Association (NAA), National Affordable Housing Management Association, The Institute for Real Estate Management, U.S. Green Building Council's Leadership in Energy and Environmental Design for

Operations and Maintenance (LEED OM), or another Agency approved source with a certifiable credentialing program. Credentialing must be illustrated in the resume(s) of the property management team and included with the pre-application.

The Agency will total the points awarded to each pre-application received within the timeframes of this Notice and rank each pre-application according to total score. If point totals are equal, the earliest time and date the pre-application was received by the Agency will determine the ranking. In the event pre-applications are still tied, they will be further ranked by giving priority to those projects with the earliest Rural Development operational date as defined under paragraph VII. 3.

B. Confirmation of Eligibility

Eligibility will be confirmed after ranking is completed on the 10 highest-scoring pre-applications in each State. If one or more of the 10 highest-scoring pre-applications is determined ineligible, (i.e. the applicant is a borrower that is not in good standing with the Agency or has been debarred or suspended by the Agency, etc.) the next highest-scoring pre-application will be confirmed for eligibility.

If one or more of the 10 highest-ranking pre-applications is a portfolio transaction, eligibility determinations will be conducted on each pre-application associated with the portfolio. Should any of the pre-applications associated with the portfolio sale be determined ineligible, those ineligible pre-application(s) will be rejected, but the overall eligibility of the portfolio sale will not be affected as long as the requirements in Section I and other provisions of this Notice are met.

If one or more of the 10 highest-ranking pre-applications in a State is a project consolidation, and one of the projects involved in the consolidation does not meet the occupancy standards cited in Section III (2), that project(s) will be determined ineligible and eliminated from the proposed consolidation transaction.

C. Selection of Pre-Applications for Further Processing

Once ranking and eligibility confirmations are complete, the Agency will conduct a four-step process to select eligible pre-applications for submission of formal applications. This process will allow the Agency to develop a representative sampling of revitalization transaction types, assure geographic distribution, and assure an adequate pipeline of transactions to use all available funding. All MPR tools are available to be used on both Section 514/516 and Section 515 projects.

*Step One:* The Agency will review the eligible pre-applications, categorize each pre-application as either Simple, Complex, or Portfolio (see section I) and sort them by State.

*Step Two:* The Agency will select, for further processing, the top-ranked portfolio transactions until a total of $50,000,000 in potential debt deferral is reached. Portfolio transactions will be limited to one per State (either RRH or FLH) and will count as one MPR transaction. A portfolio transaction, as defined in section I will be limited to a maximum of 15 projects.

*Step Three:* The highest ranked complex transactions (RRH or FLH) will be selected for further processing, not to exceed 1 per State.

*Step Four:* Additional projects will be selected from the highest ranked eligible pre-applications involving simple transactions in each State until a total of three RRH pre-applications for MPR transactions are reached. If a FLH complex transaction has not been selected in Step Three above, one additional FLH project will be selected from the highest ranked eligible pre-applications involving FLH simple transactions, until a total of four MPR pre-applications per State is reached. States that do not have a FLH pre-application will be limited to three MPR pre-applications.

If there are insufficient funds for all projects under any step, the Agency may suspend further selections. Any remaining eligible applications will be carried over to the next fiscal year for consideration. Any pre-applications that have not been approved by September 30, 2013, will be rescored and ranked with any future pre-applications according to the applicable future Notice unless it is withdrawn. Any such unfunded pre-applications not approved by the Agency prior to September 30, 2014, automatically will be considered withdrawn by the Agency. Applicants, however, may reapply for funding under future Notices.

## VIII. Processing of Selected Pre-Applications

Those eligible pre-applications that are ranked and then selected for further processing will be invited to submit a formal application on SF 424, ''Application for Federal Assistance.'' Those eligible pre-applications that are not selected for further processing will be retained by the Agency unless they are withdrawn according to this Notice. Applicants rejected will be notified their pre-applications were not selected and provided with appeal rights under 7 CFR part 11. In the event a pre-application is selected for further processing and the applicant declines, the next highest ranked pre-application of the same transaction type in that State will be selected provided there is no change in the preliminary eligibility of the pre-applicant. If there are no other pre-applications of the same transaction type, then the next highest-ranked pre-application, regardless of transaction type, will be selected.

Applications (SF 424s) can be obtained and completed online. An electronic version of this form may be found on the internet at *http://www.epa.gov/ogd/AppKit/index.htm* or a hard copy may be obtained by contacting the State Office in the State where the project is located and can be submitted either electronically or in hard copy (refer to Section X for a listing of State Offices)

Awards made under this Notice are subject to the provisions contained in the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2012, Public Law 112–55, Division A sections 738 and 739 regarding corporate felony convictions and corporate federal tax delinquencies. To comply with these provisions, all applicants also must submit form AD–3030 which can be found here: *http://www.ocio.usda.gov/forms/ocio_forms.html.*

If a pre-application is accepted for further processing, the applicant must submit additional information needed to demonstrate eligibility and feasibility (such as a CNA), consistent with this Notice and the appropriate sections of 7 CFR part 3560, prior to the issuance of any restructuring offer. The Agency will provide additional guidance to the applicant and request information and documents necessary to complete the underwriting and review process. Since the character of each application may vary substantially depending on the type of transaction proposed, information requirements will be provided as appropriate. Complete project information must be submitted as soon as possible, but in no case later than 45 calendar days from the date of Agency notification of the applicant's selection for further processing or September 1, 2013, whichever occurs first. Failure to submit the required information in a timely manner may result in the Agency discontinuing the processing of the request.

The Agency will work with the applicants selected for further processing in accordance with the following:

1. Based on the feasibility of the type of transaction that will best suit the project and the availability of funds, further eligibility confirmation determinations will be conducted by the Agency.

2. If an Agency approved CNA has not already been submitted to the Agency, an Agency approved CNA will be required (see 7 CFR 3560.103(c) and the Agency's published ''Guidance on the Capital Needs Assessment Process'' available at *http://www.rurdev.usda.gov/HMF_MPR.html* and the CNA Statement of Work together with any non-conflicting amendments). Agency approved CNAs must be prepared by a qualified independent contractor and are obtained to determine needed repairs and any necessary adjustments to the reserve account for long-term project viability. In order for the Agency to approve a CNA it must also include:

i. A physical inspection of the site, architectural features, common areas and all electrical and mechanical systems;

ii. An inspection of a sample of dwelling units;

iii. Identify repair or replacement needs;

iv. Provide a cost estimate of the repair and replacement expenses; and

v. Provide at least a 20-year analysis of the timing and funding for identified needs which includes reasonable assumptions regarding inflation. The cost of the CNA will be considered a part of the project expense and may be paid from the ''project reserve'' with prior approval of the Agency. The Agency approval for participation in this program will be contingent upon the Agency's final approval of the CNA and concurrence in the scope of work by the owner. The Agency, in its sole discretion, may choose to obtain a CNA, at its expense, if it determines that doing so is in the best interest of the Government.

3. Underwriting will be conducted by the Agency. The feasibility and structure of each revitalization proposal will be based on the Agency's underwriting and determination of the restructuring tools that will minimize the cost to the Government consistent with the purposes of this Notice.

## IX. MPR Offers

Approved MPR offers will be presented to successful applicants who will then have up to 15 calendar days to accept or reject the offer in writing. If no offer is made, the application will be rejected and appeal rights will be given. Closing of MPR offers will occur within 90 days of acceptance by the applicant unless extended in writing by the Agency.

## X. USDA Rural Development MFH State Office Contacts

(**Note:** Telephone numbers listed are not toll-free.)

Alabama State Office, Suite 601, Sterling Centre, 121 Carmichael Road, Montgomery, AL 36106–3683, (334) 279–3455, Anne Chavers.

Alaska State Office, 800 West Evergreen, Suite 201, Palmer, AK 99645, (907) 761–7723, Cindy Jackson.

Arizona State Office, Phoenix Courthouse and Federal Building, 230 North First Avenue, Suite 206, Phoenix, AZ 85003–1706, (602) 280–8764, Ernie Wetherbee.

Arkansas State Office, 700 W. Capitol Avenue, Room 3416, Little Rock, AR 72201–3225, (501) 301–3254, Jackie Young.

California State Office, 430 G Street, #4169, Davis, CA 95616–4169, (530) 792–5821, Debra Moretton.

Colorado State Office, USDA Rural Development, Denver Federal Center, Building 56, Room 2300, P.O. Box 25426, Denver, CO 80225–0426, (720) 544–2923, Mary Summerfield.

Connecticut, Served by Massachusetts State Office.

Delaware and Maryland State Office, 1221 College Park Drive, Suite 200, Dover, DE 19904, (302) 857–3615, Debra Eason.

Florida & Virgin Islands State Office, 4440 NW. 25th Place, Gainesville, FL 32606–6563, (352) 338–3465, Tresca Clemmons.

Georgia State Office, Stephens Federal Building, 355 E. Hancock Avenue, Athens, GA 30601–2768, (706) 546–2164, Jack Stanek.

Hawaii State Office, (Services all Hawaii, American Samoa Guam, and Western Pacific), Room 311, Federal Building, 154 Waianuenue Avenue, Hilo, HI 96720, (808) 933–8305, Nate Reidel.

Idaho State Office, Suite A1, 9173 West Barnes Drive, Boise, ID 83709, (208) 378–5628, Joyce Weinzetl.

Illinois State Office, 2118 West Park Court, Suite A, Champaign, IL 61821–2986, (217) 403–6222, Barry L. Ramsey.

Indiana State Office, 5975 Lakeside Boulevard, Indianapolis, IN 46278, (317) 290–3100, extension 425, Douglas Wright.

Iowa State Office, 210 Walnut Street, Room 873, Des Moines, IA 50309, (515) 284–4493, Shannon Chase.

Kansas State Office, 1303 SW First American Place, Suite 100, Topeka, KS 66604–4040, (785) 271–2721, Mike Resnik.

Kentucky State Office, 771 Corporate Drive, Suite 200, Lexington, KY 40503, (859) 224–7325, Paul Higgins.

Louisiana State Office, 3727 Government Street, Alexandria, LA 71302, (318) 473–7962, Yvonne R. Emerson.

Maine State Office, 967 Illinois Ave., Suite 4, Bangor, ME 04402–0405, (207) 990–9110, Bob Nadeau.

Maryland, Served by Delaware State Office.

Massachusetts, Connecticut, & Rhode Island State Office, 451 West Street, Amherst, MA 01002, (413) 253–4310, Richard Lavoie.

Michigan State Office, 3001 Coolidge Road, Suite 200, East Lansing, MI 48823, (517) 324–5192, Julie Putnam.

Minnesota State Office, 375 Jackson Street Building, Suite 410, St. Paul, MN 55101–1853, (651) 602–7820, Linda Swanson.

Mississippi State Office, Federal Building, Suite 831, 100 W. Capitol Street, Jackson, MS 39269, (601) 965–4325, Darnella Smith-Murray.

Missouri State Office, 601 Business Loop 70 West, Parkade Center, Suite 235, Columbia, MO 65203, (573) 876–0987, Rachelle Long.

Montana State Office, 2229 Boot Hill Court, Bozeman, MT 59715, (406) 585–2515, Deborah Chorlton.

Nebraska State Office, Federal Building, Room 152, 100 Centennial Mall N, Lincoln, NE 68508, (402) 437–5734, Linda Anders.

Nevada State Office, 1390 South Curry Street, Carson City, NV 89703–5146, (775) 887–1222, extension 105, William Brewer.

New Hampshire State Office, Concord Center, Suite 218, Box 317, 10 Ferry Street, Concord, NH 03301–5004, (603) 223–6050, Heidi Setien.

New Jersey State Office, 5th Floor North Suite 500, 8000 Midlantic Drive, Mt. Laurel, NJ 08054, (856) 787–7732, Neil Hayes.

New Mexico State Office, 6200 Jefferson Street NE., Room 255, Albuquerque, NM 87109, (505) 761–4945, Yvette Wilson.

New York State Office, The Galleries of Syracuse, 441 S. Salina Street, Suite 357 5th Floor, Syracuse, NY 13202, (315) 477–6421, Michael Bosak.

North Carolina State Office, 4405 Bland Road, Suite 260, Raleigh, NC 27609, (919) 873–2055, Beverly Casey.

North Dakota State Office, Federal Building, Room 208, 220 East Rosser, P.O. Box 1737, Bismarck, ND 58502, (701) 530–2049, Kathy Lake.

Ohio State Office, Federal Building, Room 507, 200 North High Street, Columbus, OH 43215–2477, (614) 255–2409, Cathy Simmons.

Oklahoma State Office, 100 USDA, Suite 108, Stillwater, OK 74074–2654, (405) 742–1070, Laurie Ledford.

Oregon State Office, 1201 NE Lloyd Boulevard, Suite 801, Portland, OR 97232, (503) 414–3353, Rod Hansen.

Pennsylvania State Office, One Credit Union Place, Suite 330, Harrisburg, PA 17110–2996, (717) 237–2281, Martha Hanson.

Puerto Rico State Office, 654 Munoz Rivera Avenue, IBM Plaza, Suite 601, Hato Rey, PR 00918, (787) 766–5095, extension 249, Lourdes Colon.

Rhode Island, Served by Massachusetts State Office.

South Carolina State Office, Strom Thurmond Federal Building, 1835 Assembly Street, Room 1007, Columbia, SC 29201, (803) 765–5122, Tim Chandler.

South Dakota State Office, Federal Building, Room 210, 200 Fourth Street SW., Huron, SD 57350, (605) 352–1136, Linda Weber.

Tennessee State Office, Suite 300, 3322 West End Avenue, Nashville, TN 37203–1084, (615) 783–1380, Kathy Connelly.

Texas State Office, Federal Building, Suite 102, 101 South Main, Temple, TX 76501, (254) 742–9711, John Kirchhoff.

Utah State Office, Wallace F. Bennett Federal Building, 125 S. State Street, Room 4311, Salt Lake City, UT 84147–0350, (801) 524–4325, Janice Kocher.

Vermont State Office, City Center, 3rd Floor, 89 Main Street, Montpelier, VT 05602, (802) 828–6015, Robert McDonald.

Virgin Islands, Served by Florida State Office.

Virginia State Office, Culpeper Building, Suite 238, 1606 Santa Rosa Road, Richmond, VA 23229, (804) 287–1596, CJ Michels.

Washington State Office, 1835 Black Lake Boulevard, Suite B, Olympia, WA 98512, (360) 704–7706, Bill Kirkwood.

West Virginia State Office, Federal Building, 75 High Street, Room 320, Morgantown, WV 26505–7500, (304) 372–3441, extension 105, Penny Thaxton.

Western Pacific Territories, Served by Hawaii State Office.

Wisconsin State Office, 4949 Kirschling Court, Stevens Point, WI 54481, (715) 345–7620, extension 157, Debbie Biga.

Wyoming State Office, P.O. Box 11005, Casper, WY 82602, (307) 233–6716, Timothy Brooks.

## X. Appeal Process

All adverse determinations are appealable pursuant to 7 CFR part 11. Instructions on the appeal process will be provided at the time an applicant is notified of the adverse action.

Dated: December 6, 2012.

**Tammye Treviño,**

*Administrator, Rural Housing Service.*

BILLING CODE 3410–XX–P

Form Approved:
OMB No. 0575-0190

# Fiscal Year 2013 Pre-application for Multi-Family Housing Revitalization Demonstration Program (MPR)

## Instructions

Applicants are encouraged, but not required, to submit this pre-application form electronically by accessing the website: http://www.rurdev.usda.gov/HMF_MPR.html and clicking on the link for the "Fiscal Year 2013 Pre-application for Multi-Family Housing Revitalization Demonstration Program (MPR)." Please note that electronic submittals are not on a secured Web site. If you do not wish to submit the form electronically by clicking on the **Send Form** button, you may still fill out the form, print it and submit it with your application package to the National Office. You also have the option to save the form, and submit it on an electronic media to the National Office with your complete application package.

Supporting documentation required by this pre-application may be sent via email to a special address that you will receive upon receipt of your electronic pre-application. If using this option, please enter the Submission Email Address on the form below (1.g.) so that all documents submitted by this user will be stored in a special folder. Under item **X. Documents Submitted**, check all supporting documents that you are submitting and indicate whether you are submitting each item in hard copy form, on electronic media, or via email. You may also refer to the MPR Notice published in the Federal Register for a complete list of documents that you will need to submit.

## I. Applicant Information

a. **Applicant's Name:** _____

b. **Applicant's Address:**

**Address, Line 1:** _____

**Address, Line 2:** _____

**City:** _____ **State:** _____ **Zip:** _____

c. **Name of Applicant's Contact Person:** _____

d. **Contact Person's Telephone Number:** _____

e. **Contact Person's Email Address:** _____

f. **DUNS Number if applying for a grant:** _____

g. **Submission Email Address:** _____

Specify the Sender's email address that will be used to email all supporting documents. When you submit this form electronically, you will receive an email address for submitting all documents checked in item X.

According to the Paperwork Reduction Act of 1995, an agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 0575-0190. The time required to complete this information collection is estimated to average 90 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

## II. Project Information

a. **Primary Project Name:** _____

b. **Project Address:**

**Address, Line 1:** _____

**Address, Line 2:** _____

**City:** _____ **State:** _____ **Zip:** _____

c. **Is this a Simple, Complex or Portfolio transaction? Check One.**

**Simple:** ___ **Complex:** ___ **Portfolio:** ___

d. **If Portfolio, what is the Portfolio Name?** A separate pre-application must be submitted for each project and each Pre-application must have the same "**Portfolio Name**."

_____

e. **Consolidation of project operations:**

**Check one below:**

- ☐ **This proposal does not involve a consolidation of properties (0 points)**
- ☐ **This proposal involves a consolidation of 2-4 properties (5 points)**
- ☐ **This proposal involves a consolidation of 5 or more properties (10 points)**

**Points:** _____

**Be sure to list all properties being consolidated in f. below.**

f. **Provide the following information for the projects being considered in this pre-application, starting with the Primary Project.**

| | Borrower ID | Proj. ID | Project Name | Vacancy Percentage (for 515 Only) | Proj. ST | Project Type 515/514/516 |
|---|---|---|---|---|---|---|
| **List Primary Project:** | | | | | | |
| 1. | | | | | | |
| **List Projects to be Consolidated with the Primary Project:** | | | | | | |
| 2. | | | | | | |
| 3. | | | | | | |

| | Borrower ID | Proj. ID | Project Name | Vacancy Percentage (for 515 Only) | Proj. ST | Project Type 515/514/516 |
|---|---|---|---|---|---|---|
| 4. | | | | | | |
| 5. | | | | | | |
| 6. | | | | | | |
| 7. | | | | | | |
| 8. | | | | | | |
| 9. | | | | | | |
| 10. | | | | | | |

For Section 515 Multi-Family Housing projects: If vacancy percentages for any of the projects listed above have 16 or more revenue producing units exceeding 10.0%, or 15.0% for projects with less than 16 revenue producing units, attach required market survey documentation.

**For Section 514/516 Off-Farm Labor Housing projects:** If cash flow for the previous 3 full years of operation is not positive, attach required market survey documentation.

**Year of Operation:** _____ **Cash Flow:** _____

**Year of Operation:** _____ **Cash Flow:** _____

**Year of Operation:** _____ **Cash Flow:** _____

g. **What is the age of the project?** (For consolidations use the project with the earliest operational date.) **Check one.**

- **Was the initial project operational date(s) prior to December 21, 1979? (25 points) Yes __**
- **Was the initial project operational date(s) on or after December 21, 1979; but before December 15, 1989? (20 points) Yes __**
- **Was the initial operational date(s) on or after December 15, 1989; but before October 1, 1991? (15 points) Yes __**

- **Was the initial operational date(s) on or after October 1, 1991? (0 points) Yes __**
  **If you answered "Yes" to the first three bullet points, provide the initial operational date of the project: ___/___/____ (mm/dd/yyyy)** Points: ____

**h. Is there an Agency approved Capital Needs Assessment (CNA)? Yes __ No __**
**If "Yes," check one:**

- **Was the CNA approved on or after October 1, 2010 and prior to October 1, 2011? (10 points) Yes __**
- **Was the CNA approved on or after October 1, 2011 but before the publication of the FY 2013 MPR Notice? (20 points) Yes __**
  **If "Yes," provide the date of the most recent Agency approved CNA: ___/___/____ (mm/dd/yyyy)** Points: ____

## III. Funds

**a. Are there contributions of other sources of funds? Yes __ No __**
**If "Yes," check one:**

- **Evidence of a commitment of at least $3,000 to $5,000 per unit/per property? (15 points) Yes __**
- **Evidence of a commitment greater than $5,000 per unit/per property? (20 points) Yes __**
- **Evidence of a commitment greater than $5,000 per unit/per property with a binding written commitment by a third party to contribute 25 percent or more of any allowable developer fee to the hard costs of construction. (25 points) Yes __** Points: ____

**If "Yes," provide the amounts obtained from the following sources. Note: only include amounts for a Rural Development (RD) Section 515 loan or Section 514/516 loan/grant if they have already been approved and obligated by RD.**

| Source: | Amount: |
|---|---|
| Tax Credits | _____ |
| 3rd Party Loan | _____ |
| 3rd Party Grant | _____ |
| Tax Exempt Financing | _____ |
| RD Section 515 Traditional Loan | _____ |
| RD Section 514/516 Off-Farm Traditional Loan/Grant | _____ |
| RD Section 538 | _____ |
| RD Re-lending Demonstration Loan | _____ |
| Owner Provided Capital Contributions | _____ |
| Total Contributions: | _____ |

**b. Does this proposal include an Owner Contribution of funds to pay transaction costs and/or hard costs of construction? Select all that apply.**

- **$10,000 per project owner contribution sufficient to pay transaction costs. (5 points) Yes __ No __** *(These funds cannot be from project reserves or operating funds or be in the form of a loan. Transaction costs are defined as those costs required to complete the transaction. These include, but are not limited to, the CNA, legal and closing costs, appraisal costs and filing/recording fees. The minimum contribution required is $10,000 per project; these funds will be required to be deposited in the property reserve account prior to closing.)* Points: _____
- **$1,000 per unit per project owner contribution for the hard costs of construction. (10 points) Yes __ No __** *(These funds cannot be from project reserves or operating funds or be in the form of a loan. Hard costs are defined as materials, inventory, equipment, property or machinery. Hard costs of construction are itemized on Form RD 1924-13, "Estimate and Certificate of Actual Cost." Form RD 1924-13 can be found at https://formsadmin.sc.egov.usda.gov/efcommon/eFileServices/eFormsAdmin/RD1924-0013.pdf . The minimum contribution required is $1,000* ***per unit*** *which will be required to be deposited in the property reserve account prior to closing. An increased return to owner may be budgeted and allowed for funds committed in accordance with 7 CFR section 3560.406(d)(14)(ii).)*
  Points: _____

## IV. Transfers and Sales

**a. Does this proposed transaction include a transfer of ownership? Yes__ No__**

If "Yes," select one of the following categories and attach a copy of the *executed* Purchase Agreement.

**b. Has the Agency servicing classification been identified as "C" or "D" for 24 months or more? (20 points) Yes __**

**c. Has the Agency servicing classification been identified as "C" or "D" for less than 24 months? (15 points) Yes __ No to b. and c. ___** Points: _____

If "No," (not involved in a transfer), category d. or e. apply:

**d. For stay-in-owners only, has the Agency servicing classification been identified as "B" as a result of a workout plan approved by the Agency prior to January 1, 2012? (25 points) Yes ___**

**e. Is a sale of 515 properties to Nonprofit/Public Housing Authority under the prepayment process pending or closed? If so, submit an executed purchase agreement with this pre-application (if sale is pending) or a copy of the purchase agreement and filed deed (if sale is closed). (20 points)**
**Yes ___ No to d. and e. ___** Points: _____

## V. Energy Conservation

You may answer a. and c. below or b. and c. Note, if you are participating in the Green Communities program under a. you may not receive additional points for items listed under b.

a. **Does this proposal include a written commitment to achieve participation in the Green Communities program by the Enterprise Community Partners (http://www.enterprisecommunity.com/solutions-and-innovation/enterprise-green-communities )?** At least 30 percent of the points needed to qualify for the Green Communities program must be earned under the Energy Efficiency section of the Green Communities qualification program**: (30 points)**

**Yes ___ No ___** Points: ____

**OR**

**b.** If you are not enrolling in the Green Communities program then points can be accumulated for each of the following items up to a total of **20 points**. Provide documentation to substantiate your answers below:

i. **Does this proposal include the replacement of heating, ventilation and air conditioning (HVAC) equipment with Energy Star qualified heating, ventilation and air conditioning equipment? (3 points):**
**Yes ___ No ___** Points: ____

ii. **Does this proposal include the replacement of windows and doors with Energy Star qualified windows and doors? (3 points):**
**Yes ___ No ___** Points: ____

iii. **Does this proposal include additional attic and wall insulation that exceeds the required R-Value of these building elements for your area as per the International Energy Conservation Code 2009? Two points will be awarded if all exterior walls exceed insulation code and one point will be awarded if attic insulation exceeds code, for a maximum of three points.**
**All exterior walls exceed insulation code (2 points):**
**Yes ___ No ___** Points: ____
**Attic insulation exceeds code (1 point):**
**Yes ___ No ___** Points: ____

iv. **Does this proposal include the reduction in building shell air leakage by at least 15 percent as determined by pre- and post-rehab blower door testing on a sample of units? Building shell air leakage may be reduced through materials such as caulk, spray foam, gaskets, and house-wrap. Sealing of duct work with mastic, foil-backed tape, or aerosolized duct sealants can also help reduce air leakage. (3 points):**

**Yes ___ No ___** Points: ____

v. **Does this proposal include 100 percent of installed appliances and exhaust fans that are Energy Star qualified? (2 points):**
**Yes ___ No ___** Points: ____

vi. **Does this proposal include 100 percent of installed water heaters that are Energy Star qualified? (2 points): Yes ___ No ___** Points: ____

vii. **Does this proposal include replacement of 100 percent of toilets with a flush capacity of more than1.6 gallons with new toilets having 1.6 gallon flush capacity or less, and with the Environmental Protection Agency (EPA) Water Sense label? (1 point):**
**Yes ___ No ___** Points: ____

viii. **Does this proposal include 100 percent of new showerheads with EPA Water Sense label? (1 point): Yes ___ No ___** Points: ____

ix. **Does this proposal include 100 percent of new faucets with EPA Water Sense label? (1 point): Yes ___ No ___** Points: ____

x. **Does this proposal include 100 percent energy-efficient lighting including Energy Star qualified fixtures, compact fluorescent replacement bulbs in standard incandescent fixtures and Energy Star ceiling fans? (1 point): Yes ___ No ___** Points: ____

c. **Does this proposal include a written commitment to achieve participation in local green/energy efficient building standards, such as a city, county or municipality program? (2 points): Yes ___ No ___** Points: ____
**Name of Local Program: _____**

Total Points for Energy Conservation: ____

## VI. Energy Generation

Rehabilitation and preservation projects that participate in the **Green Communities program** by the Enterprise Community Partners or receive at least **eight points** for Energy Conservation measures are eligible to earn additional points for installation of on-site renewable energy sources. Renewable, on-site energy generation will compliment a weathertight, well insulated building envelope with highly efficient mechanical systems. Possible renewable energy generation technologies include, but are not limited to: wind turbines and micro-turbines, micro-hydro power, photovoltaics (capable of producing a voltage when exposed to radiant energy, especially light), solar hot water systems and biomass/biofuel systems that do not use fossil fuels in production. Geo-exchange systems are highly encouraged as they lessen the total demand for energy and, if supplemented with

other renewable energy sources, can achieve zero energy consumption more easily. Points under this section will be awarded as follows.

a. Projects whose preliminary or rehabilitation building plans and energy analysis propose a 10 percent to 100 percent energy generation commitment (where generation is considered to be the total amount of energy needed to be generated on-site to make the building a net-zero consumer of energy) may be awarded points corresponding to their percent of commitment as follows:

- ☐ **0 to 9 percent commitment to energy generation (0 points)**
- ☐ **10 to 29 percent commitment to energy generation (1 point)**
- ☐ **30 to 49 percent commitment to energy generation (2 points)**
- ☐ **50 to 69 percent commitment to energy generation (3 points)**
- ☐ **70 to 89 percent commitment to energy generation (4 points)**
- ☐ **90 percent or more commitment to energy generation (5 points)**

Points: _____

**Note:** In order to receive **more than one point** for commitment to energy generation, an accurate energy analysis prepared by an engineer will need to be submitted with the pre-application. Energy analysis of preliminary building plans using industry recognized simulation software must document the projected total energy consumption of the building, the portion of building consumption which will be satisfied through on-site generation, and the building's Home Energy Rating System (HERS) score.

## VII. Green Property Management Credentials

Projects will be awarded an additional five points if the designated property management company or individuals that will assume maintenance and operations responsibilities upon completion of construction or substantial rehabilitation work have a Credential for Green Property Management. Credentialing can be obtained from the National Apartment Association (NAA), National Affordable Housing Management Association, the Institute for Real Estate Management, U.S. Green Building Council's Leadership in Energy and Environmental Design for Operations and Maintenance (LEED OM), or another source with a certifiable credentialing program. This must be illustrated in the resume(s) of the property management team and submitted with the application. (5 points)

**I have submitted resumes of the designated property management company or individuals responsible for maintenance and operations that have a Credential for Green Property Management. (5 points) Yes ___ No ___** Points: _____

## VIII. Tenant Service Provision

The Agency will award five points for applications that include new services provided by a non-profit organization, which may include a faith-based organization, or by another Government agency. Such services shall be provided at no cost to the project and shall be made available to all tenants. Examples of such services may include transportation for the elderly, after-school day care services or after-school tutoring.

**New tenant services will be provided to all tenants at no cost to the project. (5 points)**

**Yes ___ No ___** Points: ____

## IX. Submission of Form AD-3030

Awards made under this notice are subject to the provisions contained in the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2012, P.L. No. 112-55, Division A, sections 738 and 739 regarding corporate felony convictions and corporate federal tax delinquencies. To comply with these provisions, all applicants must submit form AD-3030 which can be found online at: http://www.ocio.usda.gov/forms/ocio_forms.html

Indicate below how you are submitting the form. For electronic submissions you may submit a scanned copy of the signed form with your pre-application.

## X. Documents Submitted

Below, please check all documents that you will be submitting as part of your complete application package. Hard copy submissions and electronic media should be mailed to the National Office. If you check the email option, you will be notified of the email address to use upon electronic receipt of this Pre-application form. See Notice for complete details.

**NOTE:** You are only required to submit supporting documents for programs in which you will be participating as indicated in this pre-application. Points will be assigned for the items that you checked based on a review of the supporting documents.

| Reference in Form | Item | Submitted via Email | Submitted to National Office |
|---|---|---|---|
| | FY 2013 Pre-application for MFH Revitalization Demonstration Program (MPR) (this form). | ☐ | ☐ Electronic media<br>☐ Hard Copy |
| **II. Project Information** | | | |
| f. | Market Survey if vacancy rates are exceeded for Section 515 projects or there is negative cash flow for Section 514/516 projects. | ☐ | ☐ Electronic media |

| | | | ☐ Hard Copy |
|---|---|---|---|
| **Reference in Form** | **Item** | **Submitted via Email** | **Submitted to National Office** |
| **III. Funds** | | | |
| a. | Evidence of commitment and sources of funds. | ☐ | ☐ Electronic media<br>☐ Hard Copy |
| b. | Evidence of owner contribution of funds for transaction costs. | ☐ | ☐ Electronic media<br>☐ Hard Copy |
| b. | Evidence of owner contribution of funds for hard costs of construction. | ☐ | ☐ Electronic media<br>☐ Hard Copy |
| **IV. Transfer and Sales** | | | |
| a. | **Executed** Purchase Agreement for a transfer of ownership. | ☐ | ☐ Electronic media<br>☐ Hard Copy |
| e. | **Executed** Purchase Agreement for a sale to Nonprofit/Public Housing Authority under the prepayment process (if sale is pending) OR a copy of the Purchase Agreement and filed deed (if sale is closed). | ☐ | ☐ Electronic media<br>☐ Hard Copy |
| **V. Energy Conservation** | | | |
| a.<br>OR | Certification in the Green Communities Program by the Enterprise Community Partners. | ☐ | ☐ Electronic media<br>☐ Hard Copy |
| b. | Documentation substantiating Green Energy improvements outlined in items i. through x. | ☐ | ☐ Electronic media<br>☐ Hard Copy |
| c. | Certification in local green energy efficient building standards. | ☐ | ☐ Electronic media<br>☐ Hard Copy |
| **VI. Energy Generation** | | | |
| a. | Preliminary building plans and an energy analysis that shows that the project will achieve 30 to 100 percent energy generation commitment. | ☐ | ☐ Electronic media<br>☐ Hard Copy |
| **VII. Green Property Management Credentials** | | | |
| | Resumes of the designated property management company or individuals responsible for maintenance and operations that have a credential for Green Property Management. | ☐ | ☐ Electronic media<br>☐ Hard Copy |
| **VIII. Tenant Service Provision** | | | |
| | Description of Tenant Services provided and organizations providing the service. | ☐ | ☐ Electronic media<br>☐ Hard Copy |
| **IX. Submission of Form AD-3030** | | | |

## XI. MPR 2013 Scoring

**PLEASE NOTE:** The scoring below is based on the responses that you have provided on this pre-application form and may not accord with the final score that the Agency assigns upon evaluating the supporting documentation that you submit. Your score may change from what you see here if the supporting documentation does not adequately support your answer or, if required documentation is missing.

| | Scoring Items for MPR 2013 | Points Earned |
|---|---|---|
| 1. | Consolidation of Project Operations (5, 10) | |
| 2. | Age of Project (15, 20, 25) | |
| 3. | Agency approved Capital Needs Assessment (10, 20) | |
| 4. | Contribution of Other Sources of Funds (15, 20, 25) | |
| 5. | Owner Contribution for transaction costs (5) | |
| 6. | Owner Contribution for hard costs of construction (10) | |
| 7. | Project classified as "C," or "D" for transfers (15, 20) **OR** | |
| 8. | Project classified as "B" for stay-in owner (25) or sale to a non-profit (20) | |
| 9. | Participation in the Green Communities Program (30) **OR** items 10. through 20. | |
| 10. | Energy Star HVAC equipment (3) | |
| 11. | Energy Star windows and doors (3) | |
| 12. | Exterior wall insulation that exceeds code (2) | |
| 13. | Attic insulation that exceeds code (1) | |
| 14. | Reduction in building shell air leakage (3) | |
| 15. | Energy Star appliances and exhaust fans (2) | |
| 16. | Energy Star water heaters (2) | |
| 17. | Reduced flush-capacity toilets (1) | |
| 18. | New showerheads with EPA water-sense label (1) | |
| 19. | New faucets with EPA water-sense label (1) | |
| 20. | Energy Star light fixtures and ceiling fans (1) | |

| | Scoring Items for MPR 2013 | Points Earned |
|---|---|---|
| 21. | Participation in local green energy standards (2) | |
| 22. | Energy Generation (1, 2, 3, 4, 5) | |
| 23. | Green Property Management Credentials (5) | |
| 24. | Tenant Service Provisions (5) | |
| | **Total Score:** | |

[FR Doc. 2012–30190 Filed 12–18–12; 8:45 am]
BILLING CODE 3410–XX–C

## DEPARTMENT OF COMMERCE

### Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

*Agency:* National Oceanic and Atmospheric Administration (NOAA).

*Title:* Modification to Gulf of Maine/Georges Bank Herring Letter of Authorization.

*OMB Control Number:* 0648–0602.

*Form Number(s):* NA.

*Type of Request:* Regular submission (extension of a current information collection).

*Number of Respondents:* 46.

*Average Hours Per Response:* 5 minutes.

*Burden Hours:* 12.

*Needs and Uses:* This request is for extension of a current information collection.

Under the Magnuson-Stevens Fishery Conservation and Management Act, the Secretary of Commerce has the responsibility for the conservation and management of marine fishery resources. We, NOAA's National Marine Fisheries Service (NMFS), and the Regional Fishery Management Councils are delegated the majority of this responsibility. The New England Fishery Management Council (Council) develops management plans for fishery resources in New England.

In 2009, we implemented modifications to the requirements for midwater trawl vessels issued an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit that fish in Northeast (NE) multispecies Closed Area I (CA I). Affected vessels intending to fish in CA I at any point during a trip are required to declare their intention when scheduling a NMFS-approved at sea observer. To ensure 100 percent observer coverage, midwater trawl vessels are not permitted to fish in CA I without an observer.

Midwater trawl vessels in the directed herring fishery that have been assigned a NMFS-approved at-sea observer and that are fishing in CA I, are prohibited, unless specific conditions are met (see below), from releasing fish from the codend of the net, transferring fish to another vessel that is not carrying a NMFS-approved observer, or discarding fish at sea, unless the fish have first been brought aboard the vessel and made available for sampling and inspection by the observer.

We recognize that there are certain conditions under which fish must be released from the codend without being sampled. Therefore, fish that have not been pumped aboard the vessel may be released if the vessel operator finds that: Pumping the catch could compromise the safety of the vessel; mechanical failure precludes bringing some or all of a catch aboard the vessel; or spiny dogfish have clogged the pump and consequently prevent pumping of the rest of the catch. If a net is released for any of these three reasons, the vessel operator must complete and sign a CA I Midwater Trawl Released Codend Affidavit detailing where, when, and why the net was released as well as a good-faith estimate of both the total weight of fish caught on that tow and the weight of fish released (if the tow had been partially pumped). The completed affidavit form must be submitted to us within 48 hr of the completion of the trip.

Following the release of a net for one of the three exemptions specified above, the vessel is required to exit CA I. The vessel may continue to fish, but may not fish in CA I for the remainder of the trip.

*Affected Public:* Business or other for-profit organizations.

*Frequency:* On occasion.

*Respondent's Obligation:* Required to obtain or retain benefits.

*OMB Desk Officer:* *OIRA_Submission@omb.eop.gov.*

Copies of the above information collection proposal can be obtained by calling or writing Jennifer Jessup, Departmental Paperwork Clearance Officer, (202) 482–0336, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov.*

Dated: December 14, 2012.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 2012–30536 Filed 12–18–12; 8:45 am]
BILLING CODE 3510–22–P

## DEPARTMENT OF COMMERCE

### Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

*Agency:* National Oceanic and Atmospheric Administration (NOAA).

*Title:* Jones and NOAA Awards Nominations.

*OMB Control Number:* 0648–0598.

*Form Number(s):* NA.

*Type of Request:* Regular submission (revision and extension of a current information collection).

*Number of Respondents:* 13.

*Average Hours per Response:* 1.

*Burden Hours:* 13.

*Needs and Uses:* This request is for revision and extension of a currently approved information collection.

The 1990 reauthorization of the Coastal Zone Management Act (CZMA) authorized an awards program to ''implement a program to promote excellence in coastal zone management by identifying and acknowledging outstanding accomplishments in the field.'' As authorized in Section 314 of the CZMA, the Walter B. Jones Memorial Awards recognize three categories of excellence: Coastal Steward of the Year, Excellence in Local Government, and Excellence in Coastal and Marine Graduate Study. The CZMA authorizes NOAA to conduct public ceremonies to acknowledge such awards, which allows NOAA to fund invitational travel and purchase awards for the Jones Awards.

In conjunction with the Walter B. Jones Memorial Awards, NOAA instituted several additional categories of awards, to recognize additional contributions to ocean and coastal resource management, including Volunteer of the Year, Nongovernmental Organization of the Year, Excellence in Promoting Cultural and Ethnic Diversity (in honor of Secretary Ronald Brown), Excellence in Business Leadership, and the Susan Snow Cotter Award for Excellence in Ocean and Coastal Resource (NOAA re-named this award in honor of Susan Snow Cotter in 2007).

As part of conducting the awards program, NOAA will distribute a ''Call for Nominations'' to representatives from Federal, state, local and nongovernmental organizations and Members of Congress that work in, are knowledgeable of or benefit from, ocean and coastal resource management.

Revision: The call for nominations brochure was digitalized in 2012 and is now emailed to NOAA constituents and available during the nomination period at *http://oceanservice.noaa.gov/programs/ocrm/jones-noaa-awards.html.*

*Affected Public:* State, local or tribal governments; not-for-profit institutions; federal government.

*Frequency:* Biannually.

*Respondent's Obligation:* Voluntary.

*OMB Desk Officer:* *OIRA_Submission@omb.eop.gov.*

Copies of the above information collection proposal can be obtained by calling or writing Jennifer Jessup, Departmental Paperwork Clearance Officer, (202) 482–0336, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov.*

Dated: December 14, 2012.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 2012–30535 Filed 12–18–12; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

*Agency:* National Oceanic and Atmospheric Administration (NOAA).

*Title:* Limits on Application of Take Prohibitions—Threatened Salmonids.

*OMB Control Number:* 0648–0399.

*Form Number(s):* NA.

*Type of Request:* Regular submission (extension of a current information collection).

*Number of Respondents:* 301.

*Average Hours Per Response:* Diversion screens, aiding/rescue of salmon and artificial propagation, 5 hours each; road maintenance agreements and tribal or joint state/tribal plans, 20 hours each; urban development ordinance packages, 30 hours; fishery harvest and hatchery plans, 10 hours; research permit applications and annual reports, 2 hours each.

*Burden Hours:* 1,705.

*Needs and Uses:* This request is for extension of a current information collection.

Section 4(d) of the Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 et. seq.) requires the National Marine Fisheries Service (NMFS) to adopt such regulations as it ''deems necessary and advisable to provide for the conservation of'' threatened species. Those regulations may include any or all of the prohibitions provided in section 9(a)(1) of the ESA, which specifically prohibits ''take'' of any endangered species (''take'' includes actions that harass, harm, pursue, kill, or capture). The first salmonid species listed by NMFS as threatened were protected by virtually blanket application of the section 9 take prohibitions. There are now 22 separate Distinct Population Segments (DPS) of west coast salmonids listed as threatened, covering a large percentage of the land base in California, Oregon, Washington and Idaho. NMFS is obligated to enact necessary and advisable protective regulations. NMFS makes section 9 prohibitions generally applicable to many of those threatened DPS, but also seeks to respond to requests from states and others to both provide more guidance on how to protect threatened salmonids and avoid take, and to limit the application of take prohibitions wherever warranted (see 70 FR 37160, June 28, 2005, 71 FR 834, January 5, 2006, and 73 FR 55451, September 25, 2008). The regulations describe programs or circumstances that contribute to the conservation of, or are being conducted in a way that limits impacts on, listed salmonids. Because we have determined that such programs/circumstances adequately protect listed salmonids, the regulations do not apply the ''take'' prohibitions to them. Some of these limits on the take prohibitions entail voluntary submission of a plan to NMFS and/or annual or occasional reports by entities wishing to take advantage of these limits, or continue within them.

*Affected Public:* Business or other for-profit organizations, state, local or tribal government.

*Frequency:* Annually and on occasion.

*Respondent's Obligation:* Mandatory.

*OMB Desk Officer:* *OIRA_Submission@omb.eop.gov.*

Copies of the above information collection proposal can be obtained by calling or writing Jennifer Jessup, Departmental Paperwork Clearance Officer, (202) 482–0336, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov.*

Dated: December 13, 2012.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 2012–30504 Filed 12–18–12; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### Foreign-Trade Zones Board

**[B–89–2012]**

### Foreign-Trade Zone 277—Western Maricopa County, AZ; Application for Expansion; (New Magnet Site) Under Alternative Site Framework

An application has been submitted to the Foreign-Trade Zones (FTZ) Board (the Board) by the Greater Maricopa Foreign-Trade Zone, Inc., grantee of Foreign-Trade Zone 277, requesting authority to expand its zone under the alternative site framework (ASF) adopted by the Board (15 CFR Sec. 400.2(c)) to include two additional new magnet sites in western Maricopa County, Arizona and request usage-driven designation for an existing temporary site. The application was submitted pursuant to the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u) and the regulations of the Board (15 CFR part 400). It was formally docketed on December 12, 2012.

FTZ 277 was approved by the Board on December 22, 2010 (Board Order 1733, 76 FR 1134, 01/07/2011) and was reorganized under the ASF on December 16, 2011 (Board Order 1804, 76 FR 80886, 12/27/2011). The zone project currently has a service area that includes a portion of Maricopa County, Arizona.

The current zone project includes the following magnet sites: *Site 1* (230.25 acres)—within the 416-acre Airport Gateway at Goodyear industrial complex, Bullard Avenue and Van Buren Street, Goodyear; *Site 2* (133.01 acres)—within the 286-acre Surprise Pointe Business Park, Waddell Road and Litchfield Road, Surprise; *Site 3* (234.84 acres)—within the 1,600-acre Palm Valley 303 Industrial Park, Camelback Road and State Road 303, Goodyear; and, *Site 4* (319.84 acres)—within the 1,314-acre 10 West Logistics Center, Van Buren Street and Interstate 10 at 339th

Avenue, Maricopa County. The zone also includes two sites which were approved on a temporary basis: *Site 5* (13.67 acres)—Suntech Arizona, Inc., 3801 S. Cotton Lane, Goodyear; and, *Site 6* (3.53 acres)—Schoeller Arca Systems, Inc., 4320 S. Cotton Lane, Goodyear.

The applicant is now requesting authority to expand its zone project in western Maricopa County as follows: include an additional magnet site (proposed *Site 7*—185 acres) at the Buckeye Industrial Park, southeast corner of Turner Road and Baseline Road, Buckeye; expand existing *Site 5* to include an additional 184.33 acres (total acreage 198 acres) and request magnet designation for the site; and, request that existing *Site 6* be designated as a usage-driven site for the sole use of Schoeller Arca Systems, Inc. The proposed new and the existing sites are located adjacent to the Phoenix, Arizona U.S. Customs and Border Protection Ports of Entry.

In accordance with the Board's regulations, Christopher Kemp of the FTZ Staff is designated examiner to evaluate and analyze the facts and information presented in the application and case record and to report findings and recommendations to the Board.

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 February 19, 2013. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to March 4, 2013.

A copy of the application will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 21013, 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 Christopher Kemp at *Christopher.Kemp@trade.gov* or (202) 482–0862.

Dated: December 12, 2012.

**Andrew McGilvray,**

*Executive Secretary.*

[FR Doc. 2012–30567 Filed 12–18–12; 8:45 am]

BILLING CODE P

## DEPARTMENT OF COMMERCE

### Foreign-Trade Zones Board

**[S–138–2012]**

### Foreign-Trade Zone 61—San Juan, Puerto Rico; Application for Subzone; Sea World, Inc.; Guaynabo, PR

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the Puerto Rico Trade & Export Company, grantee of FTZ 61, requesting special-purpose subzone status for the facility of Sea World, Inc., located in Guaynabo, Puerto Rico. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally docketed on December 12, 2012.

The proposed subzone (1.71 acres) is located within the Amelia Industrial Park at Calle Diana Lot 36, Guaynabo, Puerto Rico. No authorization for production activity has been requested at this time. The proposed subzone would be subject to the existing activation limit of FTZ 61.

In accordance with the Board's regulations, Camille Evans of the FTZ Staff is the designated examiner to review the application and make recommendations to the Executive Secretary.

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 January 28, 2013. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to February 12, 2013.

A copy of the application will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 21013, 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 Camille Evans at *Camille.Evans@trade.gov* or (202) 482–2350.

Dated: December 12, 2012.

**Andrew McGilvray,**

*Executive Secretary.*

[FR Doc. 2012–30557 Filed 12–18–12; 8:45 am]

BILLING CODE P

## DEPARTMENT OF COMMERCE

### Bureau of Industry and Security

**[Docket No. 121114631–2631–01]**

### Impact of the Implementation of the Chemical Weapons Convention (CWC) on Commercial Activities Involving ''Schedule 1'' Chemicals (Including Schedule 1 Chemicals Produced as Intermediates) Through Calendar Year 2012

**AGENCY:** Bureau of Industry and Security, Commerce.

**ACTION:** Notice of inquiry.

**SUMMARY:** The Bureau of Industry and Security (BIS) is seeking public comments on the impact that implementation of the Chemical Weapons Convention (CWC), through the Chemical Weapons Convention Implementation Act (CWCIA) and the Chemical Weapons Convention Regulations (CWCR), has had on commercial activities involving ''Schedule 1'' chemicals during calendar year 2012. The purpose of this notice of inquiry is to collect information to assist BIS in its preparation of the annual certification to the Congress, which is required under Condition 9 of Senate Resolution 75, April 24, 1997, in which the Senate gave its advice and consent to the ratification of the CWC.

**DATES:** Comments must be received by January 18, 2013.

**ADDRESSES:** You may submit comments by any of the following methods:

- *Email: willard.fisher@bis.doc.gov.* Include the phrase ''Schedule 1 Notice of Inquiry'' in the subject line;
- *Fax:* (202) 482–3355 (Attn: Willard Fisher);
- By mail or delivery to Regulatory Policy Division, Bureau of Industry and Security, U.S. Department of Commerce, Room 2099B, 14th Street and Pennsylvania Avenue NW., Washington, DC 20230.

**FOR FURTHER INFORMATION CONTACT:** For questions on the Chemical Weapons Convention requirements for ''Schedule 1'' chemicals, contact Douglas Brown, Treaty Compliance Division, Office of Nonproliferation and Treaty Compliance, Bureau of Industry and Security, U.S. Department of Commerce, Phone: (202) 482–1001. For questions on the submission of comments, contact Willard Fisher, Regulatory Policy Division, Office of Exporter Services, Bureau of Industry and Security, U.S. Department of Commerce, Phone: (202) 482–2440.

**SUPPLEMENTARY INFORMATION:**

**Background**

In providing its advice and consent to the ratification of the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and Their Destruction, commonly called the Chemical Weapons Convention (CWC or ''the Convention''), the Senate included, in Senate Resolution 75 (S. Res. 75, April 24, 1997), several conditions to its ratification. Condition 9, titled ''Protection of Advanced Biotechnology,'' calls for the President to certify to Congress on an annual basis that ''the legitimate commercial activities and interests of chemical, biotechnology, and pharmaceutical firms in the United States are not being significantly harmed by the limitations of the Convention on access to, and production of, those chemicals and toxins listed in Schedule 1.'' On July 8, 2004, President Bush, by Executive Order 13346, delegated his authority to make the annual certification to the Secretary of Commerce.

The CWC is an international arms control treaty that contains certain verification provisions. In order to implement these verification provisions, the CWC established the Organization for the Prohibition of Chemical Weapons (OPCW). The CWC imposes certain obligations on countries that have ratified the Convention (i.e., States Parties), among which are the enactment of legislation to prohibit the production, storage, and use of chemical weapons, and the establishment of a National Authority to serve as the national focal point for effective liaison with the OPCW and other States Parties. The CWC also requires each State Party to implement a comprehensive data declaration and inspection regime to provide transparency and to verify that both the public and private sectors of the State Party are not engaged in activities prohibited under the CWC.

''Schedule 1'' chemicals consist of those toxic chemicals and precursors set forth in the CWC ''Annex on Chemicals'' and in Supplement No. 1 to part 712 of the Chemical Weapons Convention Regulations (CWCR) (15 CFR parts 710–722). The CWC identified these toxic chemicals and precursors as posing a high risk to the object and purpose of the Convention.

The CWC (Part VI of the ''Verification Annex'') restricts the production of ''Schedule 1'' chemicals for protective purposes to two facilities per State Party: a single small-scale facility (SSSF) and a facility for production in quantities not exceeding 10 kg per year. The CWC Article-by-Article Analysis submitted to the Senate in Treaty Doc. 103–21 defined the term ''protective purposes'' to mean ''used for determining the adequacy of defense equipment and measures.'' Consistent with this definition and as authorized by Presidential Decision Directive (PDD) 70 (December 17, 1999), which specifies agency and departmental responsibilities as part of the U.S. implementation of the CWC, the Department of Defense (DOD) was assigned the responsibility to operate these two facilities, thereby precluding commercial production of ''Schedule 1'' chemicals for protective purposes in the United States. The assignment of responsibility to DOD did not establish any limitations on ''Schedule 1'' chemical activities that are not prohibited by the CWC. However, the Department of Defense maintains strict controls on ''Schedule 1'' chemicals produced at its facilities in order to ensure the accountability and proper use of such chemicals, consistent with the object and purpose of the Convention.

The provisions of the CWC that affect commercial activities involving ''Schedule 1'' chemicals are implemented in the CWCR (see 15 CFR 712) and in the Export Administration Regulations (EAR) (see 15 CFR 742.18 and 15 CFR part 745), both of which are administered by the Bureau of Industry and Security (BIS). Pursuant to CWC requirements, the CWCR restrict commercial production of ''Schedule 1'' chemicals to research, medical, or pharmaceutical purposes (commercial production for ''protective purposes'' is precluded, as described above). The CWCR also contain other requirements and prohibitions that apply to ''Schedule 1'' chemicals and/or ''Schedule 1'' facilities. Specifically, the CWCR:

(1) Prohibit the import of ''Schedule 1'' chemicals from States not Party to the Convention (15 CFR 712.2(b));

(2) Require annual declarations by certain facilities engaged in the production of ''Schedule 1'' chemicals in excess of 100 grams aggregate per calendar year (i.e., declared ''Schedule 1'' facilities) for purposes not prohibited by the Convention (15 CFR 712.5(a)(1) and (a)(2));

(3) Require government approval of ''declared Schedule 1'' facilities (15 CFR 712.5(f));

(4) Provide that ''declared Schedule 1'' facilities are subject to initial and routine inspection by the Organization for the Prohibition of Chemical Weapons (15 CFR 712.5(e) and 716.1(b)(1));

(5) Require 200 days advance notification of establishment of new ''Schedule 1'' production facilities producing greater than 100 grams aggregate of ''Schedule 1'' chemicals per calendar year (15 CFR 712.4);

(6) Require advance notification and annual reporting of all imports and exports of ''Schedule 1'' chemicals to, or from, other States Parties to the Convention (15 CFR 712.6, 742.18(a)(1) and 745.1); and

(7) Prohibit the export of ''Schedule 1'' chemicals to States not Party to the Convention (15 CFR 742.18(a)(1) and (b)(1)(ii)).

For purposes of the CWCR (see 15 CFR 710.1), ''production of a Schedule 1 chemical'' means the formation of ''Schedule 1'' chemicals through chemical synthesis, as well as processing to extract and isolate ''Schedule 1'' chemicals. Such production is understood, for CWCR declaration purposes, to include intermediates, by-products, or waste products that are produced and consumed within a defined chemical manufacturing sequence, where such intermediates, by-products, or waste products are chemically stable and therefore exist for a sufficient time to make isolation from the manufacturing stream possible, but where, under normal or design operating conditions, isolation does not occur.

**Request for Comments**

In order to assist in determining whether the legitimate commercial activities and interests of chemical, biotechnology, and pharmaceutical firms in the United States are significantly harmed by the limitations of the Convention on access to, and production of, ''Schedule 1'' chemicals as described in this notice, BIS is seeking public comments on any effects that implementation of the Chemical Weapons Convention, through the Chemical Weapons Convention Implementation Act and the Chemical Weapons Convention Regulations, has had on commercial activities involving ''Schedule 1'' chemicals during calendar year 2012. To allow BIS to properly evaluate the significance of any harm to commercial activities involving ''Schedule 1'' chemicals, public comments submitted in response to this notice of inquiry should include both a quantitative and qualitative assessment of the impact of the CWC on such activities.

**Submission of Comments**

All comments must be submitted to one of the addresses indicated in this

notice. The Department requires that all comments be submitted in written form.

The Department encourages interested persons who wish to comment to do so at the earliest possible time. The period for submission of comments will close on January 18, 2013. The Department will consider all comments received before the close of the comment period. Comments received after the end of the comment period will be considered if possible, but their consideration cannot be assured. The Department will not accept comments accompanied by a request that a part or all of the material be treated confidentially because of its business proprietary nature or for any other reason. The Department will return such comments and materials to the persons submitting the comments and will not consider them. All comments submitted in response to this notice will be a matter of public record and will be available for public inspection and copying.

The Office of Administration, Bureau of Industry and Security, U.S. Department of Commerce, displays public comments on the BIS Freedom of Information Act (FOIA) Web site at *http://www.bis.doc.gov/foia*. This office does not maintain a separate public inspection facility. If you have technical difficulties accessing this Web site, please call BIS's Office of Administration, at (202) 482–1093, for assistance.

Dated: December 12, 2012.

**Kevin J. Wolf,**

*Assistant Secretary for Export Administration.*

[FR Doc. 2012–30480 Filed 12–18–12; 8:45 am]

**BILLING CODE 3510–33–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

### Proposed Information Collection; Comment Request; Interim Procedures for Considering Requests Under the Commercial Availability Provision of the United States-Panama Trade Promotion Agreement (U.S.-Panama TPA)

**AGENCY:** International Trade Administration.

**ACTION:** Notice.

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

**DATES:** Written comments must be submitted on or before February 19, 2013.

**ADDRESSES:** Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*).

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument and instructions should be directed to Laurie Mease, Office of Textiles and Apparel, Telephone: 202–482–3400, Fax: 202–482–0858, Email: *Laurie.Mease@trade.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Abstract

Title II, Section 203(o) of the United States-Panama Trade Promotion Agreement Implementation Act (the ''Act'') [Pub. L. 112–43] implements the commercial availability provision provided for in Article 3.25 of the United States-Panama Trade Promotion Agreement (the ''Agreement''). The Agreement entered into force on October 31, 2012. Subject to the rules of origin in Annex 4.1 of the Agreement, pursuant to the textile provisions of the Agreement, fabric, yarn, and fiber produced in Panama or the United States and traded between the two countries are entitled to duty-free tariff treatment. Annex 3.25 of the Agreement also lists specific fabrics, yarns, and fibers that the two countries agreed are not available in commercial quantities in a timely manner from producers in Panama or the United States. The fabrics listed are commercially unavailable fabrics, yarns, and fibers, which are also entitled to duty-free treatment despite not being produced in Panama or the United States.

The list of commercially unavailable fabrics, yarns, and fibers may be changed pursuant to the commercial availability provision in Chapter 3, Article 3.25, Paragraphs 4–6 of the Agreement. Under this provision, interested entities from Panama or the United States have the right to request that a specific fabric, yarn, or fiber be added to, or removed from, the list of commercially unavailable fabrics, yarns, and fibers in Annex 3.25 of the Agreement.

Chapter 3, Article 3.25, paragraph 6 of the Agreement requires that the President ''promptly'' publish procedures for parties to exercise the right to make these requests. Section 203(o)(4) of the Act authorizes the President to establish procedures to modify the list of fabrics, yarns, or fibers not available in commercial quantities in a timely manner in either the United States or Panama as set out in Annex 3.25 of the Agreement. The President delegated the responsibility for publishing the procedures and administering commercial availability requests to the Committee for the Implementation of Textile Agreements (''CITA''), which issues procedures and acts on requests through the U.S. Department of Commerce, Office of Textiles and Apparel (''OTEXA'') (See Proclamation No. 8894, 77 FR 66507, November 5, 2012).

The intent of the U.S.-Panama TPA Commercial Availability Procedures is to foster the use of U.S. and regional products by implementing procedures that allow products to be placed on or removed from a product list, on a timely basis, and in a manner that is consistent with normal business practice. The procedures are intended to facilitate the transmission of requests; allow the market to indicate the availability of the supply of products that are the subject of requests; make available promptly, to interested entities and the public, information regarding the requests for products and offers received for those products; ensure wide participation by interested entities and parties; allow for careful review and consideration of information provided to substantiate requests, responses, and rebuttals; and provide timely public dissemination of information used by CITA in making commercial availability determinations.

CITA must collect certain information about fabric, yarn, or fiber technical specifications and the production capabilities of Panamanian and U.S. textile producers to determine whether certain fabrics, yarns, or fibers are available in commercial quantities in a timely manner in the United States or Panama, subject to Section 203(o) of the Act.

### II. Method of Collection

Participants in a commercial availability proceeding must submit public versions of their Requests, Responses or Rebuttals electronically (via email) for posting on OTEXA's Web site. Confidential versions of those submissions which contain business confidential information must be delivered in hard copy to OTEXA.

### III. Data

*OMB Control Number:* None.
*Form Number(s):* None.
*Type of Review:* Regular submission (new information collection).

*Affected Public:* Business or other for-profit organizations.

*Estimated Number of Respondents:* 16.

*Estimated Time per Response:* 8 hours per Request, 2 hours per Response, and 1 hour per Rebuttal.

*Estimated Total Annual Burden Hours:* 89.

*Estimated Total Annual Cost to Public:* $5,340.

**IV. Request for Comments**

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: December 14, 2012.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 2012–30555 Filed 12–18–12; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

### Limitation of Duty-Free Imports of Apparel Articles Assembled in Haiti Under the Haitian Hemispheric Opportunity Through Partnership for Encouragement Act (HOPE)

**AGENCY:** International Trade Administration, Commerce.

**ACTION:** Notification of annual quantitative limit on certain apparel under HOPE.

**DATES:** *Effective Date:* December 20, 2012.

**FOR FURTHER INFORMATION CONTACT:** Maria Dybczak, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–3651.

**SUPPLEMENTARY INFORMATION:** HOPE provides for duty-free treatment for certain apparel articles imported directly from Haiti. Section 213A(b)(1)(B) of HOPE outlines the requirements for certain apparel articles to qualify for duty-free treatment under a ''value-added'' program. In order to qualify for duty-free treatment, apparel articles must be wholly assembled, or knit-to-shape, in Haiti from any combination of fabrics, fabric components, components knit-to-shape, and yarns, as long as the sum of the cost or value of materials produced in Haiti or one or more countries, as described in HOPE, or any combination thereof, plus the direct costs of processing operations performed in Haiti or one or more countries, as described in HOPE, or any combination thereof, is not less than an applicable percentage of the declared customs value of such apparel articles. Pursuant to HELP, the applicable percentage for the period December 20, 2012 through December 19, 2013, is 50 percent or more.

For every twelve-month period following the effective date of HOPE, duty-free treatment under the value-added program is subject to a quantitative limitation. HOPE provides that the quantitative limitation will be recalculated for each subsequent 12-month period. Section 213A (b)(1)(C) of HOPE, as amended by Title V of the Tax Relief and Health Care Act of 2006 and the Food, Conservation, and Energy Act of 2008 (HOPE II) and Haiti Economic Lift Program Act of 2010 (HELP), requires that, for the twelve-month period beginning on December 20, 2012, the quantitative limitation for qualifying apparel imported from Haiti under the value-added program will be an amount equivalent to 1.25 percent of the aggregate square meter equivalent of all apparel articles imported into the United States in the most recent 12-month period for which data are available. The aggregate square meters equivalent of all apparel articles imported into the United States is derived from the set of Harmonized System lines listed in the Annex to the World Trade Organization Agreement on Textiles and Clothing (''ATC''), and the conversion factors for units of measure into square meter equivalents used by the United States in implementing the ATC. For purposes of this notice, the most recent 12-month period for which data are available as of December 20, 2012 is the 12-month period ending on October 31, 2012.

Therefore, for the one-year period beginning on December 20, 2012 and extending through December 19, 2013, the quantity of imports eligible for preferential treatment under the value-added program is 306,742,329 square meters equivalent. Apparel articles entered in excess of these quantities will be subject to otherwise applicable tariffs.

**Authority:** The Caribbean Basin Recovery Act (CBERA), as amended by the Haitian Hemispheric Opportunity Through Partnership for Encouragement Act of 2006 (HOPE), Title V of the Tax Relief and Health Care Act of 2006 and the Food, Conservation, and Energy Act of 2008 (HOPE II); the Haiti Economic Lift Program Act of 2010 (HELP); and implemented by Presidential Proclamations No. 8114, 72 FR 13655, 13659 (March 22, 2007), and No. 8596, 75 FR 68,153 (November 4, 2010).

Dated: December 11, 2012.

**Janet E. Heinzen,**

*Acting, Deputy Assistant Secretary for Textiles and Apparel.*

[FR Doc. 2012–30341 Filed 12–18–12; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

### Request for Applications for United States Travel and Tourism Advisory Board

**AGENCY:** International Trade Administration, Commerce.

**ACTION:** Notice of an opportunity to apply for membership on the United States Travel and Tourism Advisory Board.

**SUMMARY:** The Department of Commerce is currently seeking applications for four memberships on the United States Travel and Tourism Advisory Board (Board). The purpose of the Board is to advise the Secretary of Commerce on matters relating to the travel and tourism industry.

**DATES:** All applications for immediate consideration for appointment must be received by the Office of Advisory Committees by 5 p.m. Eastern Standard Time (EST) on December 28, 2012. After that date, the Department will continue to accept applications under this notice through August 30, 2013 to fill any vacancies that may arise.

**ADDRESSES:** Please submit application information by mail to Jennifer Pilat, Office of Advisory Committees, U.S. Travel and Tourism Advisory Board Executive Secretariat, U.S. Department of Commerce, Room 4043, 1401 Constitution Avenue NW., Washington, DC 20230 or via email to *oacie@trade.gov.*

**FOR FURTHER INFORMATION CONTACT:** Jennifer Pilat, U.S. Travel and Tourism Advisory Board Executive Secretariat, U.S. Department of Commerce, Room

4043, 1401 Constitution Avenue NW., Washington, DC 20230, *telephone:* 202–482–1369, *email: Jennifer.Pilat@trade.gov.*

**SUPPLEMENTARY INFORMATION:** The United States Travel and Tourism Advisory Board (Board) is established under the Federal Advisory Committee Act, as amended, 5 U.S.C. App. (FACA), and advises the Secretary of Commerce (Secretary) on matters relating to the U.S. travel and tourism industry pursuant to 15 U.S.C. 1512. The Board provides a means of ensuring regular contact between the U.S. Government and the travel and tourism industry. The Board advises the Secretary on government policies and programs that affect United States travel and tourism, and the Board serves as forum for discussing and proposing solutions to industry-related problems.

The Board acts as a liaison among the stakeholders represented by the membership and provides a forum for those stakeholders on current and emerging issues in the travel and tourism sector. The Board recommends ways to ensure that the United States remains the preeminent destination for international visitation and tourism throughout the world. The Office of Advisory Committees is accepting applications for Board members. Members shall represent companies and organizations in the travel and tourism sector from a broad range of products and services, company sizes, and geographic locations and shall be drawn from large, medium, and small travel and tourism companies, private-sector organizations involved in the export of travel and tourism-related products and services, and other tourism-related entities.

Each Board member shall serve as the representative of a U.S. company in the travel and tourism industry, a U.S. organization involved in the export of travel and tourism-related products and services, or a tourism-related U.S. entity. For eligibility purposes, a ''U.S. company'' is a for-profit firm that is incorporated in the United States (or an unincorporated U.S. firm with its principal place of business in the United States) that is controlled by U.S. citizens or by other U.S. companies. A company is not a U.S. company if 50 percent plus one share of its stock (if a corporation, or a similar ownership interest of an unincorporated entity) is known to be controlled, directly or indirectly, by non-U.S. citizens or non-U.S. companies. For eligibility purposes, a ''U.S. organization'' is an organization, including trade associations and nongovernmental organizations (NGOs), established under the laws of the United States, that is controlled by U.S. citizens, by another U.S. organization (or organizations), or by a U.S. company (or companies), as determined based on its board of directors (or comparable governing body), membership, and funding sources, as applicable. For eligibility purposes, a U.S. entity includes state and local tourism marketing entities, state government tourism offices, state and/or local government-supported tourism marketing entities, multi-state tourism marketing entities, and other tourism-related entities that can demonstrate U.S. ownership or control.

Members of the Board will be selected, in accordance with applicable Department of Commerce guidelines, based on their ability to carry out the objectives of the Board as set forth above. Members of the Board shall be selected in a manner that ensures that the Board is balanced in terms of points of view, industry subsector, range of products and services, demographics, geography, and company size.

Additional factors which will be considered in the selection of Board members include candidates' proven experience in the strategic development and management of travel and tourism-related or other service-related organizations; or the candidate's proven experience in promoting, developing, and implementing advertising and marketing programs for travel-related or tourism-related industries.

Priority may be given to a Chief Executive Officer, Executive Director, or President (or comparable level of responsibility) of a U.S. company, U.S. organization, or U.S. entity in the travel and tourism sector.

Members will be appointed to fill vacancies for the remainder of their current appointment terms. All appointments will automatically terminate no later than November 15, 2013. Members will serve at the discretion of the Secretary of Commerce.

Members shall serve in a representative capacity, representing the views and interests of their particular industry subsector. Board members are not special government employees, and will receive no compensation for their participation in Board activities.

Members participating in Board meetings and events will be responsible for their travel, living and other personal expenses. Meetings will be held regularly and, to the extent practical, not less than twice annually, usually in Washington, DC. To be considered immediately for membership, please provide the following information by the 12/28/2012, 5 p.m. EST deadline, via email, to *OACIE@trade.gov* or, via mail, to Jennifer Pilat, Office of Advisory Committees, U.S. Travel and Tourism Advisory Board Executive Secretariat, U.S. Department of Commerce, Room 4043, 1401 Constitution Avenue NW., Washington, DC 20230. After that date, the Department will continue to accept applications under this notice through August 30, 2013 to fill any vacancies that may arise.

1. Name and title of the individual requesting consideration.

2. A sponsor letter from the applicant on his or her company/organization/entity letterhead or, if the applicant is to represent a company/organization/entity other than his or her employer, a letter from the company/organization/entity to be represented, containing a brief statement of why the applicant should be considered for membership on the Board. This sponsor letter should also address the applicant's travel and tourism-related experience.

3. The applicant's personal resume.

4. An affirmative statement that the applicant is not required to register as a foreign agent under the Foreign Agents Registration Act of 1938, as amended.

5. An affirmative statement by the applicant that he or she is not a Federally registered lobbyist, and that the applicant understands that he or she, if appointed, will not be allowed to continue to serve as a Board member if the applicant becomes a Federally registered lobbyist.

6. If the applicant represents a tourism-related U.S. entity, the functions and responsibilities of the entity, and information regarding the entity's U.S. ownership or control.

7. If the applicant represents an organization, information regarding the control of the organization, including the governing structure, members, and revenue sources as appropriate signifying compliance with the criteria set forth above.

8. If the applicant represents a company, information regarding the control of the company, including the governing structure and stock holdings as appropriate signifying compliance with the criteria set forth above.

9. The company's, organization's, or entity's size and ownership, product or service line and major markets in which the company, organization, or operates.

10. Brief statement describing how the applicant will contribute to the work of the Board based on his or her unique experience and perspective (not to exceed 100 words).

Dated: December 11, 2012.

**Jennifer Pilat,**

*Executive Secretary, U.S. Travel and Tourism Advisory Board.*

[FR Doc. 2012–30309 Filed 12–18–12; 8:45 am]

**BILLING CODE 3510–DR–P**

## COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

### Appointments to Performance Review Board for Senior Executive Service

**AGENCY:** Committee for Purchase from People Who Are Blind or Severely Disabled.

**ACTION:** Appointment of Performance Review Board for Senior Executive Service.

**SUMMARY:** The Committee For Purchase from People Who Are Blind Or Severely Disabled (Committee) has announced the following appointments to the Committee Performance Review Board.

The following individuals are appointed as members of the Committee Performance Review Board responsible for making recommendations to the appointing and awarding authorities on performance appraisal ratings and performance awards for Senior Executive Service employees:

Perry E. Anthony, Ph.D., Deputy Commissioner, Rehabilitation Services Administration, Department of Education.

James M. Kesteloot, Private Citizen.

J. Paul M. Laird, Regional Director, North Central Region, Federal Bureau of Prisons, U.S. Department of Justice.

All appointments are made pursuant to Section 4314 of Chapter 43 of Title 5 of the United States Code.

**DATES:** *Effective Date:* December 20, 2012.

**FOR FURTHER INFORMATION CONTACT:** Patricia Briscoe, Telephone: (703) 603–7740, Fax: (703) 603–0655, or email *CMTEFedReg@abilityone.gov.*

**Patricia Briscoe,**

*Deputy Director, Business Operations (Pricing and Information Management).*

[FR Doc. 2012–30477 Filed 12–18–12; 8:45 am]

**BILLING CODE 6353–01–P**

## DEPARTMENT OF DEFENSE

### Office of the Secretary

### Department of Defense Task Force on the Care, Management, and Transition of Recovering Wounded, Ill, and Injured Members of the Armed Forces; Notice of Federal Advisory Committee Meeting

**AGENCY:** Department of Defense, Office of the Assistant Secretary of Defense.

**ACTION:** Meeting notice.

**SUMMARY:** Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150, the Department of Defense announces that the following Federal Advisory Committee meeting of the Department of Defense Task Force on the Care, Management, and Transition of Recovering Wounded, Ill, and Injured Members of the Armed Forces (subsequently referred to as the Task Force) will take place.

**DATES:** Monday, January 14, 2013 and Tuesday, January 15, 2013 from 8:00 a.m. to 5:00 p.m. EDT, each day.

**ADDRESSES:** DoubleTree by Hilton Hotel Washington DC—Crystal City, 300 Army Navy Drive, Arlington, VA 22202 (in the Washington Room).

**FOR FURTHER INFORMATION CONTACT:** Mail Delivery service through Recovering Warrior Task Force, Hoffman Building II, 200 Stovall St, Alexandria, VA 22332–0021 ''Mark as Time Sensitive for January Meeting''. Emails to *rwtf@wso.whs.mil.* Denise F. Dailey, Designated Federal Officer; Telephone (703) 325–6640. Fax (703) 325–6710.

**SUPPLEMENTARY INFORMATION:**

*Purpose of the Meeting:* The purpose of the meeting is for the Task Force Members to convene and gather data from panels and briefers on the Task Force's topics of inquiry.

*Agenda:* (Refer to *http://dtf.defense.gov/rwtf/meetings.html* for the most up-to-date meeting information)

**Day One: Monday, January 14, 2013**

8:00 a.m.–9:45 a.m. Welcome and Planning
9:45 a.m.–10:45 a.m. Hearing Center of Excellence (HCE) Updates
10:45 a.m.–11:00 a.m. Break
11:00 a.m.–12:00 p.m. Vision Center of Excellence (VCE) Updates
12:00 p.m.–1:00 p.m. Break for Lunch
1:00 p.m.–2:00 p.m. Traumatic Extremity and Amputation Center of Excellence (EACE) Updates
2:00 p.m.–2:15 p.m. Break
2:15 p.m.–3:15 p.m. Interagency Program Office (IPO)
3:15 p.m.–3:30 p.m. Break
3:30 p.m.–4:30 p.m. National Intrepid Center of Excellence (NICoE) Briefing
4:30 p.m.–5:00 p.m. Wrap Up

**Day Two: Tuesday, January 15, 2013**

8:00 a.m.–8:15 a.m. Public Forum
8:15 a.m.–9:15 a.m. Site Visit Debrief
9:15 a.m.–9:30 a.m. Break
9:30 a.m.–10:30 a.m. U.S. Army Medical Research and Materiel Command TBI Research Efforts Briefing
10:30 a.m.–11:30 a.m. Veteran Affairs VR&E Service Briefing
11:30 a.m.–12:30 p.m. Break for Lunch
12:30 p.m.–1:30 p.m. Veteran Affairs Federal Recovery Coordination Program (FRCP)
1:30 p.m.–2:30 p.m. Office of the Assistant Secretary of Defense for Health Affairs (HA)
2:30 p.m.–2:45 p.m. Break
2:45 p.m.–4:45 p.m. Defense Centers of Health on Psychological Health and Traumatic Brain Injury (DCoE PH and TBI) Updates
4:45 p.m.–5:00 p.m. Wrap Up

*Public's Accessibility to the Meeting:* Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165, and the availability of space, this meeting is open to the public. Seating is on a first-come basis.

Pursuant to 41 CFR §§ 102–3.105(j) and 102–3.140, and section 10(a)(3) of the Federal Advisory Committee Act of 1972, the public or interested organizations may submit written statements to the Department of Defense Task Force on the Care, Management, and Transition of Recovering Wounded, Ill, and Injured Members of the Armed Forces about its mission and functions. If individuals are interested in making an oral statement during the Public Forum time period, a written statement for a presentation of two minutes must be submitted as below and must identify it is being submitted for an oral presentation by the person making the submission. Identification information must be provided and at a minimum must include a name and a phone number. Individuals may visit the Task Force Web site at *http://dtf.defense.gov/rwtf/* to view the Charter. Individuals making presentations will be notified by Wednesday, January 9, 2013. Oral presentations will be permitted only on Tuesday, January 15, 2013 from 8:00 a.m. to 8:15 a.m. EDT before the Task Force. The number of oral presentations will not exceed ten, with one minute of questions available to the Task Force members per presenter. Presenters should not exceed their two minutes.

Written statements in which the author does not wish to present orally may be submitted at any time or in response to the stated agenda of a planned meeting of the Department of Defense Task Force on the Care, Management, and Transition of Recovering Wounded, Ill, and Injured Members of the Armed Forces.

All written statements shall be submitted to the Designated Federal Officer for the Task Force through the contact information in **FOR FURTHER INFORMATION CONTACT**, and this individual will ensure that the written statements are provided to the membership for their consideration.

Statements, either oral or written, being submitted in response to the agenda mentioned in this notice must be received by the Designated Federal Officer at the address listed no later than 5:00 p.m. EDT, Monday, January 7, 2013 which is the subject of this notice. Statements received after this date may not be provided to or considered by the Task Force until its next meeting. Please mark mail correspondence as ''Time Sensitive for January Meeting.''

The Designated Federal Officer will review all timely submissions with the Task Force Co-Chairs and ensure they are provided to all members of the Task Force before the meeting that is the subject of this notice.

Reasonable accommodations will be made for those individuals with disabilities who request them. Requests for additional services should be directed to Ms. Heather Moore, (703) 325–6640, by 5:00 p.m. EDT, Monday, January 7, 2013.

Dated: December 14, 2012.

**Aaron Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 2012–30522 Filed 12–18–12; 8:45 am]

**BILLING CODE 5001–06–P**

## DEPARTMENT OF EDUCATION

### Notice of Proposed Collection Requests; Comment Request

**AGENCY:** Department of Education.

**ACTION:** Public comment extension.

**SUMMARY:** On October 18, 2012, the U.S. Department of Education published a 60-day comment period notice in the **Federal Register** (include Vol. #, 77, Page 64111, Column 2) seeking public comment for an information collection entitled, ''Annual Performance Report for the Gaining Early Awareness for Undergraduate Programs.'' ED is extending the comment period to January 4, 2013 due to the public's inability to access the collection at the beginning of the comment period. Please provide comments through regulations.gov site. The Docket ID number is ED–2012–OPE–0036.

The Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, hereby issues this extension.

Dated: December 12, 2012.

**Kate Mullan,**

*Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.*

[FR Doc. 2012–30508 Filed 12–18–12; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

**[Docket No.: ED–2012–ICCD–0069]**

### Agency Information Collection Activities; Comment Request; Foreign Graduate Medical School Consumer Information Reporting Form

**AGENCY:** Department of Education (ED), Federal Student Aid (FSA).

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing a new information collection.

**DATES:** Interested persons are invited to submit comments on or before 2/18/2013.

**ADDRESSES:** Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting Docket ID number ED–2012–ICCD–0069 or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E117, Washington, DC 20202–4537.

**FOR FURTHER INFORMATION CONTACT:** Electronically mail *ICDocketMgr@ed.gov.* Please do not send comments here.

**SUPPLEMENTARY INFORMATION:** The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

*Title of Collection:* Foreign Graduate Medical School Consumer Information Reporting Form.

*OMB Control Number:* 1845–NEW.

*Type of Review:* A new information collection.

*Respondents/Affected Public:* Private Sector; State, Local, or Tribal Government.

*Total Estimated Number of Annual Responses:* 25.

*Total Estimated Number of Annual Burden Hours:* 11.

*Abstract:* This is a request for a new collection to obtain consumer information from foreign graduate medical institutions that participate in the William D. Ford Federal Direct Loan Program (Direct Loan Program) as authorized under Title IV of the Higher Education Act of 1963, as amended, (HEA). The request is to gain approval of a form for reporting specific graduation information to the Department of Education (Department) with a certification signed by the institutions President/CEO/Chancellor as well as for disseminating that information to prospective U.S. students. The Departments regulations, at 34 CFR 668.14(b)(7), require Title IV participating institutions to submit reports to the Department containing such information as the Secretary may reasonably require to carry out the purposes of the Title IV, HEA programs. This is being done to improve consumer information by providing more specific consumer information to prospective

U.S. medical students at foreign institutions.

Dated: December 12, 2012.

**Kate Mullan,**

*Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.*

[FR Doc. 2012–30509 Filed 12–18–12; 8:45 am]

**BILLING CODE 4000–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–9763–5]**

## Farm, Ranch, and Rural Communities Committee

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of meeting.

**SUMMARY:** Under the Federal Advisory Committee Act, Public Law 92–463, EPA gives notice of a teleconference meeting of the Farm, Ranch, and Rural Communities Committee (FRRCC). The FRRCC is a policy-oriented committee that provides policy advice, information, and recommendations to the EPA Administrator on a range of environmental issues and policies that are of importance to agriculture and rural communities.

The purpose of this teleconference is to discuss specific topics of relevance for consideration by the Committee in order to provide advice and insights to the Agency on environmental policies and programs that affect and engage agriculture and rural communities.

**DATES:** The Farm, Ranch, and Rural Communities Committee will hold a public teleconference on Thursday, January 17, 2013 from 2:00 p.m. until 4:00 p.m. Eastern Standard Time.

**FOR FURTHER INFORMATION CONTACT:** Alicia Kaiser, Designated Federal Officer, *kaiser.alicia@epa.gov,* 202–564–7273, US EPA, Office of the Administrator (1101A), 1200 Pennsylvania Avenue NW., Washington, DC 20460.

**SUPPLEMENTARY INFORMATION:** Members of the public wishing to gain access to the teleconference, make brief oral comments, or provide a written statement to the FRRCC must contact Alicia Kaiser, Designated Federal Officer, at *kaiser.alicia@epa.gov* or 202–564–7273 by January 4, 2013.

*Meeting Access:* For information on access or services for individuals with disabilities or to request accommodations please contact Alicia Kaiser at *kaiser.alicia@epa.gov* or 202–564–7273, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: December 7, 2012.

**Alicia Kaiser,**

*Designated Federal Officer.*

[FR Doc. 2012–30582 Filed 12–18–12; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2012–0390; FRL–9371–8]**

## Notice of Receipt of Pesticide Products; Registration Applications

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** EPA has received applications to register pesticide products containing an active ingredient not included in any currently registered pesticide products. Pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is hereby providing notice of receipt and opportunity to comment on these applications.

**DATES:** Comments must be received on or before January 18, 2013.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number and the EPA File Symbol of interest as shown in the body of this document, by one of the following methods:

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

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

**FOR FURTHER INFORMATION CONTACT:** A contact person is listed at the end of each registration application summary and may be contacted by telephone, email, or mail. Mail correspondence to the Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001. As part of the mailing address, include the contact person's name, division, and mail code.

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this action apply to me?*

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of the North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

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

*B. What should I consider as I prepare my comments for EPA?*

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

## II. Registration Applications

EPA has received applications to register pesticide products containing an active ingredient not included in any currently registered pesticide products. Pursuant to the provisions of FIFRA section 3(c)(4), EPA is hereby providing notice of receipt and opportunity to comment on these applications. Notice of receipt of these applications does not imply a decision by the Agency on these applications. For actions being evaluated under the Agency's public participation process for registration actions, there will be an additional opportunity for a 30–day public comment period on the proposed decision. Please see the Agency's public participation Web site for additional information on this process (*http://www.epa.gov/pesticides/regulating/registration-public-involvement.html*). EPA received the following applications to register pesticide products containing an active ingredient not included in any currently registered products:

1. *EPA File Symbol:* 62097–EI. *Docket ID Number:* EPA–HQ–OPP–2012–0831. *Applicant:* Fine Agrochemicals, Ltd., *Active ingredient:* Prohydrojasmon (PDJ) at 98%. *Product type:* Plant Growth Regulator. *Proposed use:* For formulation use only. Contact: Gina Burnett, BPPD, (703) 605–0513, email address: *burnett.gina@epa.gov*.

2. *EPA File Symbol:* 62097–EO. *Docket ID Number:* EPA–HQ–OPP–2012–0831. *Applicant:* Fine Agrochemicals, Ltd., 12733 Director's Loop, Woodbridge, VA 22192. *Active ingredient:* Prohydrojasmon (PDJ) at 5.25%. *Product type:* Plant Growth Regulator. *Proposed use:* Fruit color development/color enhancement on red apple varieties. Contact: Gina Burnett, BPPD, (703) 605–0513, email address: *burnett.gina@epa.gov*.

## List of Subjects

Environmental protection, Pesticides and pests.

Dated: December 11, 2012.

**Lois Rossi,**

*Director, Registration Division, Office of Pesticide Programs.*

[FR Doc. 2012–30434 Filed 12–18–12; 8:45 am]

BILLING CODE 6560–50–P

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## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2012–0390; FRL–9372–5]**

## Notice of Receipt of Pesticide Products; Registration Applications To Register New Uses

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** This notice announces receipt of applications to register new uses for pesticide products containing currently registered active ingredients pursuant to the provisions of section 3(c) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended. This notice provides the public with an opportunity to comment on the applications.

**DATES:** Comments must be received on or before January 18, 2013.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number and the EPA Registration Number or EPA File Symbol for the product of interest to you as shown in the body of this document, by one of the following methods:

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

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

**FOR FURTHER INFORMATION CONTACT:** A contact person is listed at the end of each registration application summary and may be contacted by telephone, email, or mail. Mail correspondence to the Registration Division (RD) (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001. As part of the mailing address, include the contact person's name, division, and mail code.

**SUPPLEMENTARY INFORMATION:**

## I. General Information

*A. Does this action apply to me?*

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

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

*B. What should I consider as I prepare my comments for EPA?*

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

**II. Registration Applications**

EPA has received applications to register new uses for pesticide products containing currently registered active ingredients. Pursuant to the provisions of FIFRA section 3(c)(4), EPA is hereby providing notice of receipt and opportunity to comment on these applications. Notice of receipt of these applications does not imply a decision by the Agency on these applications. For actions being evaluated under the Agency's public participation process for registration actions, there will be an additional opportunity for a 30-day public comment period on the proposed decision. Please see the Agency's public participation Web site for additional information on this process (*http://www.epa.gov/pesticides/regulating/registration-public-involvement.html*). EPA received the following applications to register new uses for pesticide products containing currently registered active ingredients:

1. *EPA File Symbol:* 100–RUUU. *Docket ID Number:* EPA–HQ–OPP–2012–0575. *Applicant:* Syngenta Crop Protection, LLC, P.O. Box 18300, Greensboro, NC 27419–8300. *Active Ingredient:* Difenoconazole-1[2-[2-chloro-4(4-clorophenoxy)] phenyl-4-methyl-1,3-dioxolan-2-ylmethyl]-1*H*-1,2,4,-triazole Difenoconazole-1[2-[2-chloro-4(4-clorophenoxy)]phenyl-4-methyl-1,3-dioxolan-2-ylmethyl]-1*H*-1,2,4,-triazole. *Product Type:* Fungicide. *Proposed Uses:* Vegetables, tuberous and corm, subgroup 1C. Contact: Rosemary Kearns, (703) 305–5611, email address: *kearns.rosemary@epa.gov.*

2. *EPA Registration Number:* 100–1363. *Docket ID Number:* EPA–HQ–OPP–2012–0215. *Applicant:* Syngenta Crop Protection, LLC, P.O. Box 18300, Greensboro, NC 27419–8300. *Active Ingredient:* Acibenzolar-S-Methyl. *Product Type:* Fungicide. *Proposed Use:* Sunflower. Contact: Rosemary Kearns, (703) 305–5611, email address: *kearns.rosemary@epa.gov.*

3. *EPA Registration Numbers:* 100–1374 and 100–1381. *Docket ID Number:* EPA–HQ–OPP–2012–0885. *Applicant:* Syngenta Crop Protection, LLC, P.O. Box 18300, Greensboro, NC 27419–8300. *Active Ingredient:* Sedaxane. *Product Type:* Fungicide. *Proposed Uses:* Seed treatment for use on potato; and potato, wet peel. Contact: Heather Garvie, RD, (703) 308–0034, email address: *garvie.heather@epa.gov.*

4. *EPA Registration Numbers:* 400–512 and 400–544. *Docket ID Number:* EPA–HQ–OPP–2012–0796. *Applicant:* Chemtura Corporation, 199 Benson Road, Middlebury, CT 06749. *Active Ingredient:* Ipconazole. *Product Type:* Fungicide. *Proposed Uses:* Legume vegetables, crop group 6. Contact: Dominic Schuler, (703) 347–0260, email address: *schuler.dominic@epa.gov.*

5. *EPA Registration Number:* 524–582. *Docket ID Number:* EPA–HQ–OPP–2012–0841. *Applicant:* Monsanto Company, 1300 I (Eye) Street NW., Suite 450 East, Washington, DC 20005. *Active Ingredient:* Diglycolamine salt of dicamba. *Product Type:* Herbicide. *Proposed Use:* Dicamba glufosinate tolerant MON 88701 cotton. Contact: Michael Walsh, (703) 308–2972, email address: *walsh.michael@epa.gov.*

6. *EPA Registration Numbers:* 2724–791 and 2724–807. *Docket ID Number:* EPA–HQ–OPP–2011–0905. *Applicant:* Wellmark International, 1501 E. Woodfield Road, Suite 200 West, Schaumberg, IL 60173. *Active Ingredient:* Etofenprox. *Product Type:* Insecticide. *Proposed Uses:* All food and feed commodities to support applications to control adult mosquitoes. Contact: Kevin Sweeney, (703) 305–5063, email address: *sweeney.kevin@epa.gov.*

7. *EPA Registration Numbers:* 7969–306 and 7969–309. *Docket ID Number:* EPA–HQ–OPP–2012–0637. *Applicant:* BASF Corporation, P.O. Box 13528, 26 Davis Drive, Research Triangle Park, NC 27709–3528. *Active Ingredient:* Fluxapyroxad. *Product Type:* Fungicide. *Proposed Uses:* Berries and small fruits, brassica leafy vegetables, bulb vegetables, cucurbit vegetables, grapes, leafy vegetables (except brassica), rice, root vegetables, sorghum, millet, strawberry, sugarcane, and tree nuts. Contact: Olga Odiott, (703) 308–9369, email address: *odiott.olga@epa.gov.*

8. *EPA Registration Numbers:* 7969–307 and 7969–308. *Docket ID Number:* EPA–HQ–OPP–2012–0637. *Applicant:* BASF Corporation, P.O. Box 13528, 26 Davis Drive, Research Triangle Park, NC 27709–3528. *Active Ingredient:* Fluxapyroxad. *Product Type:* Fungicide. *Proposed Uses:* Seed treatment use on Brassica vegetables, bulb vegetables, cucurbit vegetables, leafy vegetables, rapeseed, rice, root vegetables, and tuber vegetables. Contact: Olga Odiott, (703) 308–9369, email address: *odiott.olga@epa.gov.*

9. *EPA Registration Number:* 7969–310. *Docket ID Number:* EPA–HQ–OPP–2012–0637. *Applicant:* BASF Corporation, P.O. Box 13528, 26 Davis Drive, Research Triangle Park, NC 27709–3528. *Active Ingredient:* Fluxapyroxad. *Product Type:* Fungicide. *Proposed Uses:* Berries and small fruits, Brassica leafy vegetables, bulb vegetables, cucurbit vegetables, grapes, leafy vegetables (except Brassica), root vegetables, strawberry, and tree nuts. Contact: Olga Odiott, (703) 308–9369, email address: *odiott.olga@epa.gov.*

10. *EPA Registration Number:* 7969–311. *Docket ID Number:* EPA–HQ–OPP–2012–0637. *Applicant:* BASF Corporation, P.O. Box 13528, 26 Davis Drive, Research Triangle Park, NC 27709–3528. *Active Ingredient:* Fluxapyroxad. *Product Type:* Fungicide. *Proposed Uses:* Berries and small fruits, Brassica leafy vegetables, bulb vegetables, cucurbit vegetables, grapes, leafy vegetables (except Brassica), root vegetables, sorghum, millet, strawberry, sugarcane, and tree nuts. Contact: Olga Odiott, (703) 308–9369, email address: *odiott.olga@epa.gov.*

11. *EPA Registration Number:* 7969–312. *Docket ID Number:* EPA–HQ–OPP–2012–0637. *Applicant:* BASF Corporation, P.O. Box 13528, 26 Davis Drive, Research Triangle Park, NC 27709–3528. *Active Ingredient:* Fluxapyroxad. *Product Type:* Fungicide. *Proposed Use:* For formulation into a fungicide for use on turfgrass. Contact: Olga Odiott, (703) 308–9369, email address: *odiott.olga@epa.gov.*

12. *EPA Registration Number:* 11678–57. *Docket ID Number:* EPA–HQ–OPP–2012–0854. *Applicant:* Makhteshim Chemical Works, Ltd., Makhteshim-Agan of North America, Inc., 3120 Highwoods Blvd., Suite 100, Raleigh, NC 27604. *Active Ingredient:* Novaluron. *Product Type:* Insecticide. *Proposed Use:* Technical product for formulation uses only. Contact: Jennifer Gaines, (703) 305–5967, email address: *gaines.jennifer@epa.gov.*

13. *EPA File Symbol:* 53883–GNA. *Docket ID Number:* EPA–HQ–OPP–2012–0845. *Applicant:* Control Solutions, Inc., 5903 Genoa-Red Bluff Road, Pasadena, TX 77507–1041. *Active Ingredient:* Novaluron. *Product Type:* Insecticide. *Proposed Uses:* Control of stable fly larvae in cattle barns and horse barns; control of litter beetles in poultry operations. Contact: Jennifer Gaines, (703) 305–5967, email address: *gaines.jennifer@epa.gov.*

14. *EPA Registration Number:* 66222–35. *Docket ID Number:* EPA–HQ–OPP–2012–0854. *Applicant:* Makhteshim-

Agan of North America, Inc., 3120 Highwoods Blvd., Suite 100, Raleigh, NC 27604. *Active Ingredient:* Novaluron. *Product Type:* Insecticide. *Proposed Use:* Peanuts and soybean seeds. Contact: Jennifer Gaines, (703) 305–5967, email address: *gaines.jennifer@epa.gov.*

15. *EPA Registration Numbers; EPA File Symbol:* 71711–30 and 71711–31; 71711–GA. *Docket ID Number:* EPA–HQ–OPP–2012–0909. *Applicant:* Nichino America, Inc., 4550 New Linden Hill Road, Suite 501, Wilmington, DE 19808. *Active Ingredient:* Tolfenpyrad. *Product Type:* Insecticide. *Proposed Use:* Lettuce (head and leaf); leaf petioles subgroup 4B; spinach; Brassica head and stem subgroup 5A; Brassica leafy subgroup 5B; vegetable, fruiting group 8; potato; nut, tree group 14 (including pistachio); almond hulls; fruit, pome group 11; apple, wet pomace; vegetable, cucurbit group 9; fruit, stone group 12; pomegranate; persimmon; citrus group 10; citrus (dried pulp and oil); grapes; raisins; cotton (seed and gin byproducts); tea; milk; cattle, sheep, goat, horse (meat, meat byproducts, fat, kidney, and liver). Contact: Driss Benmhend, (703) 308–9525, email address: *benmhend.driss@epa.gov.*

16. *EPA Registration Numbers:* 75753–1 and 75753–2. *Docket ID Number:* EPA–HQ–OPP–2003–0722. *Applicant:* Agriguard Company, LLC, 186 North Ave. East, Centennial Plaza, Suite 100, P.O. Box 630, Cranford, NJ 07016. *Active Ingredient:* Furfural. *Product Type:* Fungicide. *Proposed Use:* Non-food use (by use of an outdoors preplant treatment on bare soil) on crop groups 8, 9, 10, 11, 12, 13 and 14. Contact: Tamue L. Gibson, (703) 305–9096, email address: *gibson.tamue@epa.gov.*

17. *EPA File Symbol:* 85721–R. *Docket ID Number:* EPA–HQ–OPP–2012–0838. *Applicant:* METBRO Distributing, L.P., 246W Shaw Avenue, Fresno, CA 93704. *Active Ingredient:* Hydrogen Cyanamide. *Product Type:* Fungicide. *Proposed Use:* Non-food preplant soil treatment. Contact: Dominic Schuler, (703) 347–0260, email address: *schuler.dominic@epa.gov.*

18. *EPA File Symbol:* 85721–E. *Docket ID Number:* EPA–HQ–OPP–2012–0839. *Applicant:* METBRO Distributing, L.P., 246W Shaw Avenue, Fresno, CA 93704. *Active Ingredient:* Propionic Acid. *Product Type:* Fungicide. *Proposed Use:* Non-food preplant soil treatment. Contact: Dominic Schuler, (703) 347–0260, email address: *schuler.dominic@epa.gov.*

19. *EPA Registration Number:* 86203–4. *Docket ID Number:* EPA–HQ–OPP–2011–0905. *Applicant:* Mitsui Chemicals Agro Inc., P.O. Box 5126, Valdosta, GA 31603–5126. *Active Ingredient:* Etofenprox. *Product Type:* Insecticide. *Proposed Uses:* All food and feed commodities to support applications to control adult mosquitoes. Contact: Kevin Sweeney, (703) 305–5063, email address: *sweeney.kevin@epa.gov.*

## III. Correction to Previously Published Registration Application

EPA is republishing the following application to show the correct docket number and to be certain that persons interested in commenting are assured that their comments will be delivered to the correct docket. This application was originally published in the **Federal Register** of Wednesday, November 7, 2012 (77 FR 66833) (FRL–9367–3), as application number 4 under Unit II. Registration Applications. The incorrect docket number that was shown in the November 7, 2012 application notice was EPA–HQ–OPP–2012–0713. With this republication there is also a new comment period, which ends on January 18, 2013. All submitted comments will be considered before EPA makes any decisions regarding this application. The corrected registration application is as follows:

*EPA Registration Numbers:* 7969–197, 7969–198 and 7969–199. *Docket ID Number:* EPA–HQ–OPP–2012–0710. *Applicant:* BASF Corporation, P.O. Box 13528, 26 Davis Drive, Research Triangle Park, NC 27709–3528. *Active Ingredient:* Boscalid. *Product Type:* Fungicide. *Proposed Uses:* Artichoke; Belgium endive; persimmon; bulb vegetable group 3–07; fruiting vegetable group 8–10; citrus fruit group 10–10; pome fruit group 11–10; berry subgroups 13–07 A, B, F, and G; oilseed group 20; turnip greens, and root vegetable subgroup 1B. Contact: Heather Garvie, (703) 308–0034, email address: *garvie.heather@epa.gov.*

## List of Subjects

Environmental protection, Pesticides and pest.

Dated: December 11, 2012.

**Lois Rossi,**

*Director, Registration Division, Office of Pesticide Programs.*

[FR Doc. 2012–30614 Filed 12–18–12; 8:45 am]

BILLING CODE 6560–50–P

# ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2009–1017; FRL–9369–4]**

## Product Cancellation Order for Certain Pesticide Registrations

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** This notice announces EPA's order for the cancellations, voluntarily requested by the registrants and accepted by the Agency, of the products listed in Table 1a and 1b of Unit II., pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). This cancellation order follows a September 19, 2012 **Federal Register** Notice of Receipt of Requests from the registrants listed in Table 2a of Unit II. and an October 7, 2010 **Federal Register** Notice of Receipt of Requests from the registrant listed in Table 2b of Unit II. to voluntarily cancel these product registrations. In the September 19, 2012 and the October 7, 2010 notices, EPA indicated that it would issue an order implementing the cancellations, unless the Agency received substantive comments within the 30 day comment period that would merit its further review of these requests, or unless the registrants withdrew their requests. The Agency did not receive any comments on the September 19, 2012 notice. The Agency received comments on the October 7, 2010 notice, but none merited its further review of the requests. Further, the registrants did not withdraw their requests. Accordingly, EPA hereby issues in this notice a cancellation order granting the requested cancellations. Any distribution, sale, or use of the products subject to this cancellation order is permitted only in accordance with the terms of this order, including any existing stocks provisions.

**DATES:** The cancellations are effective December 19, 2012.

**FOR FURTHER INFORMATION CONTACT:** John W. Pates, Jr., Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 308–8195; email address: *pates.john@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. General Information

### *A. Does this action apply to me?*

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and

agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action.

*B. How can I get copies of this document and other related information?*

The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2009–1017, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), EPA West Bldg., Rm. 3334, 1301 Constitution Ave., NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

**II. What action is the Agency taking?**

This notice announces the cancellation, as requested by registrants, of 19 products registered under FIFRA section 3. These registrations are listed in sequence by registration number in Tables 1a and 1b of this unit.

TABLE 1a—PRODUCT CANCELLATIONS

| EPA Registration No. | Product name | Chemical name |
|---|---|---|
| 002724–00622 | Speer Py-Perm Aqueous Insect Killer #5 | Piperonyl butoxide; Pyrethrins (No Inert Use); Permethrin. |
| 002724–00633 | Speer Py-Perm Aqueous Insect Killer #9 | Piperonyl butoxide; Pyrethrins (No Inert Use); Permethrin. |
| 007405–00073 | Chemi-cap Flying & Crawling Insecticide II | Pyrethrins, Piperonyl butoxide, Permethrin. |
| 011678–00072 | MCW Technical Diflubenzuron | Diflubenzuron. |
| 015300–00011 | Chemical Treatment CT–202 | Poly(oxy-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl dichloride). |
| 015300–00022 | Chemical Treatment CL–2158 | Poly(oxy-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl dichloride). |
| 015300–00023 | Chemical Treatment CL–2159 | Poly(oxy-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl dichloride). |
| 047000–00169 | R & M Flea & Tick Shampoo #3 | Piperonyl butoxide, Pyrethrins. |
| 052867–00001 | Microbiotrol 99W | Poly(oxy-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl dichloride). |
| 066222–00059 | Propiconazole Technical | Propiconazole. |
| 066330–00371 | Tribenuron-methyl Technical | Tribenuron-methyl. |
| 070908–00003 | NAC 20 | Boric Acid. |
| 073049–00441 | Dinotefuran 0.5% Cockroach Gel Bait Professional | Dinotefuran. |
| 073049–00442 | Dinotefuran 0.5% Roach Bait Stations | Dinotefuran. |
| 073049–00443 | Dinotefuran 0.2% Roach Bait Station | Dinotefuran. |
| 073049–00446 | Shuriken Cockroach Gel | Dinotefuran. |
| 081343–00001 | Mykrostat A–100 | 10,10′-Oxybisphenoxarsine. |
| CA010023 | Goal 2XL Herbicide | Oxyfluorfen. |

TABLE 1b—ALDICARB PRODUCT CANCELLATION

| EPA Registration No. | Product name | Chemical name |
|---|---|---|
| 264–330 | TEMIK® brand 15G | Aldicarb. |

Tables 2a and 2b of this unit include the names and addresses of record for all registrants of the products in the Tables of this unit, in sequence by EPA company number. This number corresponds to the first part of the EPA registration numbers of the products listed in the Tables of this unit.

TABLE 2a—REGISTRANTS OF CANCELLED PRODUCTS

| EPA Company No. | Company name and address |
|---|---|
| 2724 | Wellmark International, 1501 E. Woodfield Road, Suite 200, West Schaumburg, IL 60173. |
| 7405 | CPC Aeroscience, Inc., P.O. Box 667770, Pompano Beach, FL 33066–7770. |
| 11678 | Makhteshim Chemical Works Ltd., 3120 Highwoods Blvd., Suite 100, Raleigh, NC 27604. |
| 15300 | Chemtreat, Inc., 5640 Cox Road, Glen Allen, VA 23060. |
| 47000 | Chem-Tech, LTD., 4515 Fleur Dr., #303, Des Moines, IA 50321. |
| 52867 | Chemical Equipment Labs, P.O. Box A, Havertown, PA 19083. |
| 66222 | Makhteshim Agan of North America, Inc., 3120 Highwoods Blvd., Suite 100, Raleigh, NC 27604. |
| 66330 | Arysta Life Science North America, LLC., 15401 Weston Parkway, Suite 150, Cary, NC 27513. |
| 70908 | Grow More, Inc., Agent: RegWest Company, LLC., 8203 West 20th Street, Suite A, Greeley, CO 80634–4696. |
| 73049 | Valent BioSciences Corporation, Environmental Science Division, 870 Technology Way, Libertyville, IL 60048–6316. |
| 81343 | MyTech, Inc., 751 Queen Ann Street, Burlington, NC 27217. |
| CA010023 | Dow AgroSciences, LLC., 9330 Zionsville Rd., 308/2E, Indianapolis, IN 46268–1054. |

TABLE 2b—REGISTRANT OF CANCELLED ALDICARB PRODUCT

| EPA Company No. | Company name and address |
|---|---|
| 264 ..... | Bayer CropScience, 2 T.W. Alexander Drive, P.O. Box 12014, Research Triangle Park, NC 27709. |

**III. Summary of Public Comments Received and Agency Response to Comments**

During the public comment period provided, EPA received no comments in response to the September 19, 2012 **Federal Register** notice announcing the Agency's receipt of the requests for voluntary cancellations of products listed in Table 1a of Unit II. The Agency received comments relating to alternatives and benefits of aldicarb use in response to the October 7, 2010 **Federal Register** notice announcing the Agency's receipt of the request for voluntary cancellation of the product listed in Table 1b of Unit II. The Agency does not believe that the comments submitted during the comment period merit further review or a denial of the request for voluntary cancellation.

**IV. Cancellation Order**

Pursuant to FIFRA section 6(f), EPA hereby approves the requested cancellations of the registrations identified in Tables 1a and 1b of Unit II. Accordingly, the Agency hereby orders that the product registrations identified in Tables 1a and 1b of Unit II. are canceled. The effective date of the cancellations that are the subject of this notice is December 19, 2012. Any distribution, sale, or use of existing stocks of the products identified in Tables 1a and 1b of Unit II. in a manner inconsistent with any of the provisions for disposition of existing stocks set forth in Unit VI. will be a violation of FIFRA.

**V. What is the Agency's authority for taking this action?**

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled or amended to terminate one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. Thereafter, following the public comment period, the EPA Administrator may approve such a request. The notice of receipt for this action was published for comment in the **Federal Register** on September 19, 2012 (77 FR 58134) (FRL–9361–1), and October 7, 2010 (75 FR 62129) (FRL–8848–1). The comment periods closed on October 19, 2012, and November 8, 2010, respectively.

**VI. Provisions for Disposition of Existing Stocks**

Existing stocks are those stocks of registered pesticide products which are currently in the United States and which were packaged, labeled, and released for shipment prior to the effective date of the cancellation action. The existing stocks provisions for the products subject to this order are as follows.

*A. For All Products Listed in Table 1a in Unit II*

The registrants may continue to sell and distribute existing stocks of products listed in Table 1a of Unit II. until December 19, 2013, which is 1 year after the publication of the Cancellation Order in the **Federal Register**. Thereafter, the registrants are prohibited from selling or distributing products listed in Table 1a, except for export in accordance with FIFRA section 17, or proper disposal. Persons other than the registrants may sell, distribute, or use existing stocks of products listed in Table 1a of Unit II. until existing stocks are exhausted, provided that such sale, distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the canceled products.

*B. For the Product Listed in Table 1b in Unit II*

Per a Memorandum of Agreement (MOA) between the Environmental Protection Agency and Bayer CropScience (Bayer) dated August 16, 2010, Bayer may only sell existing stocks of the product listed in Table 1b of Unit II. labeled for use on citrus and potatoes for export consistent with the requirements of FIFRA section 17 or for purposes of proper disposal.

Bayer may only sell or distribute Temik 15G end-use products permitting use on cotton, dry beans, peanut, soybean, sugar beets, and sweet potatoes until December 31, 2014. After that date, Bayer may only distribute such products intended for export consistent with the requirements of FIFRA section 17 or for purposes of proper disposal.

Sale and distribution of Temik 15G labeled for use on cotton, dry beans, peanut, soybean, sugar beets, and sweet potatoes by any other party is permitted until December 31, 2016, and thereafter only for purposes of proper disposal or export consistent with the requirements of FIFRA section 17.

Existing stocks of the Temik 15G labeled for use on cotton, dry beans, peanut, soybean, sugar beets, and sweet potatoes may be used until August 31, 2018, provided that such use is in all respects consistent with the previously approved label, and labeling accompanying the product.

**List of Subjects**

Environmental protection, Pesticides and pests.

Dated: November 15, 2012.

**Richard P. Keigwin, Jr.,**

*Director, Pesticide Re-evaluation Division, Office of Pesticide Programs.*

[FR Doc. 2012–30433 Filed 12–18–12; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2012–0844; FRL–9368–8]**

## Notice of Receipt of a Request To Voluntarily Cancel Certain Pesticide Registrations

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** In accordance with section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, EPA is issuing a notice of receipt of request by registrants to voluntarily cancel certain pesticide registrations. EPA intends to grant this request at the close of the comment period for this announcement unless the Agency receives substantive comments within the comment period that would merit its further review of the request, or unless the registrants withdraw their request. The cancellation for the allethrins technical products will be effective September 30, 2015, and the cancellation for the allethrins end-use products will be effective December 31, 2016, as described in Unit II. below. If any of these cancellation requests are granted, the Agency will issue a cancellation order that will prescribe conditions pertaining to the sale,

distribution, and use of existing stocks of canceled products.

**DATES:** Comments must be received on or before January 17, 2013.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2010–0844, by one of the following methods:

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

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

**FOR FURTHER INFORMATION CONTACT:** Molly Clayton, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 603–0522; email address: *clayton.molly@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. General Information

### *A. Does this action apply to me?*

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. If you have any questions regarding the information in this notice, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

### *B. What should I consider as I prepare my comments for EPA?*

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

## II. What action is the Agency taking?

This notice announces receipt by the Agency of a request from the technical registrants Valent Biosciences Corporation and Sumitomo Chemical Company Limited to cancel all their allethrins pesticide products registered under FIFRA section 3 or 24(c). These registrations are listed in sequence by registration number in Table 1 of this unit.

The allethrin series of pyrethroid insecticides includes bioallethrin (PC code 004003), esbiol (004004), esbiothrin (004007, formerly 004003/004004), and pynamin forte (004005). The allethrins are members of the pyrethroid class of insecticides. They are used to control flying and crawling insects in a number of commercial, horticultural and residential applications. Common product forms include wasp and hornet aerosols; yard and patio foggers; flying insect killer aerosols; total release aerosols (indoor foggers); mosquito repellants (mats and coils); space sprays; and crawling insect killer aerosols. The allethrins are not registered for use on food, and they have no U.S. tolerances associated with their use; therefore, they are not subject to the Food Quality Protection Act (FQPA). There are currently two technical registrants for the allethrins, with one (Valent BioSciences Corporation) being a subsidiary of the second (Sumitomo Chemical Company).

The allethrins were the subjects of a reregistration eligibility decision (RED), which was completed on June 30, 2007, and amended on May 27, 2009. In reregistration, EPA completed human health and environmental risk assessments for the allethrins. During reregistration, to reduce potential ecological exposure, the registrants voluntarily canceled pet shampoos and dips and large-scale outdoor uses, such as uncultivated agricultural areas and golf courses. Since outdoor uses were thereby limited to localized spot treatments, no ecological mitigation measures were specified in the RED.

On March 31, 2010, the public phase of registration review for the allethrins began with the opening of the initial docket (EPA–HQ–OPP–2010–0022). The comment period for the allethrins registration review docket was open for 60 days, from March 31, 2010, to June 1, 2010. The Final Work Plan (FWP) for the allethrins was completed on August 11, 2010. The Agency's projected registration review timeline described in the FWP established that the preliminary risk assessments would be completed by December 2018, and the final registration decision would be completed in 2020.

The technical registrants subsequently requested cancellation of their allethrins technical products effective September 30, 2015, and cancellation of their end use products effective December 31, 2016.

TABLE 1—TECHNICAL PRODUCT REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION

| Registration No. | Product name |
|---|---|
| 10308–3 | Pynamin Forte Technical. |
| 73049–105 | Bioallethrin Technical. |
| 73049–125 | Crossfire Technical. |
| 73049–155 | Esbiol Technical. |
| 73049–156 | Crossfire Technical. |
| 73049–359 | Bioallethrin Technical. |
| 73049–394 | VBC Bioallethrin 90% Concentrate. |
| 73049–395 | VBC Esbiol Concentrate. |
| 73049–399 | VBC Esbiothrin. |

TABLE 2—END-USE PRODUCT REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION

| Registration No. | Product name |
|---|---|
| 73049–157 | Cypermethrin/Esbiothrin/Piperonyl Butoxide 0.05%/0.1%/0.4% A. |
| 73049–177 | DS 205 Insecticide. |
| 73049–178 | UltraTec DS 215 Insecticide. |
| 73049–180 | DS 530 Insecticide. |
| 73049–183 | ULTRATEC DS 210 Insecticide. |

TABLE 2—END-USE PRODUCT REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION—Continued

| Registration No. | Product name |
|---|---|
| 73049–184 | Ultratec KD AC. |
| 73049–210 | DSP 0.25–2.5–25 AC. |
| 73049–354 | UltraTec DS OB AC. |
| 73049–389 | UltraTec DSP 515 Insecticide. |
| 73049–390 | UltraTec DS 105 OB Insecticide. |

Table 3 of this unit includes the names and addresses of record for all registrants of the products in Table 1 of this unit, in sequence by EPA company number. This number corresponds to the first part of the EPA registration numbers of the products listed in this unit.

TABLE 3—REGISTRANTS REQUESTING VOLUNTARY CANCELLATION

| EPA Company No. | Company name and address |
|---|---|
| 10308 | Sumitomo Chemical Company, Ltd., 1330 Dillon Heights Avenue, Baltimore, MD 21228–1199. |
| 73049 | Valent BioSciences Corporation, 870 Technology Way, Suite 100, Libertyville, IL 60048–6316. |

## III. What is the Agency's authority for taking this action?

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**.

Section 6(f)(1)(B) of FIFRA requires that before acting on a request for voluntary cancellation, EPA must provide a 30-day public comment period on the request for voluntary cancellation or use termination. In addition, FIFRA section 6(f)(1)(C) provides for the possibility of a 180-day comment period where the voluntary cancellation involves a pesticide registered for at least one minor agricultural use. Because the allethrins are not registered for any minor agricultural uses, this 180-day comment provision does not apply, and EPA is providing a 30-day comment period on the proposed voluntary cancellation of allethrins registrations.

## IV. Procedures for Withdrawal of Request

Registrants who choose to withdraw a request for cancellation should submit such withdrawal in writing to the person listed under **FOR FURTHER INFORMATION CONTACT**. If the products have been subject to a previous cancellation action, the effective date of cancellation and all other provisions of any earlier cancellation action are controlling. Any request for withdrawal should be submitted before the end of the comment period but, as a practical matter, must be received before EPA issues a final order.

## V. Existing Stocks

Existing stocks are those stocks of registered pesticide products that are currently in the United States and that were packaged, labeled, and released for shipment prior to the effective date of the cancellation action. Because these allethrins products are reregistered pesticides, and there are no known risks of concern, the cancellation date for the technical products will occur five years prior to the time of the planned registration review decision for the allethrins, the Agency expects to grant this request unless the Agency receives substantive comments that warrant further review of the request or the registrants withdraw their request. In 2013, EPA intends to issue an order in the **Federal Register** canceling all of the technical registrations as of September 30, 2015 and end use product registrations as of December 31, 2016. It is the Agency's current intention to include in that order the following terms and conditions applicable to existing stocks:

- No sale or distribution of allethrins technical products by any person, other than for purposes of disposal or export, will be permitted after September 30, 2015.
- No use of technical allethrins products to formulate end-use products will be permitted after December 31, 2015.
- As of January 1, 2017, persons other than registrants will be allowed to sell, distribute, or use existing stocks of cancelled end use products until such stocks are exhausted. Use of existing stocks will be permitted only to the extent that the use is consistent with the terms of the previously-approved labeling accompanying the product used.

### List of Subjects

Environmental protection, Pesticides and pests, Allethrins.

Dated: December 3, 2012.

**Richard P. Keigwin, Jr.,**

*Director, Pesticide Re-evaluation Division, Office of Pesticide Programs.*

[FR Doc. 2012–30357 Filed 12–18–12; 8:45 am]

BILLING CODE 6560–50–P

## FEDERAL COMMUNICATIONS COMMISSION

### Information Collection Being Submitted to the Office of Management and Budget for Emergency Review and Approval

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice; request for comments.

**SUMMARY:** As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3502–3520), the Federal Communications Commission invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s). Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimates; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of

information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid OMB control number.

**DATES:** Written Paperwork Reduction Act (PRA) comments should be submitted on or before January 3, 2013. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

**ADDRESSES:** Submit your PRA comments to Nicholas A. Fraser, Office of Management and Budget (OMB), via fax at 202–395–5167 or via Internet at *Nicholas_A._Fraser@omb.eop.gov* and to Judith B. Herman, Federal Communications Commission, via the Internet at *Judith-b.herman@fcc.gov.* To submit your PRA comments by email send them to: *PRA@fcc.gov.*

**FOR FURTHER INFORMATION CONTACT:** Judith B. Herman, Office of Managing Director, FCC, at 202–418–0214.

**SUPPLEMENTARY INFORMATION:** The Commission is requesting emergency OMB processing of the new information collection requirements contained in this notice. The Commission is requesting OMB approval by January 11, 2013.

*OMB Control Number:* 3060–XXXX.

*Title:* Study Area Boundary Maps Reported in Esri Shapefile Format, DA 12–1777.

*Form Number:* N/A.

*Type of Review:* New collection.

*Respondents:* Business or other for-profit entities.

*Number of Respondents:* 1,443 respondents; 1,443 responses.

*Estimated Time per Response:* 26 hours.

*Frequency of Response:* On occasion and biennial reporting requirement.

*Obligation to Respond:* Mandatory. Statutory authority for this information collection is contained in 47 U.S.C. section 254(b) of the Communications Act of 1934, as amended.

*Total Annual Burden:* 7,924 hours.

*Total Annual Cost:* $705,935.

*Privacy Impact Assessment:* N/A.

*Nature and Extent of Confidentiality:* No questions of a confidential nature are asked.

*Needs and Uses:* The Commission requires that all incumbent local exchange carriers (ILECs) to file shapefile maps of their service territories in a state (study area). Shapefiles are a commonly used, digitized, geographic information system (GIS) format. Accurate and accessible maps are essential to the legitimate distribution of universal service support to rural, high cost carriers. After the shapefiles are uploaded into a web interface provided by the Commission, each ILEC must certify the accuracy of its study area maps. ILECs must also submit updated shapefile maps if their study area boundaries change, and must recertify the accuracy of the map every two years.

Federal Communications Commission.

**Cecilia Sigmund,**

*Acting, Associate Secretary.*

[FR Doc. 2012–30597 Filed 12–18–12; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL DEPOSIT INSURANCE CORPORATION

### Agency Information Collection Activities: Renewal of a Currently Approved Collection; Comment Request; Foreign Banks

**AGENCY:** Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Notice and request for comment.

**SUMMARY:** In accordance with requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the FDIC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The FDIC hereby gives notice that it is seeking comment on renewal of its ''Foreign Banks'' information collection (OMB No. 3064–0114). At the end of the comment period, any comments and recommendations received will be analyzed to determine the extent to which the FDIC should modify the collection prior to submission to OMB for review and approval.

**DATES:** Comments must be submitted on or before February 19, 2013.

**ADDRESSES:** Interested parties are invited to submit written comments. All comments should refer to the name of the collection. Comments may be submitted by any of the following methods:

- *http://www.FDIC.gov/regulations/laws/federal/notices.html.*
- *Email: comments@fdic.gov.*
- *Mail:* Leneta G. Gregorie (202.898.3719), Counsel, Federal Deposit Insurance Corporation, Room NYA–5050, 550 17th Street NW., Washington, DC 20429.
- *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7:00 a.m. and 5:00 p.m.

A copy of the comments may also be submitted to the FDIC Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** For further information about the revisions discussed in this notice, please contact Leneta G. Gregorie, by telephone at (202) 898–3719 or by mail at the address identified above. In addition, copies of the proposed revised Forms 7200/05 and 7200/09, and proposed new Form 7200/18 can be obtained at the FDIC's Web site (*http://www.fdic.gov/regulations/laws/federal/*).

**SUPPLEMENTARY INFORMATION:** The FDIC is proposing to renew, without change, the following information collection.

*Title:* Foreign Banks.

*Estimated Number of Respondents and Burden Hours:*

| FDIC Collection | Hours per response | Number of respondents | Times per year | Burden hours |
|---|---|---|---|---|
| Application to move a branch | 8 | 1 | 1 | 8 |
| Application for consent to operate a noninsured branch | 8 | 1 | 1 | 8 |
| Application to conduct activities | 8 | 1 | 1 | 8 |
| Recordkeeping | 120 | 10 | 1 | 1,200 |
| Pledge of assets | | | | |
| Records | 0.25 | 10 | 4 | 10 |

| FDIC Collection | Hours per response | Number of respondents | Times per year | Burden hours |
|---|---|---|---|---|
| Reports | 2 | 10 | 4 | 80 |
| Total Burden | | | | 1,314 |

*General Description of Collection:* The collection involves information obtained in connection with applications for consent to move an insured state-licensed branch of a foreign bank (12 CFR 303.184); applications to operate as a noninsured state-licensed branch of a foreign bank (12 CFR 303.186); applications from an insured state-licensed branch of a foreign bank to conduct activities which are not permissible for a federally-licensed branch (12 CFR 303.187); internal recordkeeping requirements for such branches (12 CFR 347.209(e)(4)); and reporting and recordkeeping requirements relating to the pledge of assets by such branches (12 CFR 347.209(e)(4) and (e)(6)).

*Current Action:* The FDIC is proposing to renew the existing information collection without change.

**Request for Comment**

Comments are invited on: (a) Whether this collections of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimate of the burden of the information collection, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the collection should be modified prior to submission to OMB for review and approval. Comments submitted in response to this notice also will be summarized or included in the FDIC's request to OMB for renewal of the information collection. All comments will become a matter of public record.

Dated at Washington, DC, this 13th day of December, 2012.

Federal Deposit Insurance Corporation.

**Robert E. Feldman,**

*Executive Secretary.*

[FR Doc. 2012–30445 Filed 12–18–12; 8:45 am]

BILLING CODE 6714–01–P

## FEDERAL ELECTION COMMISSION

**[Notice 2012–09]**

## Filing Dates for the Illinois Special Election in the 2nd Congressional District

**AGENCY:** Federal Election Commission.

**ACTION:** Notice of filing dates for special election.

**SUMMARY:** Illinois has scheduled elections on February 26, 2013, and April 9, 2013, to fill the U.S. House seat in the 2nd Congressional District vacated by Representative Jesse Jackson, Jr. Committees required to file reports in connection with the Special Primary Election on February 26, 2013, shall file a 12-day Pre-Primary Report. Committees required to file reports in connection with both the Special Primary and Special General Election on April 9, 2013, shall file a 12-day Pre-Primary Report, a 12-day Pre-General Report, and a 30-day Post-General Report.

**FOR FURTHER INFORMATION CONTACT:** Ms. Elizabeth S. Kurland, Information Division, 999 E Street NW., Washington, DC 20463; Telephone: (202) 694–1100; Toll Free (800) 424–9530.

**SUPPLEMENTARY INFORMATION:**

**Principal Campaign Committees**

All principal campaign committees of candidates who participate in the Illinois Special Primary and Special General Elections shall file a 12-day Pre-Primary Report on February 14, 2013; a 12-day Pre-General Report on March 28, 2013; and a 30-day Post-General Report on May 9, 2013. (See chart below for the closing date for each report).

All principal campaign committees of candidates participating *only* in the Special Primary Election shall file a 12-day Pre-Primary Report on February 14, 2013. (See chart below for the closing date for each report).

**Unauthorized Committees (PACs and Party Committees)**

Political committees filing on a semi-annual basis in 2013 are subject to special election reporting if they make previously undisclosed contributions or expenditures in connection with the Illinois Special Primary or Special General Election by the close of books for the applicable report(s). (See chart below for the closing date for each report).

Committees filing monthly that make contributions or expenditures in connection with the Illinois Special Primary or General Elections will continue to file according to the monthly reporting schedule.

Additional disclosure information in connection with the Illinois Special Election may be found on the FEC Web site at *http://www.fec.gov/info/report_dates.shtml*.

**Disclosure of Lobbyist Bundling Activity**

Principal campaign committees, party committees and Leadership PACs that are otherwise required to file reports in connection with the special elections must simultaneously file FEC Form 3L if they receive two or more bundled contributions from lobbyists/registrants or lobbyist/registrant PACs that aggregate in excess of the lobbyist bundling disclosure threshold during the special election reporting periods (see charts below for closing date of each period). 11 CFR 104.22(a)(5)(v).

The lobbyist bundling disclosure threshold for calendar year 2012 was $16,700. This threshold amount may change in 2013 based upon the annual cost of living adjustment (COLA). Once the adjusted threshold amount becomes available, the Commission will publish it in the **Federal Register** and post it on its Web site.

CALENDAR OF REPORTING DATES FOR ILLINOIS SPECIAL ELECTION

| Report | Close of books[1] | Reg./Cert. & overnight mailing deadline | Filing deadline |
|---|---|---|---|
| **Quarterly Filing Committees Involved in *Only* the Special Primary (02/26/13) Must File:** | | | |
| Pre-Primary | 02/06/13 | 02/11/13 | 02/14/13 |
| April Quarterly | 03/31/13 | 04/15/13 | 04/15/13 |
| **Semi-Annual Filing Committees Involved in *Only* the Special Primary (02/26/13) Must File:** | | | |
| Pre-Primary | 02/06/13 | 02/11/13 | 02/14/13 |
| Mid-Year | 06/30/13 | 07/31/13 | 07/31/13 |
| **Quarterly Filing Committees Involved in Both the Special Primary (02/26/13) and Special General (04/09/13) Must File:** | | | |
| Pre-Primary | 02/06/13 | 02/11/13 | 02/14/13 |
| Pre-General | 03/20/13 | 03/25/13 | 03/28/13 |
| April Quarterly | 03/31/13 | 04/15/13 | 04/15/13 |
| Post-General | 04/29/13 | 05/09/13 | 05/09/13 |
| July Quarterly | 06/30/13 | 07/15/13 | 07/15/13 |
| **Semi-Annual Filing Committees Involved in Both the Special Primary (02/26/13) and Special General (04/09/13) Must File:** | | | |
| Pre-Primary | 02/06/13 | 02/11/13 | 02/14/13 |
| Pre-General | 03/20/13 | 03/25/13 | 03/28/13 |
| Post-General | 04/29/13 | 05/09/13 | 05/09/13 |
| Mid-Year | 06/30/13 | 07/31/13 | 07/31/13 |
| **Quarterly Filing Committees Involved in *Only* the Special General (04/09/13) Must File:** | | | |
| Pre-General | 03/20/13 | 03/25/13 | 03/28/13 |
| April Quarterly | 03/31/13 | 04/15/13 | 04/15/13 |
| Post-General | 04/29/13 | 05/09/13 | 05/09/13 |
| July Quarterly | 06/30/13 | 07/15/13 | 07/15/13 |
| **Semi-Annual Filing Committees Involved in *Only* the Special General (04/09/13) Must File:** | | | |
| Pre-General | 03/20/13 | 03/25/13 | 03/28/13 |
| Post-General | 04/29/13 | 05/09/13 | 05/09/13 |
| Mid-Year | 06/30/13 | 07/31/13 | 07/31/13 |

[1] These dates indicate the end of the reporting period. A reporting period always begins the day after the closing date of the last report filed. If the committee is new and has not previously filed a report, the first report must cover all activity that occurred before the committee registered as a political committee with the Commission up through the close of books for the first report due.

Dated: December 10, 2012.

On behalf of the Commission.

**Caroline C. Hunter,**

*Chair, Federal Election Commission.*

[FR Doc. 2012–30505 Filed 12–18–12; 8:45 am]

**BILLING CODE 6715–01–P**

## FEDERAL MARITIME COMMISSION

### Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on the agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of the agreements are available through the Commission's Web site (www.fmc.gov) or by contacting the Office of Agreements at (202)–523–5793 or *tradeanalysis@fmc.gov.*

*Agreement No.:* 012164–001.

*Title:* KL/WHS Space Charter and Sailing Agreement.

*Parties:* Kawasaki Kisen Kaisha, Ltd. and Wan Hai Lines (Singapore) PTE Ltd.

*Filing Party:* Jason P. Gonzalez, Nixon Peabody LLP, Gas Company Tower, 555 West Fifth Street, 46th Floor, Los Angeles, CA 90013.

*Synopsis:* The amendment permits a larger capacity vessel to be used under the agreement.

*Agreement No.:* 012192.

*Title:* HMM/CMA CGM Slot Exchange Agreement.

*Parties:* Hyundai Merchant Marine Co., Ltd. and CMA CGM, S.A.

*Filing Party:* David F. Smith, Esq.; Cozen O'Connor; 1627 I Street NW., Suite 1100; Washington, DC 20006–4007.

*Synopsis:* The agreement authorizes Hyundai and CMA to exchange slots on their respective services for the purpose of repositioning empty containers.

By Order of the Federal Maritime Commission.

Dated: December 14, 2012.

**Karen V. Gregory,**

*Secretary.*

[FR Doc. 2012–30579 Filed 12–18–12; 8:45 am]

**BILLING CODE 6730–01–P**

## FEDERAL MARITIME COMMISSION

### Ocean Transportation Intermediary License Applicants

The Commission gives notice that the following applicants have filed an application for an Ocean Transportation Intermediary (OTI) license as a Non-Vessel-Operating Common Carrier (NVO) and/or Ocean Freight Forwarder (OFF) pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. 40101). Notice is also given of the filing of

applications to amend an existing OTI license or the Qualifying Individual (QI) for a licensee.

Interested persons may contact the Office of Ocean Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573, by telephone at (202) 523–5843 or by email at *OTI@fmc.gov.*

Acco Foreign Shipping, Inc. (OFF), 10880 NW. 27th Street, Suite 200, Doral, FL 33172. Officer: Ali A. Germi, President (QI). Application Type: Add Trade Name Acco Terramar.

DI Global Logistics, Inc. (NVO & OFF), 1730 NW 96th Avenue, Miami, FL 33172. Officers: Johan Arenas, Vice President (QI), Carlos N. Delgado Arenas, President. Application Type: New NVO & OFF License.

Exclusive Global Logistics, Inc. (NVO & OFF), 9635 Heinrich Hertz Drive, San Diego, CA 92154. Officers: Hwa Y. Yoon, CFO (QI), Bowhan Kim, CEO. Application Type: New NVO & OFF License.

KJW–CHB, LLC (OFF), 765 North Route 83, Suite 114, Bensenville, IL 60106. Officer: Keh J. Wu, President (QI). Application Type: New OFF License.

Sippi Logistics Inc (NVO & OFF), 1122 La Cienega Blvd., Suite 630, Inglewood, CA 90304. Officers: Musarat Izhar, President' (QI), Taher Hussaini, Secretary. Application Type: New NVO & OFF License.

Star Freight Logistics LLC (NVO & OFF), 5963 NW 102 Avenue, Doral, FL 33178. Officer: Edivaldo Rezende, Member (QI). Application Type: New NVO & OFF License.

Titan International Shipping, Inc. (NVO), 8900 W. Sample Road, Suite 101, Coral Springs, FL 33065. Officer: Roberto G. Durand, President (QI). Application Type: New NVO License.

Rapid Cargo & Logistics, Inc. (NVO), 15606 S. Broadway Center Street, Gardner, CA 90248. Officer: Richard Y. Hong, President (QI). Application Type: QI Change.

By the Commission.

Dated: December 14, 2012.

**Karen V. Gregory,**

*Secretary.*

[FR Doc. 2012–30573 Filed 12–18–12; 8:45 am]

**BILLING CODE 6730–01–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 January 3, 2013.

A. Federal Reserve Bank of St. Louis (Yvonne Sparks, Community Development Officer) P.O. Box 442, St. Louis, Missouri 63166–2034:

1. *Michael Cripps,* individually and as a member of a group acting in concert which consists of Michael Cripps, Helen Cripps, Sarah Cripps, and Troy Cripps, all of Murphysboro, Illinois; to acquire voting shares of First of Murphysboro Corp., and thereby indirectly acquire voting shares of The First Bank and Trust Company of Murphysboro, both in Murphysboro, Illinois.

Board of Governors of the Federal Reserve System, December 14, 2012.

**Margaret McCloskey Shanks,**

*Deputy Secretary of the Board.*

[FR Doc. 2012–30525 Filed 12–18–12; 8:45 am]

**BILLING CODE 6210–01–P**

## FEDERAL RESERVE SYSTEM

### Formations of, Acquisitions by, and Mergers of Savings and Loan Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Home Owners' Loan Act (12 U.S.C. 1461 *et seq.*) (HOLA), Regulation LL (12 CFR part 238), and Regulation MM (12 CFR part 239), and all other applicable statutes and regulations to become a savings and loan holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a savings association and nonbanking companies owned by the savings and loan 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 application also will 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 HOLA (12 U.S.C. 1467a(e)). 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 10(c)(4)(B) of the HOLA (12 U.S.C. 1467a(c)(4)(B)). 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 January 14, 2013.

A. Federal Reserve Bank of New York (Ivan Hurwitz, Vice President) 33 Liberty Street, New York, New York 10045–0001:

1. *Flushing Financial Corporation,* Flushing, New York; to become a bank holding company upon the merger of Flushing Savings Bank, FSB, Flushing, New York, with and into Flushing Commercial Bank, North New Hyde Park, New York, which will become a New York State-chartered commercial bank and change its name to Flushing Bank.

Board of Governors of the Federal Reserve System, December 14, 2012.

**Margaret McCloskey Shanks,**

*Deputy Secretary of the Board.*

[FR Doc. 2012–30526 Filed 12–18–12; 8:45 am]

**BILLING CODE 6210–01–P**

## DEPARTMENT OF DEFENSE

## GENERAL SERVICES ADMINISTRATION

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

**[OMB Control No. 9000–0074: Sequence 44]**

### Federal Acquisition Regulation; Information Collection; Contract Funding—Limitation of Costs/Funds

**AGENCIES:** Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Notice of request for public comments regarding an extension of an existing OMB clearance.

**SUMMARY:** Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement concerning limitation of costs/funds.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the Federal Acquisition Regulations (FAR), and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

**DATES:** Submit comments on or before February 19, 2013.

**ADDRESSES:** Submit comments identified by Information Collection 9000–0074, Contract Funding—Limitation of Costs/Funds by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.*

Submit comments via the Federal eRulemaking portal by searching the OMB control number. Select the link ''Submit a Comment'' that corresponds with ''Information Collection 9000–0074, Contract Funding—Limitation of Costs/Funds''. Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 9000–0074, Contract Funding—Limitation of Costs/Funds'' on your attached document.

- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417. ATTN: Hada Flowers/IC 9000–0074, Contract Funding—Limitation of Costs/Funds.

*Instructions:* Please submit comments only and cite Information Collection 9000–0074, Contract Funding—Limitation of Costs/Funds, in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

**FOR FURTHER INFORMATION CONTACT:** Mr. Edward Chambers, Procurement Analyst, Office of Governmentwide Acquisition Policy, GSA (202) 501–3221 or email *Edward.chambers@gsa.gov.*

**SUPPLEMENTARY INFORMATION:**

### A. Purpose

Firms performing under Federal cost-reimbursement contracts are required to notify the contracting officer in writing whenever they have reason to believe—

(1) The costs the contractors expect to incur under the contracts in the next 60 days, when added to all costs previously incurred, will exceed 75 percent of the estimated cost of the contracts; or

(2) The total cost for the performance of the contracts will be greater or substantially less than estimated. As a part of the notification, the contractors must provide a revised estimate of total cost.

### B. Annual Reporting Burden

Based on Federal Procurement Data System data for Fiscal Year 2011, the number of responses for the type of actions related to this information collection requirement increased from 53,456 to 57,460. As a result, there is an upward adjustment to the estimated burden hours since the last notice for an extension to this information collection published in the **Federal Register** at 74 FR 56639, November 2, 2009.

*Respondents:* 3,598.
*Responses per Respondent:* 15.96999.
*Annual Responses:* 57,460.
*Hours per Response:* .5.
*Total Burden Hours:* 28,730.
*Obtaining Copies of Proposals:* Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417, telephone (202) 501–4755. Please cite OMB Control No. 9000–0074, Contract Funding—Limitation of Costs/Funds, in all correspondence.

Dated: December 8, 2012.

**William Clark,**

*Acting Director, Federal Acquisition Policy Division, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmnetwide Policy.*

[FR Doc. 2012–30514 Filed 12–18–12; 8:45 am]

BILLING CODE 6820–EP–P

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## DEPARTMENT OF DEFENSE

## GENERAL SERVICES ADMINISTRATION

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

**[Docket 2012–0076; Sequence 47; OMB Control No. 9000–0091]**

## Federal Acquisition Regulation; Information Collection; Anti-Kickback Procedures

**AGENCIES:** Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Notice of request for public comments regarding an extension of an existing OMB clearance.

**SUMMARY:** Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement concerning anti-kickback procedures.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the Federal Acquisition Regulation (FAR), and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

**DATES:** Submit comments on or before February 19, 2013.

**ADDRESSES:** Submit comments identified by *Information Collection 9000–0091, Anti-Kickback Procedures,* by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching the OMB control number. Select the link ''Submit a Comment'' that corresponds with ''Information Collection 9000–0091, Anti-Kickback Procedures''. Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 9000–0091, Anti-Kickback Procedures'' on your attached document.
- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417. ATTN: Hada Flowers/IC 9000–0091, Anti-Kickback Procedures.

*Instructions:* Please submit comments only and cite Information Collection 9000–0091, Anti-Kickback Procedures, in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

**FOR FURTHER INFORMATION CONTACT:** Ms. Cecelia L. Davis, Procurement Analyst,

Office of Governmentwide Acquisition Policy, GSA (202) 219–0202 or email *Cecelia.davis@gsa.gov.*

**SUPPLEMENTARY INFORMATION:**

**A. Purpose**

Federal Acquisition Regulation (FAR) 52.203–7, Anti-Kickback Procedures, requires that all contractors have in place and follow reasonable procedures designed to prevent and detect in its own operations and direct business relationships, violations of section 3 of the Anti-Kickback Act of 1986 (41 U.S.C. 51–58). Whenever prime contractors or subcontractors have reasonable grounds to believe that a violation of section 3 of the Act may have occurred, they are required to report the possible violation in writing to the contracting agency inspector general, the head of the contracting agency if an agency does not have an inspector general, or the Department of Justice. The information is used to determine if any violations of section 3 of the Act have occurred.

There is no Governmentwide data collection process or system which identifies the number of alleged violations to the Anti-Kickback Act of 1986 (41 U.S.C. 51–58) that are reported annually to agency inspectors general, the heads of the contracting agency if an agency does not have an inspector general, or the Department of Justice. To date, no public comments or questions have been received regarding the burden estimates included in the currently approved clearance.

**B. Annual Reporting Burden**

*Respondents:* 100.

*Responses per Respondent:* 1.

*Annual Responses:* 100.

*Hours per Response:* 1.

*Total Burden Hours:* 100.

*Obtaining Copies of Proposals:* Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417, telephone (202) 501–4755. Please cite OMB Control No. 9000–0091, Anti-Kickback Procedures, in all correspondence.

Dated: December 11, 2012.

**William Clark,**

*Acting Director, Federal Acquisition Policy Division, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.*

[FR Doc. 2012–30559 Filed 12–18–12; 8:45 am]

BILLING CODE 6820–EP–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[60-Day-12–0822]**

### Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–7570 and send comments to Ron Otten, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an email to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

**Proposed Project**

National Intimate Partner and Sexual Violence Surveillance System (0920–0822, Expiration 11/30/2013)—Revision—National Center for Injury Prevention and Control (NCIPC), Centers for Disease Control and Prevention (CDC).

*Background and Brief Description*

The health burden of Intimate Partner Violence (IPV), Sexual Violence (SV) and stalking are substantial. In 2010, the National Intimate Partner and Sexual Violence Surveillance System (NISVSS) reported that approximately 6.9 million women and 5.6 million men experienced rape, physical violence and/or stalking by an intimate partner within the last year. The health care costs of IPV exceed $5.8 billion each year, nearly $3.9 billion of which is for direct medical and mental health care services.

Sexual violence also has a profound and long-term impact on the physical and mental health of the victim. Existing estimates of lifetime experiences of rape range from 15% to 36% for females. Sexual violence against men, although less prevalent, is also a public health problem; approximately, 1 in 5 women and 1 in 71 men have experienced attempted, completed or alcohol or drug facilitated rape at some point in their lifetime. Nearly 1.3 million women reported being raped in the past 12 months. Nearly 1 in 3 women and 1 in 10 men in the United States have experienced rape, physical violence and/or stalking by an intimate partner and reported at least one impact related to experiencing these or other forms of violent behavior within the relationship (e.g., being fearful, concerned for safety, post-traumatic stress disorder (PTSD) symptoms, need for health care, injury, contacting a crisis hotline, need for housing services, need for victim's advocate services, need for legal services, missed at least one day of work or school).

NISVSS 2010 data indicates that approximately 5 million women and 1.4 million men in the United States are stalked in the 12 months prior to the survey. There are overlaps between stalking and other forms of violence in intimate relationships; approximately 14% of females who were stalked by an intimate partner in their lifetime also experienced physical violence by an intimate partner; while 12% of female victims experienced rape, physical violence and stalking by a current or former intimate partner in their lifetime. Furthermore, 76% of female victims of intimate partner homicides were stalked by their partners before they were killed.

In order to address this important public health problem, CDC implemented, beginning in 2010, the National Intimate Partner and Sexual Violence Surveillance System that produces national and state level estimates of IPV, SV and Stalking on an annual basis. In 2010, a total of 16,507 completed interviews were conducted among English and/or Spanish speaking male and female adults (18 years and older) living in the United States.

CDC proposes a revision to the currently approved data collection instrument, by conducting a one-year pilot study using a newly revised instrument during the calendar year of 2013. The changes to the instrument are twofold: First, the current NISVSS survey instrument has been shortened in efforts to develop a core instrument that will be administered on an annual

basis. Second, topic specific modules contain questions to produce data that are needed on a regular basis but are not needed annually. Each individual topic specific modules will be administered in addition to the core survey on a revolving annual schedule. The goals of the revised data collection instrument are to: (1) Improve NISVSS data quality, (2) increase our response rates, (3) decrease the breakoff rates, (4) and to reduce the burden on the respondents.

In this period of field testing, a total of 36,000 households will be screened. After determining eligibility and consent, 10,000 will complete the survey. The average burden per screened respondent remains at 3 minutes (total burden in hours equals 1,800) while the average burden per surveyed respondent is 25 minutes (total burden in hours equals 4,166). The survey will be conducted among English or Spanish speaking male and female adults (18 years and older) living in the United States. There are no costs to respondents to participate other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

| Type of respondent | Form name | Number of responses | Number of responses per respondent | Average burden per response (in hours) | Total burden (in hours) |
|---|---|---|---|---|---|
| Households | NISVSS 2013 Test Instrument (screened). | 36,000 | 1 | 3/60 | 1,800 |
| | NISVSS 2013 Test Instrument (surveyed). | 10,000 | 1 | 25/60 | 4,166 |
| Total | | | | | 5,966 |

Dated: December 13, 2012.

**Ron A. Otten,**

*Director, Office of Scientific Integrity (OSI), Office of the Associate Director for Science (OADS), Office of the Director, Centers for Disease Control and Prevention.*

[FR Doc. 2012–30560 Filed 12–18–12; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[60-Day–13–0650]**

### Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–7570 or send comments to Ron Otten, 1600 Clifton Road, MS D–74, Atlanta, GA 30333 or send an email to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

**Proposed Project**

Prevention Research Centers Program National Evaluation Reporting System (OMB No. 0920–0650, exp. 6/30/2013)—Revision—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

*Background and Brief Description*

The Prevention Research Centers (PRC) Program was established by Congress through the Health Promotion and Disease Prevention Amendments of 1984. CDC manages the PRC Program and currently provides funding to PRC grantees that are housed within schools of public health, medicine or osteopathy. Awards are made for five years and may be renewed through a competitive application process. PRCs conduct outcomes-oriented health promotion and disease prevention research on a broad range of topics using a multi-disciplinary and community-based approach. Research projects involve state and local health departments, health care providers, universities, community partners, and other organizations. PRCs collaborate with external partners to assess community health priorities; identify research priorities; set research agendas; conduct research projects and related activities such as training and technical assistance; and disseminate research results to public health practitioners, researchers, and the general public. Each PRC receives an approximately equal amount of funding from CDC to establish its core capacity and support a core research project as well as training and evaluation activities. Research foci reflect each PRC's area of expertise and the needs of the community. Health disparities and goals outlined in *Healthy People 2020* are a particular emphasis for most PRC core research.

CDC is currently approved to collect performance information from PRCs through a web-based survey and telephone interview (OMB #0920–0650, exp. 6/30/2013). The web-based survey is designed to collect information on the PRCs' collaborations with health departments; formal training programs and other training activities; and other funded prevention research projects conducted separately from their core research. A structured telephone interview with a key PRC informant obtains information on systems and environmental changes in which PRCs are involved. The content of the information collection is guided by a set of performance indicators developed (2002) and later revised (2009) in collaboration with the PRCs.

CDC will request OMB approval to continue collecting performance information from PRCs for three years, with some changes. In this revision, CDC requests OMB approval to (1) continue using a web-based survey and telephone interview for data collection, (2) change the platform of the web-based

survey, (3) decrease the data collection burden for each PRC by decreasing the number of questions collected on an annual basis, and (4) revise some questions for clarity or to reflect the current needs and priorities of the program.

CDC will continue to use the information reported by PRCs to identify training and technical assistance needs, respond to requests for information from Congress and other sources, monitor grantees' compliance with cooperative agreement requirements, evaluate progress made in achieving goals and objectives, and describe the impact and effectiveness of the PRC Program.

There is no change in the number of respondents (37). Each PRC program will report the required information to CDC once per year. The estimated burden per response for the web-based survey will decrease from six hours to five hours, and the estimated burden per response for each telephone interview will decreased from one hour to 30 minutes. There are no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

| Type of respondent | Form name | Number of respondents | Number of responses per respondent | Average burden per response (in hours) | Total burden (in hours) |
|---|---|---|---|---|---|
| PRC Program | Survey | 37 | 1 | 5 | 185 |
| | Telephone Interview | 37 | 1 | 30/60 | 19 |
| Total | | | | | 204 |

Dated: December 13, 2012.

**Ron A. Otten,**

*Director, Office of Scientific Integrity (OSI), Office of the Associate Director for Science (OADS), Office of the Director.*

[FR Doc. 2012–30562 Filed 12–18–12; 8:45 am]

BILLING CODE 4163–18–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[30-Day–13–12PS]**

### Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call (404) 639–7570 or send an email to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

**Proposed Project**

Evaluation of the Get Yourself Tested (GYT) Campaign—New—National Center for HIV/AIDS, Viral Hepatitis, STD and TB Prevention (NCHHSTP), Centers for Disease Control and Prevention (CDC).

*Background and Brief Description*

The purpose of this data collection is to evaluate the reach and impact of the *GYT: Get Yourself Tested* campaign. Evaluation of *GYT* will be based on data collected from 4000 young adults. The data will be collected through a 30-minute, web-based survey. Data from the survey will then be quantitatively evaluated to determine the reach and impact of the *GYT: Get Yourself Tested* campaign.

This information needs to be collected in order to evaluate whether the *GYT: Get Yourself Tested* campaign is reaching the appropriate target audience, identify messages the audience is taking away from *GYT;* determine whether individuals who saw the *GYT* campaign are more likely to engage in target behaviors and their mediators; and determine whether perceived norms around testing, treatment, and sexual health vary between people who have seen the campaign and those who have not. The information obtained from the proposed data collection will be used by CDC to improve, update and decide whether to continue the *GYT* campaign and to determine whether *GYT* is able or unable to impact norms and behaviors related to STD testing. It will also be used to inform future efforts to communicate with the public about STD/HIV testing.

Because the *GYT* campaign targets young adults and minority youth, populations with higher rates of STD/HIV than the general population, it is essential to examine the effectiveness of this communication to determine whether this campaign is addressing these high STD/HIV rates. If the campaign is not evaluated, there will be no evidence-based criteria which can be used to guide the future of the campaign. Additionally, future efforts to communicate with the public and providers about STD/HIV issues will be hampered by the lack of evidence of this campaign's effectiveness.

CDC, National Association of City and County Health Officials (NACCHO) and Knowledge Networks will disseminate the study results to the public through reports prepared for/by CDC, NACCHO and Knowledge Networks and through peer-reviewed journal articles and related presentations. All releases of information will be reviewed and approved by CDC and partner organizations involved with GYT.

This evaluation study will rely on a Web-based survey to be self-administered at home or at work on personal computers. Using the existing research panel as a population from which to draw a sample of participants has many advantages. First, because the panel is already recruited, consented, and familiar with the technology, there is no burden of recruitment and introduction to the survey method. This saves a great deal of burden on the public and on CDC, as we need not engage in random-digit dialing (RDD) or other sampling procedures to accrue participants, and we need not spend time explaining how to complete the survey. Second, Knowledge Networks has conducted the research to validate the sample and ensure its representativeness. This enhances the generalizability of the study, and thus the value of the results is greater than if we relied on a sample of phone-recruited volunteers. Third, Knowledge Networks has conducted surveys of sensitive and stigmatized topics in the past, including an in-depth and explicit sexual behavior survey. These surveys have been extremely successful. This allows us to proceed with confidence in the method, the contractor, and the survey design. The total annualized

response burden is estimated at 2000 hours for 4000 web-based surveys.

There are no costs to respondents other than their time.

ANNUALIZED BURDEN HOURS

| Respondents | Form name | Number of respondents | Number of responses per respondent | Average burden per response (hrs.) |
|---|---|---|---|---|
| Young adults | Web-based survey | 4000 | 1 | 30/60 |

Dated: December 13, 2012.

**Ron A. Otten,**

*Director, Office of Scientific Integrity (OSI), Office of the Associate Director for Science (OADS), Office of the Director, Centers for Disease Control and Prevention.*

[FR Doc. 2012–30563 Filed 12–18–12; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[60-Day–13–13EP]**

### Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–7570 or send comments to Ron Otten, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an email to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

**Proposed Project**

Million Hearts™ Hypertension Control Challenge—New—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

*Background and Brief Description*

Cardiovascular disease is a leading cause of death for men and women in the United States, among the most costly health problems facing our nation today, and among the most preventable. Heart disease and stroke also contribute significantly to disability. High blood pressure, also known as hypertension, is one of the leading causes of heart disease and stroke. Currently, about 67 million American adults have high blood pressure but fewer than half (46%) have adequately controlled blood pressure. The costs of hypertension and its associated diseases are estimated at $156 billion annually, including the cost of medical care and the cost of lost productivity.

In September 2011, CDC launched the Million Hearts™ initiative with the goal of preventing one million heart attacks and strokes by 2017. In order to achieve this goal, at least 10 million more Americans must have their blood pressure under control. Toward this end, Million Hearts™ is promoting clinical practices that are effective in increasing blood pressure control among patient populations. There is scientific evidence that provides general guidance on the types of system-based changes to clinical practice that can improve patient blood pressure control, but more information is needed to fully understand implementation practices so that they can be shared and promoted.

In May 2013, CDC proposes to launch the Million Hearts™ Hypertension Control Challenge to identify clinical practices and health systems that have been successful in achieving high rates of hypertension control and to develop models for dissemination. The most successful clinical practices or health plans will be recognized as Million Hearts™ Hypertension Control Champions and will receive a cash award of $5,000–$15,000. Recognition will be provided to two groups of practices: Those that represent fewer than 50,000 covered lives, and those that represent 50,000 or more covered lives. Providers eligible to apply for recognition include single practice providers, group practice providers, and healthcare systems. The Challenge is authorized by Public Law 111–358, the America Creating Opportunities to Meaningfully Promote Excellence in Technology, Education and Science Reauthorization Act of 2010 (COMPETES Act).

CDC requests OMB approval to collect the information needed to identify, qualify, and rank applicants for recognition through the Million Hearts™ Hypertension Control Challenge. Interested providers or clinical programs may voluntarily self-nominate their practice or healthcare system by completing a web-based nomination form located on the Challenge.gov web portal. The nomination process will include submission of the minimum amount of data needed to provide evidence of clinical success in achieving hypertension control, including: (a) Two point-in-time measures of the clinical hypertension control rate for the patient population, (b) the size of the clinic population served, and (c) a description of the sustainable systems adopted to achieve hypertension control rates. The estimated burden for completing the nomination form is 30 minutes.

CDC scientists or contractors will assign a preliminary score to each submitted nomination form. Those with the highest preliminary scores will be further reviewed by a CDC-sponsored panel of three to five experts in hypertension control. The panel will provide CDC with a ranked list of nominees recommended for recognition through the Million Hearts™ Hypertension Control Challenge.

Finalists will be asked to participate in a data verification process so that CDC can verify the information submitted on the nomination form. The estimated burden to the respondent is one hour, which includes time to review

the nomination form with a reviewer or abstractor in person or by phone, and to describe to the reviewer how information was obtained from electronic records, chart reviews, or other sources. Finalists may be eliminated based on the results of data verification.

Each remaining finalist, or Champion, will be asked to participate in a semi-structured interview. The interview will provide detailed information about the strategies employed by the practice or health system to achieve exemplary rates of hypertension control, including barriers and facilitators for those strategies. The interview will focus on systems and processes and should take no preparation time by the finalist. The estimated burden to the respondent is two hours, which includes time to review the interview protocol with the interviewer, respond to the interview questions, and review qualitative data.

OMB approval is requested for three years. On an annual basis, CDC estimates that information will be collected from 1,750 nominees using the nomination form, at most 30 data verification forms, and at most 30 semi-structured interviews that include review of qualitative data. The number of Champions recognized in the first year of the challenge may be less than 30. As the Challenge becomes known, the number of recognized Champions may increase to a maximum of 30.

The overall goal of the Million Hearts™ initiative is to improve the quality of care delivered to hypertensive patients. CDC will use the information collected through the Million Hearts™ Hypertension Control Challenge to increase widespread attention to hypertension at the clinical practice level, improve understanding of successful implementation strategies at the health system level, bring prestige to organizations that invest in hypertension control, and motivate individual practices to strengthen their hypertension control efforts. Although some providers and healthcare systems routinely provide data on hypertension control rates to entities such as quality improvement committees, these entities do not collect or disseminate information about the clinic processes used to achieve hypertension control. Information collected through the Million Hearts™ Hypertension Control Challenge will link success in clinical outcomes of hypertension control with information about procedures that can be used to achieve similar favorable outcomes. The Challenge will allow interested providers and health care systems to replicate successful the strategies.

Participation is voluntary and there are no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

| Type of respondent | Form name | Number of respondents | Number of responses per respondent | Avg. burden per response (in hr) | Total burden (in hr) |
|---|---|---|---|---|---|
| Physicians (Single or Group Practices). | Million Hearts™ Hypertension Control Champion Nomination form. | 1,750 | 1 | .5 | 875 |
| Finalists | Data Verification Form | 30 | 1 | 1 | 30 |
| Selected Champion | Semi-structured Interview | 30 | 1 | 2 | 60 |
| Total | | | | | 965 |

Dated: December 13, 2012.

**Ron A. Otten,**

*Director, Office of Scientific Integrity (OSI), Office of the Associate Director for Science (OADS), Office of the Director, Centers for Disease Control and Prevention.*

[FR Doc. 2012–30564 Filed 12–18–12; 8:45 am]

BILLING CODE 4163–18–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[Docket Number CDC–2012–0014; NIOSH–260]**

### Silver Nanoparticles (AgNPs); Information and Comment Request

**AGENCY:** National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

**ACTION:** Request for information and comment.

**SUMMARY:** The National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention (CDC), as part of its mission to investigate new and emerging hazards, has initiated an evaluation of the scientific data on silver nanoparticles (AgNPs) to ascertain the potential health risks to workers and to identify gaps in knowledge so that appropriate laboratory and field research studies can be conducted. NIOSH has identified a number of relevant publications on AgNPs. This listing (*Evaluation of the scientific data on silver nanoparticles (AgNPs*) can be found in Docket CDC–2012–0014 at *http://www.regulations.gov.*

NIOSH is requesting additional information on the following: (1) Published and unpublished reports and findings from *in vitro* and *in vivo* toxicity studies with AgNPs, (2) information on possible health effects observed in workers exposed to AgNPs, (3) information on workplaces and products in which AgNPs can be found, (4) description of work tasks and scenarios with a potential for exposure, (5) information on measurement methods and, workplace exposure data, and (6) information on control measures (e.g., engineering controls, work practices, PPE) that are being used in workplaces where potential exposures to AgNPs occur.

**DATES:** Electronic or written comments must be received on or before February 19, 2013.

**ADDRESSES:** You may submit comments, identified by CDC–2012–0014 and docket number NIOSH–260, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* NIOSH Docket Office, Robert A. Taft Laboratories, MS–C34, 4676 Columbia Parkway, Cincinnati, OH 45226.

All information received in response to this notice must include the agency name and docket number (CDC–2012–0014; NIOSH–260). All relevant comments received will be posted without change to *www.regulations.gov,* including any personal information provided. For access to the docket to read background documents or

comments received, go to *www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Ralph Zumwalde, NIOSH, MS–C14, Robert A. Taft Laboratories, 4676 Columbia Parkway, Cincinnati, Ohio 45226, telephone (513) 533–8320 or Eileen Kuempel, telephone (513) 533–8363.

## Background

Nanotechnology is generally defined as the intentional manipulation of matter to form novel structures with one or more dimension or features less than 100 nanometers (nm). Nanotechnology involves a wide range of chemistries and almost unlimited types of structures that have highly unpredictable interactions with biological systems. Producing materials at the nanoscale often results in specific physicochemical characteristics that may differ from those of the bulk substance. Because of these specific characteristics the use of substances in nano-form may pose certain health risks not observed from the use of the bulk form of the substance. Nano-silver is one type of nanomaterial that may have different physical-chemical characteristics than the bulk form of silver. The National Institute for Occupational Safety and Health (NIOSH) is interested in gathering data to determine whether a health risk to workers may exist from exposure to AgNPs and if specific risk management guidance is needed to prevent exposure.

Several recently reported short-term experimental animal studies with AgNPs [Kim et al. 2008, 2009; Sung et al. 2008, 2009; Song et al. 2012] have shown consistent physiological and toxicological responses including: (1) Uptake of AgNPs to the blood and their subsequent distribution to all major organs and tissues, (2) decrements in lung function and induction of inflammatory responses, and (3) histopathology changes in the kidney and especially in the liver, in which bile duct hyperplasia was identified as the principal toxicological effect. Evidence is available from the 90-day inhalation study in Sprague-Dawley rats that AgNPs can deposit in the lung and be transported via the blood to the liver [Sung et al. 2008, 2009]. Studies also indicate that AgNPs can be transported and deposited in major organs and tissues when administered via gavage to Sprague-Dawley and F344 rats for 28 and 90 days [Kim et al. 2008, 2010]. A common feature of the systemic toxicological effects of AgNPs, irrespective of the exposure route, was the onset of histopathological effects to the liver in exposed Sprague-Dawley and F344 rats [Sung et al. 2009; Kim et al. 2010]. High-dose animals in both studies developed bile duct hyperplasia along with some signs of hepatic necrosis. In the 90-day oral study, these effects were accompanied by changes in some clinical chemistry parameters indicative of perturbations in liver metabolism, for example, increases in serum cholesterol concentration and AP activity [Kim et al. 2010]. In the 90-day inhalation study of Sung et al. [2008, 2009] these systemic effects were accompanied by lung function deficits, the development of inflammation responses, and alveolar accumulation of macrophages [Sung et al. 2008]. In another 90-day inhalation study by the same group of researchers [Song et al. 2012], decreases in lung function and lung inflammation were observed in male rats that persisted in the high dose group at 12 weeks after cessation of exposure. In female rats, no decrease in lung function was observed, and the lung inflammation showed gradual recovery after cessation of exposure [Song et al. 2012].

Published reports on worker exposure to AgNPs are limited but indicate the potential airborne release of AgNPs during their production [Park et al. 2009; Lee et al. 2011a, b] or as an exposure resulting from the electro-refining of silver [Miller et al. 2010].

## Information Needs

Additional data and information are needed to assist NIOSH in evaluating the occupational safety and health concerns of working with AgNPs. Information is particularly needed for determining the relevance of bile duct hyperplasia and hepatocellular necrosis observed in AgNP exposed rats, as well as information on: (1) Sources of AgNP exposure, (2) factors that influence worker's exposure, (3) in-place exposure control measures (e.g., engineering controls) and work practices that are effective in reducing worker exposures, and (4) appropriate measurement methods and exposure metrics for characterizing workplace exposures.

NIOSH seeks to obtain materials, including published and unpublished reports and research findings, to evaluate the possible health risks of occupational exposure to AgNPs. Examples of requested information include the following:

(1) Identification of industries or occupations in which exposures to AgNPs may occur.

(2) Trends in the production and use of AgNPs.

(3) Description of work tasks and scenarios with a potential for exposure to AgNPs.

(4) Workplace exposure measurement data in various types of industries and jobs.

(5) Case reports or other health information demonstrating potential health effects in workers exposed to AgNPs.

(6) Research findings from *in vitro* and *in vivo* toxicity studies, including physical-chemical characterization of AgNPs.

(7) Information on control measures (e.g., engineering controls, work practices, PPE) being taken to minimize worker exposure to AgNPs.

(8) Information on measurement methods and exposure metrics that can be used to quantify worker exposure to AgNPs including information on the limitations of those methods in quantifying exposures?

## References

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Dated: December 12, 2012.

**John Howard,**

*Director, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention.*

[FR Doc. 2012–30515 Filed 12–18–12; 8:45 am]

BILLING CODE 4163–19–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Comment Request

*Title:* Mother and Infant Home Visiting Program Evaluation—Strong Start: Data collection.

*Description:* In September 2012, the Administration for Children and Families (ACF), the Centers for Medicare and Medicaid Services (CMS), and the Health Resources and Services Administration (HRSA) within the U.S. Department of Health and Human Services (HHS) launched an evaluation called the Mother and Infant Home Visiting Program Evaluation—Strong Start (MIHOPE—Strong Start). The study will evaluate the effectiveness of two evidence-based home visiting models—Healthy Families America and Nurse Family Partnership—at improving birth outcomes for women who are enrolled in Medicaid. The evaluation is part of the Strong Start for Mothers and Newborns initiative, which is informing the federal government about the effects of prenatal interventions that may provide better care, improved health, and reduced medical costs by improving birth outcomes.

Data collected for MIHOPE-Strong Start will include the following: (1) A 20-minute baseline family survey, (2) two-hour semi-structured interviews with state administrators of the Maternal, Infant, and Early Childhood Home Visiting program, (3) web-based surveys with program managers of local home visiting programs, and (4) web-based surveys with home visitors in those programs. In addition, the study will collect information on dosage and referrals from home visiting programs' management information systems, and will collect information on family outcomes from state and vital records systems.

These data will be combined with administrative data to estimate the effects of the home visiting programs on birth outcomes and infant health and health care in the first year, both overall and for groups of families and programs. Data on program implementation will provide information on how local programs operate and the dosage of home visiting services that families receive.

*Respondents:* The respondents will include 20,000 women who are no more than seven months pregnant when they enter the study, 8 state administrators, 68 program managers, and 782 home visitors. Data collection activities will take place over a three-year period. The annual burden on the public for these activities is estimated to be 2,435 hours over a three year period (approximately 21 minutes per person over three years).

Copies of the proposed instruments and brief project description may be obtained by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade SW., Washington, DC 20447, Attn: OPRE Reports Clearance Officer. All requests should be identified by the title of the information collection. Email address: *OPREinfocollection@acf.hhs.gov.*

The Department specifically requests comments on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

A comment is best assured of having its full effect if it is received within 30 days of this publication. Written comments and recommendations for the proposed information collection should be sent directly to Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade SW., Washington, DC 20447, Attn: OPRE Reports Clearance Officer.

**Steven M. Hanmer,**

*Reports Clearance Officer.*

[FR Doc. 2012–30367 Filed 12–18–12; 8:45 am]

BILLING CODE 4184–22–M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2012–N–0976]**

### Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Guidance: Emergency Use Authorization of Medical Products

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

**DATES:** Fax written comments on the collection of information by January 18, 2013.

**ADDRESSES:** To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, Fax: 202–395–7285, or emailed to *oira_submission@omb.eop.gov.* All comments should be identified with the OMB control number 0910–0595. Also include the FDA docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:** Ila S. Mizrachi, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–7726, *Ila.Mizrachi@fda.hhs.gov.*

**SUPPLEMENTARY INFORMATION:** In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

### Reporting and Recordkeeping for Emergency Use Authorization of Medical Products (OMB Control Number 0910–0595)—Extension

The guidance describes the Agency's general recommendations and procedures for issuance of emergency

use authorizations (EUA) under section 564 of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 360bbb–3), which was amended by the Project BioShield Act of 2004 (Pub. L. 108–276). The FD&C Act permits the Commissioner to authorize the use of unapproved medical products or unapproved uses of approved medical products during an emergency declared under section 564 of the FD&C Act. The data to support issuance of an EUA must demonstrate that, based on the totality of the scientific evidence available to the Commissioner, including data from adequate and well-controlled clinical trials (if available), it is reasonable to believe that the product may be effective in diagnosing, treating, or preventing a serious or life-threatening disease or condition (21 U.S.C. 360bbb–3(c)). Although the exact type and amount of data needed to support an EUA may vary depending on the nature of the declared emergency and the nature of the candidate product, FDA recommends that a request for consideration for an EUA include scientific evidence evaluating the product's safety and effectiveness, including the adverse event profile for diagnosis, treatment, or prevention of the serious or life-threatening disease or condition, as well as data and other information on safety, effectiveness, risks and benefits, and (to the extent available) alternatives.

Under section 564 of the FD&C Act, the FDA Commissioner may establish conditions on the authorization. Section 564(e) requires the FDA Commissioner (to the extent practicable given the circumstances of the emergency) to establish certain conditions on an authorization that the Commissioner finds necessary or appropriate to protect the public health and permits the Commissioner to establish other conditions that she finds necessary or appropriate to protect the public health. Conditions authorized by section 564(e) of the FD&C Act include, for example: Requirements for information dissemination to health care providers or authorized dispensers and product recipients; adverse event monitoring and reporting; data collection and analysis; recordkeeping and records access; restrictions on product advertising, distribution, and administration; and limitations on good manufacturing practices requirements. Some conditions, the statute specifies, are mandatory to the extent practicable for authorizations of unapproved products and discretionary for authorizations of unapproved uses of approved products. Moreover, some conditions may apply to manufacturers of an EUA product, while other conditions may apply to any person who carries out any activity for which the authorization is issued. Section 564 of the FD&C Act also gives the FDA Commissioner authority to establish other conditions on an authorization that she finds to be necessary or appropriate to protect the public health.

For purposes of estimating the annual burden of reporting (Table 1), FDA has established four categories of respondents as follows: (1) Those who file a request for FDA to issue an EUA or a substantive amendment to an EUA that has previously been issued, assuming that a requisite declaration under section 564 of the FD&C Act has been made and criteria for issuance have been met; (2) those who submit a request for FDA to review information/data (i.e., a pre-EUA package) for a candidate EUA product or a substantive amendment to an existing pre-EUA package for preparedness purposes; (3) manufacturers who carry out an activity related to an unapproved EUA product (e.g., administering product, disseminating information) who must report to FDA regarding such activity; and (4) public health authorities (e.g., State, local) who carry out an activity (e.g, administering product, disseminating information) related to an unapproved EUA product who must report to FDA regarding such activity.

In some cases, manufacturers directly submit EUA requests. Often a Federal Government entity (e.g., Center for Disease Control and Prevention, Department of Defense) requests that FDA issue an EUA and submits pre-EUA packages for FDA to review. In many of these cases, manufacturer respondents inform these requests and submissions, which are the activities that form the basis of the estimated reporting burdens. However, in some cases such as with antimicrobial products for which there are multiple generic manufacturers, the Federal Government is the sole respondent; manufacturers do not inform these requests or submissions. FDA estimates minimal burden when the Federal Government performs the relevant activities. In addition to variability based on whether there is an active manufacturer respondent, other factors also inject significant variability in estimates for annual reporting burdens. A second factor is the type of product. For example, FDA estimates greater burden for novel therapeutics than for certain unapproved uses of approved products. A third significant factor that injects variability is the type of submission. For example, FDA estimates greater burden for ''original'' EUA and pre-EUA submissions than for amendments to them, and FDA estimates minimal burden to issue an EUA when there is a previously reviewed pre-EUA package or investigational application. For purposes of estimating the reporting burden, FDA has calculated the anticipated burden on manufacturers based on the anticipated types of responses (i.e., estimated manufacturer input), types of product, and types of submission that comprise the described reporting activities.

For purposes of estimating the annual burden of recordkeeping, FDA has also calculated the anticipated burden on manufacturers and public health officials associated with administration of unapproved products authorized for emergency use, recognizing that the Federal Government will perform much of the recordkeeping related to administration of such products (*see* Table 2 of this document).

In the **Federal Register** of October 1, 2012 (77 FR 59926), FDA published a 60-day notice requesting public comment on the proposed collection of information. No comments were received.

No burden was attributed to reporting or recordkeeping for unapproved uses of approved products, since those products are already subject to approved collections of information (i.e., Adverse Experience Reporting for Biological Products is approved under 0910–0308 through November 30, 2014; Adverse Drug Experience Reporting is approved under 0910–0230 through August 31, 2015; Adverse Device Experience Reporting is approved under OMB control number 0910–0471 through May 31, 2014; Investigational New Drug (IND) Application Regulations are approved under 0910–0014 through April 30, 2015, and Investigational Device Exemption (IDE) Reporting is approved under OMB control number 0910–0078 through February 28, 2013. Any additional burden imposed by this proposed collection would be minimal.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

| Type of respondent | Number of respondents | Number of responses per respondent | Total annual responses | Average burden per response | Total hours |
|---|---|---|---|---|---|
| Requests to Issue an EUA or a Substantive Amendment to an Existing EUA | 9 | 1.33 | 12 | 33 | 396 |
| FDA Review of a Pre-EUA Package or an Amendment Thereto | 11 | 1.45 | 16 | 35 | 560 |
| Manufacturers of an Unapproved EUA Product | 5 | 1.6 | 8 | 2 | 16 |
| Public Health Authorities; Unapproved EUA Product | 30 | 3 | 90 | 2 | 180 |
| Total | | | | | 1,152 |

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

| Type of respondent | Number of recordkeepers | Number of records per recordkeeper | Total annual records | Average burden per recordkeeping | Total hours |
|---|---|---|---|---|---|
| Manufacturers of an Unapproved EUA Product | 5 | 1.6 | 8 | 25 | 200 |
| Public Health Authorities; Unapproved EUA Product | 30 | 3 | 90 | 3 | 270 |
| Total | | | | | 470 |

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: *December 13, 2012.*

**Leslie Kux,**

*Assistant Commissioner for Policy.*

[FR Doc. 2012–30513 Filed 12–18–12; 8:45 am]

**BILLING CODE 4160–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2012–N–1202]**

### Comprehensive Assessment of the Process for the Review of Device Submissions; Request for Comments

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice; request for comments.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the statement of work for an assessment of the process for the review of medical device submissions. The assessment is part of the FDA performance commitments relating to the Medical Device User Fee Amendments of 2012 (MDUFA III), which reauthorized device user fees for fiscal years 2013–2017. The assessment is described in section V, ''Independent Assessment of Review Process Management'', of the commitment letter entitled ''MDUFA Performance Goals and Procedures'' [1] (MDUFA III Commitment Letter). The assessment will be conducted by an independent contractor in two phases. FDA is providing a period of 30 days for public comment on the statement of work before requesting proposals for the assessment.

**DATES:** Submit electronic or written comments by February 4, 2013.

**ADDRESSES:** 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. All comments should be identified with the docket number found in brackets in the heading of this document. All comments received may be posted without change to *http://www.regulations.gov,* including any personal information provided. For additional information on submitting comments, see the ''Comments'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

**FOR FURTHER INFORMATION CONTACT:** Amber Sligar, Office of Planning, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, rm. 3291, Silver Spring, MD 20993–0002, 301–796–9384, *Amber.Sligar@fda.hhs.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Background

On July 9, 2012, President Obama signed into law the Food and Drug Administration Safety and Innovation Act (Pub. L. 112–144) (FDASIA).[2] Title II of FDASIA is MDUFA III, which gives FDA the authority to collect device user fees from industry for fiscal years (FYs) 2013 to 2017. MDUFA III took effect on October 1, 2012, and will sunset in 5 years on October 1, 2017.

Device user fees were first established by Congress in 2002. Medical device companies pay fees to FDA when they register their establishment and list their devices with the Agency, whenever they submit an application or a notification to market a new medical device in the United States, and for certain other types of submissions. Under MDUFA III, FDA is authorized to collect user fees that will total approximately $595 million (plus adjustments for inflation) over 5 years. With this additional funding, FDA will be able to hire more than 200 full-time-equivalent workers over the course of MDUFA III. In exchange, FDA has committed to meet certain performance goals outlined in the MDUFA III Commitment Letter.

### II. Assessment of FDA's Process for the Review of Device Submissions

Section V of the MDUFA III Commitment Letter states that FDA and the device industry will participate in a comprehensive assessment of the process for the review of device applications. The assessment will include consultation with both FDA and industry. The assessment will be conducted in two phases by a private, independent consulting firm, under

[1] *http://www.fda.gov/downloads/MedicalDevices/NewsEvents/WorkshopsConferences/UCM295454.pdf.*

[2] *http://www.gpo.gov/fdsys/pkg/PLAW-112publ144/pdf/PLAW-112publ144.pdf.*

contract with FDA, capable of performing the technical analysis, management assessment, and program evaluation tasks required to address the assessment as described in the MDUFA III Commitment Letter. For Phase 1, FDA will award the contract no later than the end of the second quarter of FY2013. Findings on high-priority recommendations (i.e., those likely to have a significant impact on review times) will be published within 6 months of award; final comprehensive findings and recommendations will be published within 1 year of contract award. FDA will publish an implementation plan within 6 months of receipt of each set of recommendations. For Phase 2 of the independent assessment, the contractor will evaluate the implementation of recommendations and publish a written assessment no later than February 1, 2016.

The assessment will address FDA's premarket review process using an assessment framework that draws from appropriate quality system standards, including, but not limited to, management responsibility, document controls and records management, and corrective and preventive action.

The assessment will include, but not be limited to, the following areas:

1. Identification of process improvements and best practices for conducting predictable, efficient, and consistent premarket reviews that meet regulatory review standards.

2. Analysis of elements of the review process (including the presubmission process, and investigational device exemption, premarket notification (510(k)), and premarket approval application reviews) that consume or save time to facilitate a more efficient process. This includes analysis of root causes for inefficiencies that may affect review performance and total time to decision. This will also include recommended actions to correct any failures to meet MDUFA goals. Analysis of the review process will include the impact of combination products, companion diagnostic products, and laboratory developed tests on the review process.

3. Assessment of FDA methods and controls for collecting and reporting information on premarket review process resource use and performance.

4. Assessment of effectiveness of FDA's Reviewer Training Program implementation.

5. Recommendations for ongoing periodic assessments and any additional, more detailed or focused assessments.

FDA will incorporate findings and recommendations, as appropriate, into its management of the premarket review program. FDA will analyze the recommendations for improvement opportunities identified in the assessment, develop and implement a corrective action plan, and assure its effectiveness. FDA also will incorporate the results of the assessment into a Good Review Management Practices (GRMP) guidance document. FDA's implementation of the GRMP guidance will include initial and ongoing training of FDA staff, and periodic audits of compliance with the guidance.

FDA is seeking public comment now on the proposed statement of work for the assessment, available at *http://www.fda.gov/downloads/MedicalDevices/DeviceRegulationandGuidance/Overview/MDUFAIII/UCM331516.pdf.*

## III. Comments

Interested persons may submit either written comments regarding the statement of work to the Division of Dockets Management (see **ADDRESSES**) or electronic comments to *http://www.regulations.gov*. 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, and will be posted to the docket at *http://www.regulations.gov.*

Dated: December 14, 2012.

**Leslie Kux,**

*Assistant Commissioner for Policy.*

[FR Doc. 2012–30511 Filed 12–18–12; 8:45 am]

**BILLING CODE 4160–01–P**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2012–D–1168]**

### Draft Guidance for Industry on Providing Submissions in Electronic Format—Summary Level Clinical Site Data for Center for Drug Evaluation and Research's Inspection Planning; Availability

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the availability of a draft guidance for industry entitled ''Providing Submissions in Electronic Format—Summary Level Clinical Site Data for CDER's Inspection Planning.'' The draft guidance is intended to assist applicants in the voluntary submission of a clinical dataset that describes and summarizes the characteristics and outcomes of clinical investigations at the level of the individual study site (summary level clinical site dataset). The summary level clinical site dataset is intended to facilitate use of a risk-based approach to timely identification of clinical investigator sites for onsite inspection by FDA during the review of marketing applications. This draft guidance describes a recommended electronic format for the summary level clinical site dataset to be submitted voluntarily in new drug applications (NDAs), biologics licensing applications (BLAs), and NDA and BLA supplemental applications submitted to FDA's Center for Drug Evaluation and Research (CDER).

**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 February 19, 2013.

**ADDRESSES:** Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 2201, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

Submit electronic comments on the draft guidance to *http://www.regulations.gov*. Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** Paul Okwesili, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 5353, Silver Spring, MD 20993–0002, 301–796–0173.

**SUPPLEMENTARY INFORMATION:**

## I. Background

FDA is announcing the availability of a draft guidance for industry entitled ''Providing Submissions in Electronic Format—Summary Level Clinical Site Data for CDER's Inspection Planning.'' FDA is responsible for making regulatory decisions about drugs and

biological products after reviewing clinical safety and efficacy data submitted in support of NDAs, BLAs, and NDA and BLA supplements submitted to CDER (BLAs submitted to and reviewed by CDER as described in the **Federal Register** of June 26, 2003 (68 FR 38067), available at *http://www.fda.gov/downloads/AboutFDA/CentersOffices/OfficeofMedicalProductsandTobacco/CBER/UCM186799.pdf*). CDER's Bioresearch Monitoring Program has specific responsibility for verifying the integrity of data submitted to FDA in support of new NDAs and BLAs and supplements, and for determining whether clinical trials are conducted in compliance with applicable FDA regulations and statutory requirements, including those intended to ensure the rights and welfare of human research subjects.

*A. Site Inspections*

As part of the application review process, FDA may conduct onsite inspections of clinical investigators, sponsors, contract research organizations, and institutional review boards. The study-related information in applications is critical to FDA's selection of clinical investigator sites for inspection. However, the current submission format for the data does not facilitate efficient site selection. Thus, CDER is requesting submission of a structured, summary-level clinical site dataset.

*B. Summary Level Clinical Site Dataset*

CDER recently initiated a pilot program evaluating a risk-based model for selecting clinical investigators for inspection. This model permits evaluation of an array of risk parameters across clinical investigator sites associated with marketing applications.

The summary level clinical site dataset:

- Contains data from all relevant studies used to support evaluation of the application, including studies supportive of various treatment indications; and
- Presents the characteristics and outcomes of the study at the site level.

The data requested in the summary level clinical site dataset comprise data elements currently collected under regulations in 21 CFR part 312 and maintained, tabulated, and submitted under regulations in 21 CFR part 314, specifically § 314.50(d)(5) *Clinical data section* and § 314.50(f) *Case report forms and tabulations* or in 21 CFR part 601, specifically § 601.2 *Applications for biologic licenses; procedures for filing*.

The electronic submission of a summary level clinical site dataset is intended to facilitate FDA's timely selection of clinical investigator sites for inspection to evaluate the integrity of the data submitted in the application or supplement.

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 this topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

## II. Comments

Interested persons may submit either written comments regarding this document to the Division of Dockets Management (see **ADDRESSES**) or electronic comments regarding to *http://www.regulations.gov*. 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, and will be posted to the docket at *http://www.regulations.gov*.

## III. Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995 (the PRA) (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information that they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** for each proposed collection of information before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing this notice of the proposed collection of information set forth in this document.

With respect to the collection of information associated with this draft guidance, FDA invites comments on the following topics: (1) Whether the proposed information collected is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimated burden of the proposed information collected, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of information collected on the respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

The draft guidance recommends an electronic format for a summary level clinical site dataset to be submitted voluntarily in NDAs, BLAs, and NDA and BLA supplemental applications submitted to CDER. The summary level clinical site dataset is intended to facilitate use of a risk-based approach to timely identification of clinical investigator sites for on-site inspection by FDA during the review of marketing applications.

The summary level dataset comprises information required in parts 312, 314, or 601, including case histories (§ 312.62(b)), information regarding foreign clinical studies not conducted under an investigational new drug application (IND) (§ 312.120), and the clinical data section (§ 314.50(d)(5)) and case report forms and tabulations (§ 314.50(f)), or in part 601 (§ 601.2 *Applications for biologic licenses; procedures for filing*) in an NDA, BLA, or supplement. The draft guidance recommends that the data be submitted electronically in a format that will facilitate site selection. The variables described in the format are elements currently used in other submissions; some of the variable names are new. The financial disclosure information is currently reported in Module 1 (region specific information) of the electronic common technical document, but is new as a variable in a dataset. In addition, identifying that a study has been conducted under an IND is new as a request in a dataset. Initial preparation of the summary level clinical site dataset and the development of new standard operating procedures (SOPs) would require additional time. Once SOPs have been established, generation of the dataset should not involve significant additional work. The applicant would likely perform additional quality assurance, which may add time to preparation and review of the submission.

Based on CDER's data on the number of applications, including supplements, that would be covered by the draft guidance, we estimate that each year approximately 75 applicants will voluntarily submit for 96 applications the summary level clinical site dataset in electronic format as recommended by

the draft guidance. We estimate that the submission of each summary level clinical site dataset will take approximately 26 hours to prepare.

Initial preparation of the summary level clinical site dataset would involve the development of new SOPs for the preparation of the summary level clinical site dataset. We estimate that 75 applicants would take approximately 12 hours to develop and subsequently 1 hour annually to maintain and update the SOP(s). The summary level clinical site dataset submitted with each application would likely involve additional quality assurance procedures, which would add approximately 1 hour for each submission.

This draft guidance also refers to previously approved collections of information found in FDA regulations. The collections of information in part 312 have been approved under OMB control number 0910–0014; the collections of information in part 314 have been approved under OMB control number 0910–0001.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED REPORTING BURDEN [1]

| Activity | Number of respondents (i.e. applicants) | Number of responses per respondent (i.e., applications) | Total responses | Hours per response | Total hours |
|---|---|---|---|---|---|
| Summary Level Clinical Site Dataset Submissions | 75 | 1.3 | 96 | 26 | 2,496 |
| Dataset Quality Assurance | 75 | 1.3 | 96 | 1 | 96 |
| Total | | | | | 2,592 |

[1] There are no capital costs or operating and maintenance costs associated with this information collection.

TABLE 2—ESTIMATED RECORDKEEPING BURDEN [1]

| Activity | Number of recordkeepers | Number of records per recordkeeper | Total records | Hours per recordkeeper | Total hours |
|---|---|---|---|---|---|
| Develop Initial SOP(s) | 75 | 1 | 75 | 12 | 900 |
| Maintain and Update SOP(s) | 75 | 1 | 75 | 1 | 75 |
| Total | | | | | 975 |

[1] There are no capital costs or operating and maintenance costs associated with this information collection.

## IV. Electronic Access

Persons with access to the Internet may obtain the document at either *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm* or *http://www.regulations.gov*.

Dated: December 13, 2012.

**Leslie Kux,**

*Assistant Commissioner for Policy.*

[FR Doc. 2012–30510 Filed 12–18–12; 8:45 am]

**BILLING CODE 4160–01–P**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2012–N–0548]**

### Drug Safety and Risk Management Advisory Committee; Notice of Meeting

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public. This meeting is being rescheduled due to the postponement of the October 29–30, 2012, Drug Safety and Risk Management Advisory Committee meeting due to unanticipated weather conditions caused by Hurricane Sandy.

*Name of Committee:* Drug Safety and Risk Management Advisory Committee.

*General Function of the Committee:* To provide advice and recommendations to the Agency on FDA's regulatory issues.

*Date and Time:* The meeting will be held on January 24, 2013, from 8 a.m. to 6 p.m., and January 25, 2013, from 8 a.m. to 5 p.m. This meeting is a reschedule of a postponed meeting announced in the **Federal Register** of June 8, 2012 (77 FR 34051–34052), originally scheduled for October 29–30, 2012.

**ADDRESSES:** FDA has opened a docket for public comment on this meeting. The docket number is FDA–2012–N–0548. The docket opened for public comment on June 8, 2012. The docket will close on February 1, 2013. Interested persons may submit either electronic or written comments regarding this meeting. 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. All comments received will be posted without change, including any personal information provided. 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. Comments received on or before January 9, 2013, will be provided to the committee before the meeting. Any comments received for the originally scheduled October 29 and 30, 2012, Drug Safety and Risk Management Advisory Committee meeting will be provided to the committee. It is not necessary to resubmit any comments previously submitted to the docket. If a comment originally submitted to the docket is resubmitted prior to January 9, 2013, both comments will be provided to the committee.

*Location:* FDA White Oak Campus, 10903 New Hampshire Ave., Building 31 Conference Center, the Great Room (rm. 1503), Silver Spring, MD, 20993–

0002. Information regarding special accommodations due to a disability, visitor parking, and transportation may be accessed at: *http://www.fda.gov/AdvisoryCommittees/default.htm;* under the heading ''Resources for You,'' click on ''Public Meetings at the FDA White Oak Campus.'' Please note that visitors to the White Oak Campus must enter through Building 1.

*Contact Person:* Kristina Toliver, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, rm. 2417, Silver Spring, MD 20993–0002, 301–796–9001, Fax: 301–847–8533, email: *DSaRM@fda.hhs.gov*, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area). A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's Web site at *http://www.fda.gov/AdvisoryCommittees/default.htm* and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before coming to the meeting.

*Agenda:* On January 24 and 25, 2013, the committee will discuss the public health benefits and risks, including the potential for abuse, of drugs containing hydrocodone either combined with other analgesics or as an antitussive. The Department of Health and Human Services received a request from the Drug Enforcement Administration for a scientific and medical evaluation and scheduling recommendation for these products in response to continued reports of misuse, abuse, and addiction related to these products. The committee will also discuss the impact of rescheduling these hydrocodone products from Schedule III to Schedule II.

Background materials for the originally scheduled October 29–30, 2012, Drug Safety and Risk Management Advisory Committee meeting are currently available at *http://www.fda.gov/AdvisoryCommittees/CommitteesMeetingMaterials/Drugs/DrugSafetyandRiskManagementAdvisoryCommittee/ucm307385.htm.* FDA intends to make background material available to the public no later than 2 business days before the January 24 and 25, 2013, Drug Safety and Risk Management Advisory Committee meeting at: *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee meeting link. If FDA is unable to post background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and background material will be posted on FDA's Web site after the meeting.

*Procedure:* Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. All electronic and written submissions submitted to the docket (see the **ADDRESSES** section of this document) on or before January 9, 2013, will be provided to the committee. Oral presentations from the public will be scheduled between approximately 8:15 a.m. and 10:15 a.m. on January 25, 2013. Those individuals interested in making formal oral presentations, including those who have previously requested time to speak at the originally scheduled October 29–30, 2012, Drug Safety and Risk Management Advisory Committee meeting, should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before January 3, 2013. Any individuals who requested time to speak at the originally scheduled October 29–30, 2012, Drug Safety and Risk Management Advisory Committee meeting, will need to follow the above instructions to request time to speak at the January 24–25, 2013, Drug Safety and Risk Management Advisory Committee meeting, as any previous requests to speak at the originally scheduled meeting do not convey to this new January 24–25, 2013, Drug Safety and Risk Management Advisory Committee meeting. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by January 4, 2013.

Persons attending FDA's advisory committee meetings are advised that the Agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Kristina Toliver at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/About AdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: *December 10, 2012.*

**Leslie Kux,**

*Assistant Commissioner for Policy.*

[FR Doc. 2012–30517 Filed 12–18–12; 8:45 am]

BILLING CODE 4160–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2012–N–1172]**

### Impact of Approved Drug Labeling on Chronic Opioid Therapy; Public Hearing; Request for Comments

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice of public hearing; request for comments.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing a public hearing to obtain information, particularly scientific evidence, such as study data or peer-reviewed analyses, on issues pertaining to the use of opioid drugs in the treatment of chronic pain.

**DATES:** The public hearing will be held on February 7 and 8, 2013, from 9 a.m. to 4 p.m. Submit electronic or written requests to make oral presentations and comments by January 18, 2013. Electronic or written comments will be accepted after the hearing until April 8, 2013.

**ADDRESSES:** The public hearing will be held at the Bethesda Marriott, 5151 Pooks Hill Rd., Bethesda, MD 20814, 301–897–9400, Fax 1–301–897–0192.

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. All comments should be identified with the docket number found in brackets in the heading of this document. Transcripts of the hearing will be available for review at the Division of

Dockets Management and on the Internet at *http://www.regulations.gov* within 30 days of the meeting.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth Giaquinto, Center for Drug Evaluation and Research, 10903 New Hampshire Ave., Silver Spring, MD 20903, 301–796–3416, FAX: 301–847–8752, *Elizabeth.Giaquinto@fda.hhs.gov;* or Mary Gross, Center for Drug Evaluation and Research, 10903 New Hampshire Ave., Silver Spring, MD 20903, 301–796–3519, FAX: 301–847–8752, *Mary.Gross@fda.hhs.gov*.

**SUPPLEMENTARY INFORMATION:**

## I. Background

Over the past several years, the role of opioid drugs in treating chronic pain has been an increasingly common subject of public discussion. FDA and other policymakers have been at the forefront of these debates, striving to find a balance between minimizing opioid drug abuse and misuse, while simultaneously enabling appropriate access to pain-relieving drugs. The July 9, 2012, approval of the Risk Evaluation Management Strategy for extended-release (ER) and long-acting (LA) opioid analgesics is a recent example of FDA's ongoing commitment to ensuring that the benefits of these types of opioid drugs continue to outweigh their risks.

While ER/LA opioid issues have been a particular focus of public health concern, discussions continue about the proper use of opioid drugs in general. Over the past several years, the Agency has received comments, petitions, and informal inquiries concerning the extent to which opioid drugs should be used in the treatment of pain. In particular, members of the public and the regulated community have debated the presence or absence of evidence showing the safety and efficacy of these drugs as pain relievers in the various populations for whom they are prescribed. Many have raised issues specific to particular opioids, such as those pertaining to drug product composition, specific abuse-deterrence properties, and biological action. Some have raised broader issues that impact the entire class of opioid drugs or a large subcategory thereof (e.g., ER/LA opioids), such as the propriety of controls on drug dosage and duration of administration or changes in indication and prescribing practices.

## II. Purpose and Scope of the Public Hearing

In light of the ongoing interest in issues related to opioid use, FDA has decided to hold a public hearing to obtain information—particularly scientific evidence, such as study data or peer-reviewed analyses—from expert members of the public on the following questions:

### *A. Diagnosis and Understanding of Patient Pain*

1. What methods do professionals use to accurately distinguish between different types of pain (e.g., cancer vs. non-cancer) and their respective etiologies?

2. What are the definitions of the terms ''mild,'' ''moderate,'' and ''severe'' when those terms are used to describe symptomatic conditions such as pain?

3. How do professionals accurately categorize a patient's pain as mild, moderate, or severe? For example, what tests or assessments do they use?

4. What methods should and do professionals use to accurately distinguish between short-term pain and chronic pain?

a. What are and should be the time periods that characterize short-term pain versus chronic pain?

b. What are and should be considered the clinical differences between short-term pain versus chronic pain?

c. What types of pain, if any, are presumed chronic versus presumed short term?

### *B. Understanding and Adhering to the Labels of Pain-Treating Products*

1. How are the words ''indicated for the treatment of moderate to severe pain'' interpreted and used by practitioners when deciding what types of treatments (including opioids) are appropriate for treating patients with pain?

2. If the indication for opioid drugs were restricted to the treatment of severe pain only, how would such a change impact:

a. Prescribing practices?

b. Patient access to pain medication and patient pain control?

c. Abuse and misuse of opioid medicines?

3. If the pain threshold described in the indication (e.g., moderate, moderate to severe, severe pain) differed based on the pain's etiology, how would such an approach impact:

a. Prescribing practices?

b. Patient access to pain medication and patient pain control?

c. Abuse and misuse of opioid medicines?

### *C. Limiting Opioid Prescription and Use*

1. Limits on exposure to opioid drugs.

a. What data, if any, exist that would support or oppose the establishment of a maximum daily dose for opioid drugs? FDA is interested in drug safety or efficacy data in particular.

b. What data, if any, exist that would support or oppose a difference in maximum daily dose for opioid drugs based on pain etiology (e.g., cancer vs. non-cancer pain)? FDA is interested in drug safety or efficacy data in particular.

c. What method(s), if any, should be used to establish a maximum daily dose of opioid drugs?

d. What effect(s), if any, would a maximum daily dose for opioid drugs have on the following:

i. Prescribing practices?

ii. Patient access to pain medication and patient pain control?

iii. Abuse and misuse of opioid medicines?

2. Limits on duration of use of opioid drugs.

a. What data, if any, exist that would support or oppose the establishment of a maximum duration of continuous treatment with opioid drugs? FDA is interested in drug safety or efficacy data in particular.

b. What data, if any, exist that would support or oppose a difference in maximum duration of continuous treatment with opioid drugs based on pain etiology (e.g., cancer vs. non-cancer pain)? FDA is interested in drug safety or efficacy data in particular.

c. What method(s), if any, should be used to establish a maximum duration of continuous treatment with opioid drugs?

d. What effect(s), if any, would a maximum duration of continuous treatment with opioid drugs have on the following:

i. Prescribing practices?

ii. Patient access to pain medication and patient pain control?

iii. Abuse and misuse of opioid medicines?

## III. Attendance at and/or Participation in the Public Hearing

If you wish to attend the hearing or make an oral presentation during the hearing, you must register by submitting either an electronic request (see the Web address listed at the end of this paragraph) or written request (see **FOR FURTHER INFORMATION CONTACT**) by close of business on January 18, 2013. You must provide your name, title, business affiliation (if applicable), address, and type of organization you represent (e.g., industry, consumer organization), and a brief summary of your presentation, if applicable (including the discussion topic(s) that will be addressed), to *https://www.surveymonkey.com/s/2R5QWZP* by January 18, 2013.

FDA will notify registered presenters of their scheduled presentation times. Persons registered to make an oral presentation should check in before the

hearing and are encouraged to arrive early to ensure the designated order of presentation times. We will try to accommodate all persons who wish to present; however, the duration of each speaker's testimony may be limited by time constraints. An agenda of the meeting and other background material will be made available 5 days before the meeting at *http://www.fda.gov/Drugs/NewsEvents/ucm326450.htm.*

Questions about the meeting may also be also submitted to *IssuesWithOpioids@fda.hhs.gov* prior to the February 7 and February 8, 2013, meeting dates.

The hearing is free and seating will be on a first-come, first-served basis. Early registration is recommended because seating is limited. FDA may limit the numbers of participants from individual organizations as well as total number of attendees based on space limitations. Registrants will receive confirmation once they have been accepted to attend the hearing. For those who cannot attend in person, information regarding viewing a live Web cast of the public hearing will be located at: *http://www.fda.gov/Drugs/NewsEvents/ucm326450.htm.*

If you need special accommodations due to a disability, contact Elizabeth Giaquinto or Mary Gross (see **FOR FURTHER INFORMATION CONTACT**).

## IV. Notice of Hearing Under 21 CFR Part 15

The Commissioner of Food and Drugs is announcing that the public hearing will be held in accordance with part 15 (21 CFR part 15). The hearing will be conducted by a presiding officer, who will be accompanied by FDA senior management from the Center for Drug Evaluation and Research.

Under § 15.30(f), the hearing is informal and the rules of evidence do not apply. No participant may interrupt the presentation of another participant. Only the presiding officer and panel members may question any person during or at the conclusion of each presentation. Public hearings under part 15 are subject to FDA's policy and procedures for electronic media coverage of FDA's public administrative proceedings (part 10 (21 CFR part 10), subpart C). Under § 10.205, representatives of the electronic media may be permitted, subject to certain limitations, to videotape, film, or otherwise record FDA's public administrative proceedings, including presentations by participants.

The hearing will be transcribed as stipulated in § 15.30(b). A transcript will be available for review at the Division of Dockets Management (see **ADDRESSES**) and on the Internet at *http://www.regulations.gov* within 30 days of the meeting. A transcript will also be available in either hard copy or on CD–ROM after submission of a Freedom of Information request. Submit written requests to the Division of Freedom of Information (ELEM–1029), Office of Management Programs, Food and Drug Administration, 12420 Parklawn Dr., Element Bldg., Rockville, MD 20857.

To the extent that the conditions for the hearing, as described in this notice, conflict with any provisions set out in part 15, this notice acts as a waiver of those provisions as specified in § 15.30(h).

## V. Request for Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) either electronic or written comments for consideration by April 8, 2013. Persons who wish to provide additional materials for consideration should file these materials with the Division of Dockets Management. You should annotate and organize your comments so that they identify the specific questions to which they refer. 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 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*.

Dated: *December 13, 2012.*

**Leslie Kux,**

*Assistant Commissioner for Policy.*

[FR Doc. 2012–30516 Filed 12–18–12; 8:45 am]

**BILLING CODE 4160–01–P**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute on Drug Abuse; 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 USC, as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable materials, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute on Drug Abuse Special Emphasis Panel; N43DA13–4417: Video Gaming Targeting Relapse Prevention in Youth with Substance Use Disorders.

*Date:* January 9, 2013.

*Time:* 9:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate contract proposals.

*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

*Contact Person:* Nadine Rogers, Ph.D., Scientific Review Officer, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, 6001 Executive Blvd., Room 4229, MSC 9550, Bethesda, MD 20892–9550, 301–402–2105, *rogersn2@nida.nih.gov.*

*Name of Committee:* National Institute on Drug Abuse Special Emphasis Panel; Profile Screening and Predictive Toxicology (8909).

*Date:* February 12, 2013.

*Time:* 10:00 a.m. to 2:00 p.m.

*Agenda:* To review and evaluate contract proposals.

*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

*Contact Person:* Lyle Furr, Contract Review Specialist, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 4227, MSC 9550, 6001 Executive Boulevard, Bethesda, MD 20892–9550, (301) 435–1439, *lf33c.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos.: 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: December 13, 2012.

**Michelle Trout,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2012–30453 Filed 12–18–12; 8:45 am]

**BILLING CODE 4140–01–P**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute on Drug Abuse Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable materials,

and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute on Drug Abuse Special Emphasis Panel; Collaborative Clinical Trials (Collaborative R01).

*Date:* January 10, 2013.

*Time:* 1:00 p.m. to 3:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

*Contact Person:* Jose F. Ruiz, Ph.D., Scientific Review Officer, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, Room 4228, MSC 9550, 6001 Executive Blvd., Bethesda, MD 20892–9550, (301) 451–3086, *ruizjf@nida.nih.gov.*

*Name of Committee:* National Institute on Drug Abuse Special Emphasis Panel; NIDA I/START Small Grant Review.

*Date:* February 13, 2013.

*Time:* 9:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Virtual Meeting).

*Contact Person:* Gerald L. McLaughlin, Ph.D., Scientific Review Officer, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, 6001 Executive Blvd., Room 4238, MSC 9550, Bethesda, MD 20892–9550, 301–402–6626, *gm145a@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos.: 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: December 13, 2012.

**Michelle Trout,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2012–30454 Filed 12–18–12; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Center for Advancing Translational 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 Center for Advancing Translational Sciences Advisory 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 belowin 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 Center for Advancing Translational Sciences Advisory Council.

*Date:* January 23, 2013.

*Open:* 8:30 a.m. to 2:45 p.m.

*Agenda:* Report from the Center Director.

*Place:* National Institutes of Health, Building 31, 31 Center Drive, Conference Room 6, Bethesda, MD 20892.

*Closed:* 3:00 p.m. to 4:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Building 31, 31 Center Drive, Conference Room 6, Bethesda, MD 20892.

*Contact Person:* Danilo A Tagle, Ph.D., Executive Secretary, National Center for Advancing Translational Sciences, Democracy Plaza, Room 992, Bethesda, MD 20892, 301–594–8064, *Danilo.Tagle@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.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Center's home page: *www.ncats.nih.gov,* where an agenda and any additional information for the meeting will be posted when available.

Dated: December 12, 2012.

**David Clary,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2012–30457 Filed 12–18–12; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Heart, Lung, and Blood Institute; Notice of 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 Heart, Lung, and Blood Advisory 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 Heart, Lung, and Blood Advisory Council.

*Date:* February 12, 2013.

*Open:* 8:00 a.m. to 12:00 p.m.

*Agenda:* To discuss program policies and issues.

*Place:* National Institutes of Health, Building 31, 31 Center Drive, Conference Room 10, Bethesda, MD 20892.

*Closed:* 1:00 p.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Building 31, 31 Center Drive, Conference Room 10, Bethesda, MD 20892.

*Contact Person:* Stephen C. Mockrin, Ph.D., Director, Division of Extramural Research Activities, National Heart, Lung, and Blood Institute, National Institutes of Health, 6701 Rockledge Drive, Room 7100, Bethesda, MD 20892, (301) 435–0260, *mockrins@nhlbi.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.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license,

or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *www.nhlbi.nih.gov/meetings/nhlbac/index.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: December 13, 2012.

**Michelle Trout,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2012–30456 Filed 12–18–12; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Arthritis and Musculoskeletal and Skin Diseases; 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 Arthritis and Musculoskeletal and Skin Diseases Advisory 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 Arthritis and Musculoskeletal and Skin Diseases Advisory Council.

*Date:* February 5, 2013.

*Open:* 8:30 a.m. to 12:00 p.m.

*Agenda:* To discuss administrative details relating to the Council's business and special reports.

*Place:* National Institutes of Health, Building 31, 31 Center Drive, Conference Room 6, Bethesda, MD 20892.

*Closed:* 1:00 p.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Building 31, 31 Center Drive, Conference Room 6, Bethesda, MD 20892.

*Contact Person:* Laura K Moen, Ph.D., Director, Division of Extramural Research Activities, NIAMS/NIH, 6701 Democracy Blvd., Ste 800, Bethesda, MD 20892, 301–451–6515, *moenl@mail.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.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

(Catalogue of Federal Domestic Assistance Program Nos. 93.846, Arthritis, Musculoskeletal and Skin Diseases Research, National Institutes of Health, HHS)

Dated: December 12, 2012.

**Carolyn A. Baum,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2012–30458 Filed 12–18–12; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Substance Abuse and Mental Health Services Administration

### Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a summary of information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

**Project: Site Visits With Grantees Integrating HIV Primary Care, Substance Abuse, and Behavioral Health Services—NEW**

The Substance Abuse and Mental Health Services Administration (SAMHSA) is requesting approval to conduct in-person Site Visit Interviews with Minority AIDS Initiative—Targeted Capacity Expansion (MAI–TCE) Grantees Integrating HIV Primary Care, Substance Abuse, and Behavioral Health Services. This is a new project request targeting the collection of programmatic level data (e.g., services provision, program administration, consumer involvement, evaluation planning, organizational capacity) through one-on-one and group interviews and site assessment surveys with grantee personnel.

The goals of the MAI–TCE project are to facilitate the development and expansion of culturally competent and effective integrated behavioral health and primary care, which include HIV services and medical treatment within 11 of the 12 Metropolitan Statistical Areas (MSAs) and Metropolitan Divisions (MDs) most heavily impacted by HIV/AIDS. The program also supports the integration of behavioral health services (i.e., prevention, treatment, and substance abuse) into the CDC's Enhanced Comprehensive HIV Prevention Plans (ECHPP). Interviews conducted with MAI–TCE grantees during site visits are an integral part of efforts to evaluate: (1) The effectiveness of program implementation across the grantee sites; (2) grantee efforts to integrate behavioral health, substance abuse and HIV care; (3) the variety of program models in use across the grantee sites; and, (4) grantee efforts to engage and successfully reach their target populations.

SAMHSA will conduct a total of two in-person site visits with each of the 11 MAI–TCE program grantees, with surveys being administered prior to each site visit.

SAMHSA will conduct interviews with grantee staff who will provide information on their program's integration of primary care and behavioral health services. While participating in the evaluation is a condition of the grantees' funding, participating in the interview and survey process is voluntary. Both instruments are designed to collect information about: specific program components; HIV testing integration challenges, successes, and lessons learned; HIV care and evidence-based behavioral health services for their specific populations of focus; and engaging consumers in the Behavioral Health and Primary Care Network Committee and other aspects of the project, including how cultural competence is operationalized.

Below is the table of the estimated total burden hours:

EXHIBIT 1—ESTIMATE OF REPORTING BURDEN: ONE SITE VISIT ROUND

| Data collection tool | Number of respondents | Responses per respondent | Total number of responses | Hour per response | Total burden hours |
|---|---|---|---|---|---|
| Interview Guide | 132 | 1 | 132 | 2.5 | 330 |
| Assessment Form | 55 | 1 | 55 | .3 | 18.3 |
| TOTAL | 132* | 2 | 187 | 2.8 | 348.3 |

NOTE*: The 55 respondents identified for the self-assessment are included in the 132 overall participants listed for the site visit protocol.

Written comments and recommendations concerning the proposed information collection should be sent by January 18, 2013 to the SAMHSA Desk Officer at the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB). To ensure timely receipt of comments, and to avoid potential delays in OMB's receipt and processing of mail sent through the U.S. Postal Service, commenters are encouraged to submit their comments to OMB via email to: *OIRA_Submission@omb.eop.gov*. Although commenters are encouraged to send their comments via email, commenters may also fax their comments to: 202–395–7285. Commenters may also mail them to: Office of Management and Budget, Office of Information and Regulatory Affairs, New Executive Office Building, Room 10102, Washington, DC 20503.

**Summer King,**

*Statistician.*

[FR Doc. 2012–30465 Filed 12–18–12; 8:45 am]

**BILLING CODE 4162–20–P**

## DEPARTMENT OF HOMELAND SECURITY

**[Docket No. DHS–2012–0072]**

### President's National Security Telecommunications Advisory Committee

**AGENCY:** National Protection and Programs Directorate, DHS.

**ACTION:** Committee Management; Notice of an Open Federal Advisory Committee Teleconference.

**SUMMARY:** The President's National Security Telecommunications Advisory Committee (NSTAC) will meet on Friday, January 11, 2013, via conference call. The meeting will be open to the public.

**DATES:** The NSTAC will meet on Friday, January 11, 2013, from 2:00 p.m. to 2:40 p.m. Please note that the meeting may close early if the committee has completed its business.

**ADDRESSES:** The meeting will be held via conference call. For access to the conference bridge, contact Ms. Sue Daage by email at *sue.daage@hq.dhs.gov* by 5:00 p.m. on Friday, January 4, 2013.

To facilitate public participation, we are inviting public comment on the issue to be considered by the committee as listed in the **SUPPLEMENTARY INFORMATION** section below. The document associated with the topic to be discussed during the conference will be available at *www.ncs.gov/nstac* for review by Monday, January 7, 2013. Written comments must be received by the NSTAC Alternate Designated Federal Officer no later than Friday, January 25, 2013, and may be submitted by any *one* of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting written comments.
- *Email: NSTAC@hq.dhs.gov.* Include the docket number in the subject line of the email message.
- *Fax:* (703) 235–4981.
- *Mail:* Alternate Designated Federal Officer, Stakeholder Engagement and Critical Infrastructure Resilience Division, National Protection and Programs Directorate, Department of Homeland Security, 245 Murray Lane, Mail Stop 3016B, Arlington, VA 20598–0615.

*Instructions:* All submissions received must include the words ''Department of Homeland Security'' and the docket number for this action. Comments received will be posted without alteration at *www.regulations.gov,* including any personal information provided.

*Docket:* For access to the docket, including all documents and comments received by the NSTAC, go to *www.regulations.gov.*

A public comment period will be held during the meeting on Friday, January 11, 2013, from 2:05 p.m. to 2:25 p.m. Speakers who wish to participate in the public comment period must register in advance no later than Friday, January 4, 2013, at 5:00 p.m. by emailing Sue Daage at *sue.daage@hq.dhs.gov.* Speakers are requested to limit their comments to three minutes and will speak in order of registration as time permits. Please note that the public comment period may end before the time indicated, following the last call for comments.

**FOR FURTHER INFORMATION CONTACT:** Michael A. Echols, NSTAC Alternate Designated Federal Officer, Department of Homeland Security, telephone (703) 235–4218.

**SUPPLEMENTARY INFORMATION:** Notice of this meeting is given under the *Federal Advisory Committee Act* (FACA), 5 U.S.C. App. (Pub. L. 92–463). The NSTAC advises the President on matters related to national security and emergency preparedness telecommunications policy.

*Agenda:* The NSTAC members will receive an update on progress made to date by the Secure Government Communications Scoping Subcommittee and will vote on the final scoping report. The Secure Government Communications Scoping Subcommittee is charged with examining how commercial-off-the-shelf technologies and private sector best practices can be used to secure unclassified communications between and among Federal civilian departments and agencies.

Dated: December 12, 2012.

**Allen F. Woodhouse,**

*Alternate Designated Federal Officer for the NSTAC.*

[FR Doc. 2012–30558 Filed 12–18–12; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF HOMELAND SECURITY

### U.S. Customs and Border Protection

### Accreditation and Approval of Intertek USA, Inc., as a Commercial Gauger and Laboratory

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** Notice of accreditation and approval of Intertek USA, Inc., as a commercial gauger and laboratory.

**SUMMARY:** Notice is hereby given that, pursuant to 19 CFR 151.12 and 19 CFR 151.13, Intertek USA, Inc., 101 20th Street South, Texas City, TX 77590, has been approved to gauge and accredited to test petroleum and petroleum products, organic chemicals and vegetable oils for customs purposes, in accordance with the provisions of 19 CFR 151.12 and 19 CFR 151.13. Anyone wishing to employ this entity to conduct laboratory analyses and gauger services should request and receive written assurances from the entity that it is accredited or approved by the U.S. Customs and Border Protection to conduct the specific test or gauger service requested. Alternatively, inquires regarding the specific test or gauger service this entity is accredited or approved to perform may be directed to the U.S. Customs and Border Protection by calling (202) 344–1060. The inquiry may also be sent to *cbp.labhq@dhs.gov.* Please reference the Web site listed below for a complete listing of CBP approved gaugers and accredited laboratories. *http://www.cbp.gov/linkhandler/cgov/trade/basic_trade/labs_scientific_svcs/commercial_gaugers/gaulist.ctt/gaulist.pdf.*

**DATES:** The accreditation and approval of Intertek USA, Inc., as commercial gauger and laboratory became effective on February 22, 2012. The next triennial inspection date will be scheduled for February 2015.

**FOR FURTHER INFORMATION CONTACT:** Dr. Mike McCormick, Laboratories and Scientific Services, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW., Suite 1500N, Washington, DC 20229, 202–344–1060.

Dated: December 12, 2012.

**Ira S. Reese,**

*Executive Director, Laboratories and Scientific Services.*

[FR Doc. 2012–30616 Filed 12–18–12; 8:45 am]

**BILLING CODE 9111–14–P**

## DEPARTMENT OF HOMELAND SECURITY

### U.S. Customs and Border Protection

### Accreditation and Approval of NMC Global Corporation, as a Commercial Gauger and Laboratory

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** Notice of accreditation and approval of NMC Global Corporation, as a commercial gauger and laboratory.

**SUMMARY:** Notice is hereby given that, pursuant to 19 CFR 151.12 and 19 CFR 151.13, NMC Global Corporation, 326 23rd St., Kenner, LA 70062, has been approved to gauge and accredited to test petroleum and petroleum products, organic chemicals and vegetable oils for customs purposes, in accordance with the provisions of 19 CFR 151.12 and 19 CFR 151.13. Anyone wishing to employ this entity to conduct laboratory analyses and gauger services should request and receive written assurances from the entity that it is accredited or approved by the U.S. Customs and Border Protection to conduct the specific test or gauger service requested. Alternatively, inquires regarding the specific test or gauger service this entity is accredited or approved to perform may be directed to the U.S. Customs and Border Protection by calling (202) 344–1060. The inquiry may also be sent to *cbp.labhq@dhs.gov.* Please reference the Web site listed below for a complete listing of CBP approved gaugers and accredited laboratories. *http://www.cbp.gov/linkhandler/cgov/trade/basic_trade/labs_scientific_svcs/commercial_gaugers/gaulist.ctt/gaulist.pdf.*

**DATES:** The accreditation and approval of NMC Global Corporation, as commercial gauger and laboratory became effective on September 21, 2011. The next triennial inspection date will be scheduled for September 2014.

**FOR FURTHER INFORMATION CONTACT:** Dr. Mike McCormick, Laboratories and Scientific Services, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW., Suite 1500N, Washington, DC 20229, 202–344–1060.

Dated: December 12, 2012.

**Ira S. Reese,**

*Executive Director, Laboratories and Scientific Services.*

[FR Doc. 2012–30613 Filed 12–18–12; 8:45 am]

**BILLING CODE 9111–14–P**

## DEPARTMENT OF HOMELAND SECURITY

### U.S. Customs and Border Protection

### Accreditation and Approval of Intertek USA, Inc., as a Commercial Gauger and Laboratory

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** Notice of accreditation and approval of Intertek USA, Inc., as a commercial gauger and laboratory.

**SUMMARY:** Notice is hereby given that, pursuant to 19 CFR 151.12 and 19 CFR 151.13, Intertek USA, Inc., 2632 Ruby Ave., Gonzales, LA 70737, has been approved to gauge and accredited to test petroleum and petroleum products, organic chemicals and vegetable oils for customs purposes, in accordance with the provisions of 19 CFR 151.12 and 19 CFR 151.13. Anyone wishing to employ this entity to conduct laboratory analyses and gauger services should request and receive written assurances from the entity that it is accredited or approved by the U.S. Customs and Border Protection to conduct the specific test or gauger service requested. Alternatively, inquires regarding the specific test or gauger service this entity is accredited or approved to perform may be directed to the U.S. Customs and Border Protection by calling (202) 344–1060. The inquiry may also be sent to *cbp.labhq@dhs.gov.* Please reference the Web site listed below for a complete listing of CBP approved gaugers and accredited laboratories. *http://www.cbp.gov/linkhandler/cgov/trade/basic_trade/labs_scientific_svcs/commercial_gaugers/gaulist.ctt/gaulist.pdf.*

**DATES:** The accreditation and approval of Intertek USA, Inc., as commercial gauger and laboratory became effective on August 23, 2011. The next triennial inspection date will be scheduled for August 2014.

**FOR FURTHER INFORMATION CONTACT:** Dr. Mike McCormick, Laboratories and Scientific Services, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW., Suite 1500N, Washington, DC 20229, 202–344–1060.

Dated: December 12, 2012.

**Ira S. Reese,**

*Executive Director, Laboratories and Scientific Services.*

[FR Doc. 2012–30619 Filed 12–18–12; 8:45 am]

**BILLING CODE 9111–14–P**

## DEPARTMENT OF HOMELAND SECURITY

### U.S. Customs and Border Protection

### Approval of Intertek USA, Inc., as a Commercial Gauger

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** Notice of approval of Intertek USA, Inc., as a commercial gauger.

**SUMMARY:** Notice is hereby given that, pursuant to 19 CFR 151.13, Intertek USA, Inc., 139 Castle Coakley, Suite #8, St. Croix, VI 00820, has been approved to gauge petroleum, petroleum products, organic chemicals and vegetable oils for

customs purposes, in accordance with the provisions of 19 CFR 151.13. Anyone wishing to employ this entity to conduct gauger services should request and receive written assurances from the entity that it is approved by the U.S. Customs and Border Protection to conduct the specific gauger service requested. Alternatively, inquires regarding the specific gauger service this entity is approved to perform may be directed to the U.S. Customs and Border Protection by calling (202) 344–1060. The inquiry may also be sent to *cbp.labhq@dhs.gov.* Please reference the Web site listed below for a complete listing of CBP approved gaugers and accredited laboratories. *http://www.cbp.gov/linkhandler/cgov/trade/basic_trade/labs_scientific_svcs/commercial_gaugers/gaulist.ctt/gaulist.pdf.*

**DATES:** The approval of Intertek USA, Inc., as commercial gauger became effective on September 13, 2011. The next triennial inspection date will be scheduled for September 2014.

**FOR FURTHER INFORMATION CONTACT:** Dr. Mike McCormick, Laboratories and Scientific Services, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW., Suite 1500N, Washington, DC 20229, 202–344–1060.

Dated: December 12, 2012.

**Ira S. Reese,**

*Executive Director, Laboratories and Scientific Services.*

[FR Doc. 2012–30611 Filed 12–18–12; 8:45 am]

**BILLING CODE 9111–14–P**

## DEPARTMENT OF HOMELAND SECURITY

### U.S. Customs and Border Protection

### Accreditation and Approval of NMC Global Corporation, as a Commercial Gauger and Laboratory

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** Notice of accreditation and approval of NMC Global Corporation, as a commercial gauger and laboratory.

**SUMMARY:** Notice is hereby given that, pursuant to 19 CFR 151.12 and 19 CFR 151.13, NMC Global Corporation, 1107 Center St., Pasadena, TX 77506, has been approved to gauge and accredited to test petroleum and petroleum products, organic chemicals and vegetable oils for customs purposes, in accordance with the provisions of 19 CFR 151.12 and 19 CFR 151.13. Anyone wishing to employ this entity to conduct laboratory analyses and gauger services should request and receive written assurances from the entity that it is accredited or approved by the U.S. Customs and Border Protection to conduct the specific test or gauger service requested. Alternatively, inquires regarding the specific test or gauger service this entity is accredited or approved to perform may be directed to the U.S. Customs and Border Protection by calling (202) 344–1060. The inquiry may also be sent to *cbp.labhq@dhs.gov*. Please reference the Web site listed below for a complete listing of CBP approved gaugers and accredited laboratories. *http://www.cbp.gov/linkhandler/cgov/trade/basic_trade/labs_scientific_svcs/commercial_gaugers/gaulist.ctt/gaulist.pdf*.

**DATES:** The accreditation and approval of NMC Global Corporation, as commercial gauger and laboratory became effective on July 01, 2011. The next triennial inspection date will be scheduled for July 2014.

**FOR FURTHER INFORMATION CONTACT:** Dr. Mike McCormick, Laboratories and Scientific Services, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW., Suite 1500N, Washington, DC 20229, 202–344–1060.

Dated: December 12, 2012.

**Ira S. Reese,**

*Executive Director, Laboratories and Scientific Services.*

[FR Doc. 2012–30623 Filed 12–18–12; 8:45 am]

**BILLING CODE 9111–14–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5608–N–05]**

### Notice of Proposed Information Collection: Survey and Collection of Information From HUD Healthy Housing Demonstration Grantees

**AGENCY:** Office of Healthy Homes and Lead Hazard Control (OHHLHC), HUD.

**ACTION:** Notice.

**SUMMARY:** The proposed information collection requirement concerning a survey of selected Healthy Homes Demonstration grantees funded by HUD will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

**DATES:** *Comments due date:* February 19, 2013.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Ashley L. Mack, Reports Liaison Officer, Office of Healthy Homes and Lead Hazard Control, Department of Housing and Urban Development, 451 7th Street SW., Room 8236, Washington, DC 20410.

**FOR FURTHER INFORMATION CONTACT:** Peter J. Ashley, Department of Housing and Urban Development, 451 7th Street SW., Room 8236, Washington, DC 20410, telephone number (202) 402–7595 (this is not a toll-free number) for copies of the proposed survey and other available documents. Hearing- or speech-challenged individuals may access this number through TTY by calling the toll-free Federal Relay Service at 800–877–8339.

**SUPPLEMENTARY INFORMATION:** The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. This Notice also lists the following information:

*Title of Proposal:* Evaluating Outcomes of HUD's Healthy Homes Demonstration Grants.

*OMB Control Number:* To be assigned.

*Need for the Information and Proposed Use:* The mission of HUD's Healthy Homes Program is ''To reduce health and safety hazards in housing in a comprehensive and cost effective manner, with a particular focus on protecting the health of children and other sensitive populations in low income households.'' (*Leading Our Nation to Healthier Homes: The Healthy Homes Strategic Plan,* U.S. Department of Housing and Urban Development Office of Healthy Homes and Lead Hazard Control, 2010, p. 7.) An evaluation and summarization of grants

awarded under the program was last completed in 2005 (''*An Evaluation of HUD's Healthy Homes Initiative: Current Findings and Outcomes,*'' Healthy Housing Solutions, March 5, 2007).

The objectives of the Healthy Homes Demonstration (HHD) grants that will be evaluated through the effort described in this notice include:

- Carrying out direct remediation where housing-related hazards may contribute to injury or illness, with a focus on children's health;
- Delivering education and outreach activities to protect children from housing-related hazards; and
- Building capacity to increase the probability that aspects of grant-supported Healthy Homes programs are sustained.

OHHLHC intends to administer an online questionnaire for up to 30 HHD grantees. This questionnaire will capture key project information to supplement information already available in reports and manuscripts from the approximately 54 HHD grants that were awarded from fiscal years 2005 to 2009, including any 2004 grant not included in the earlier evaluation, and any more recent grantee whose grant ends this fiscal year. OHHLHC is especially interested in determining whether any of the grantee's data sets (i.e., resulting from project evaluation) would be of value to OHHLHC for additional analyses. After a review of available reports and manuscripts, OHHLHC anticipates roughly half of these grantees (up to 30) will be asked to complete the online questionnaire. OHHLHC will target those grantees that have carried out the greatest number of interventions, collected the most detailed evaluation data on cost, health and housing impacts and outcomes, and can demonstrate significant capacity-building and sustainable approaches to guide policy development and guidance for future healthy homes efforts.

A questionnaire was developed for the 2005 evaluation that captured key information about recruitment/enrollment, assessment, interventions, skills training, and community education/outreach in HHI grantee projects. This questionnaire will be modified for this new data collection effort. The online questionnaire will be administered through a secure Web site.

*Agency Form Numbers:* None.

*Members of Affected Public:* HUD Office of Healthy Homes Demonstration grantees (i.e., not-for profit and for-profit firms located in the United States, state and local governments, federally recognized Indian Tribes, and colleges and universities). Participation is voluntary. The only cost to respondents is their time.

TOTAL BURDEN ESTIMATE

| Requirement | Number of respondents | Hours per respondent | Total hours | Cost per hour | Labor cost | Startup cost | O&M cost | Total cost |
|---|---|---|---|---|---|---|---|---|
| Complete questionnaire | 30 | 16 | 480 | $32.75 | $15,720 | $0 | $0 | $15,720 |
| Total | 30 | 16 | 480 | | 15,720 | 0 | 0 | 15,720 |

*Status of the Proposed Information Collection:* New request. OMB approval is requested for up to two years, with data collection beginning approximately July 2013.

**Authority:** The Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: December 12, 2012.

**Jon L. Gant,**

*Director, HUD Office of Healthy Homes and Lead Hazard Control.*

[FR Doc. 2012–30600 Filed 12–18–12; 8:45 am]

BILLING CODE 4210–67–P

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R6–ES–2012–N190; FF06E16000–123–FXES11130600000D2]**

### Endangered and Threatened Wildlife and Plants; Enhancement of Survival Permit Application; Draft Black-Footed Ferret Programmatic Safe Harbor Agreement and Environmental Assessment

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of availability; request for comments.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, have received an application from the Black-footed Ferret Recovery Implementation Coordinator for an enhancement of survival permit under the Endangered Species Act of 1973, as amended (ESA). The application includes a draft programmatic Safe Harbor Agreement (Agreement) to reintroduce the federally endangered black-footed ferret on properties of voluntary participants across the species' range to further recovery of this species. Pursuant to the ESA and the National Environmental Policy Act, we announce the availability of the draft Agreement and draft environmental assessment (EA) for review and comment by the public and Federal, Tribal, State, and local governments.

**DATES:** Written comments must be submitted by January 18, 2013.

**ADDRESSES:** Send written comments by U.S. mail to Kimberly Tamkun, U.S. Fish and Wildlife Service, National Black-footed Ferret Conservation Center, P.O. Box 190, Wellington, CO 80549–0190, or via email to *FerretSHA@fws.gov.* You also may send comments by facsimile to (970) 897–2732. The draft Agreement and EA are available on the Black-Footed Ferret Recovery Program Web site at *http://www.blackfootedferret.org/.* You also may review copies of these documents during regular business hours at the National Black-footed Ferret Conservation Center (Ferret Center), 19180 North East Frontage Road Carr, CO 80612–9719. If you do not have access to the Web site or cannot visit our office, you may request copies by telephone at (970) 897–2730 ext. 238 or by letter to the Ferret Center.

**FOR FURTHER INFORMATION CONTACT:** Pete Gober, Black-footed Ferret Recovery Coordinator, U.S. Fish and Wildlife Service, (970) 897–2730 ext. 224; *pete_gober@fws.gov.*

**SUPPLEMENTARY INFORMATION:** Under a Safe Harbor Agreement, participating landowners voluntarily undertake conservation activities on their property to benefit species listed under the ESA (16 U.S.C. 1531 *et seq.*). Enrolled landowners have the option to return their property to baseline conditions established at the time the Agreement was developed. If the Agreement meets all the permit issuance criteria, we issue an enhancement-of-survival permit under section 10(a)(1)(A) of the ESA. The permit authorizes incidental take of the covered species that may result from implementation of conservation actions,

specific land uses, and return to baseline under the Agreement. We also provide enrollees assurances that we will not impose further land, water, or resource-use restrictions or additional commitments of land, water, or finances beyond that agreed to in the Agreement. Application requirements and issuance criteria for enhancement-of-survival permits through Safe Harbor Agreements are found in 50 CFR 17.22 and 17.32.

We are providing this notice under section 10(c) of the ESA and National Environmental Policy Act (NEPA) regulations (40 CFR 1506.6; 43 CFR part 46). We are requesting comments on the proposed Agreement and issuance of enhancement-of-survival permit. We prepared a draft environmental assessment (EA) to comply with NEPA (42 U.S.C. 4321 *et seq.*), and will evaluate whether the proposed Agreement, issuance of permit, and other alternatives in the draft EA may cause significant impacts to the quality of the human environment. We also invite comments on the draft EA.

The historic range of the black-footed ferret (*Mustela nigripes*) overlaps with suitable habitat supporting black-tailed, white-tailed, and Gunnison's prairie-dog (their primary prey) in portions of the 12 States of Arizona, Colorado, Kansas, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Utah, and Wyoming, as well as Canada and Mexico. The black-footed ferret was twice considered extinct or nearly extinct before all known wild ferrets were captured for captive breeding in 1985. Today, due to reintroduction efforts, 20 populations exist throughout the species' range. However, the Service's 1988 Recovery Plan and 2009 Spotlight Species Action Plan for the ferret advise that more ferret populations be established to move toward recovery.

Therefore, we have developed the proposed Agreement to provide incentives for landowners to volunteer lands with adequate habitat for ferret reintroductions across the historic range of the species within the United States. Under the proposed Agreement, we would issue a permit to the Black-footed Ferret Recovery Implementation Coordinator, who would then enroll willing landowners under certificates of inclusion that would confer incidental take authorization and assurances to the enrollees. Consistent with the Safe Harbor policy (64 FR 32717) and section 7 of the ESA, we would also provide non-enrolled neighboring landowners with incidental take authorization through the section 7 biological opinion and assurances to those neighbors who sign a separate agreement.

To enroll in the Agreement, an eligible landowner would voluntarily work with the Coordinator to develop a site-specific reintroduction plan. Each reintroduction plan would identify a conservation zone on the enrollee's property, consisting of either (a) at least 1,500 acres of habitat occupied by black-tailed prairie dogs (*Cynomys ludovicianus*) or (b) 3,000 acres occupied by white-tailed prairie dogs (*Cynomys leucurus*) or Gunnison's prairie dogs (*Cynomys gunnisoni*). The conservation zone would be targeted for ferret reintroductions. Depending on the needs of the enrollee, a management zone surrounding the conservation zone might also be established. Because grazing is considered compatible with ferret habitat, enrollees may graze their cattle in the both zones throughout the life of the reintroduction plan. If necessary, efforts to control diseases, such as sylvatic plague, will be carried out in both zones. Prairie dog control may also occur within the management zone, as necessary, but not in the conservation zone. Where beneficial, State wildlife agencies, tribes, the U.S. Fish and Wildlife Service, Animal Plant Health Inspection Service—Wildlife Services, the Natural Resources Conservation Service, the U.S. Geological Survey, nongovernmental organizations, and other partners may be party to the reintroduction plan to assist implementation by the enrolled landowner. Each reintroduction plan would have a term of 10 to 40 years within the duration of the Agreement, which is proposed to be 50 years.

## Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: November 29, 2012.

**Michael Thabault,**

*Acting Regional Director—Ecological Services, Mountain-Prairie Region, Denver, Colorado.*

[FR Doc. 2012–30470 Filed 12–18–12; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[LLUTW01100–12200000–AL0000]**

## Notice of Closure, Target Shooting Public Safety Closure on the Lake Mountains in Utah County, UT

**AGENCY:** Bureau of Land Management, Department of the Interior.

**ACTION:** Notice of Closure.

**SUMMARY:** The Bureau of Land Management (BLM), pursuant to their regulations, has closed approximately 900 acres of public land on the Lake Mountains in Utah County, Utah, to recreational target shooting to protect public safety. This closure does not restrict other public activities or access to the Lake Mountains area.

**DATES:** This target shooting closure within the described area will remain in effect no longer than two years from December 19, 2012, or earlier if a land use planning decision is completed.

**FOR FURTHER INFORMATION CONTACT:** Kevin Oliver, District Manager, BLM West Desert District Office; 2370 South 2300 West, Salt Lake City, UT 84119; Phone: 801–977–4300; email: *blm_ut_sl_mail@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 individuals 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 individuals. You will receive a reply during normal hours.

**SUPPLEMENTARY INFORMATION:** This temporary closure affects public lands on the Lake Mountains, Utah County, Utah. The legal description of the affected public lands is:

**Salt Lake Meridian**

T. 7 S., R. 1 E.,
  Sec. 6, lot 1, NE¼SE¼;
  Sec. 7, lot 1.
T. 7 S., R. 1 W.,
  Sec. 13, lots 2, 11, 12, and portions of lots 3, 4, 9, and 10, and the SE¼SW¼ lying east of the 345 KV power line*;
  Sec. 24, lots 1–3, 10, 13, 17, 18, and portions of lots 11 and 12, and the NW¼ lying east of the 345 KV power line*;
  Sec. 26, NW¼NE¼, NW¼SW¼, and portions of the N½NW¼ lying east of the 345 KV power line.*

* BLM right-of-way UTU 0115794.

The area described contains approximately 900 acres more or less.

The Salt Lake Field Office hereby closes a portion of the Lake Mountains, Utah County, Utah to all target shooting

for public safety reasons. The area will be closed under the authority of 43CFR 8364.1—Closures and Restrictions and in conformance with IM 2010–028 Change 1. Due to unsafe conditions and danger to the public, it is imperative for the BLM to close the area immediately. The proposed target shooting closure would affect approximately 900 acres on the lower slopes of the southeast bench of the Lake Mountains. The closure would be in effect for two years or until an analysis of impacts is completed through the land use planning process. The Lake Mountains are a small mountain range located on the west side of Utah Lake. The range is only about 8 miles wide and 12 miles long. The city of Saratoga Springs borders the north side of the mountains and the city of Eagle Mountain is along the west side. State Highway 68 runs along the eastern bench of the Lake Mountains; it is a main arterial road and is used by residential, agricultural and recreational traffic. There are a number of communications sites on the top of the mountain as well as a major power line that runs along a lower elevation ridge. There are private residences along the lake shore. Utah Lake is a popular area for recreationists, boaters, and anglers. A lake access point known as the Knolls is one of the few public access points on the western side and is located just off Highway 68. The Lake Mountains are comprised of a mixed ownership pattern and includes lands managed by the BLM, Utah School and Institutional Trust Lands Administration and several private property owners.

The area is primarily used by residents of Utah and southern Salt Lake counties for target shooting. The Lake Mountains receive about 4,000 visitors each month and on weekends; as many as 400 people concentrate into five areas, including other dispersed locations. The slopes of the Lake Mountains provide a natural backstop ideal for target shooting; however, some shooters choose to target practice in the relatively flat terrain on the lower slopes. Given the topography of the area and the number of people who visit it, the area subject to this Order is not conducive to safe target shooting. Target shooting in the area has resulted in near-misses of homes, automobiles, and people. Recently, bullets shot from BLM-administered land traveled approximately 2,000 feet to neighboring private land and into a home, just missing the homeowner. In another case, school children were in the line of fire of target shooters.

This closure would be made under the authority of the regulations in 43 CFR 8364.1 (a), which states: ''To protect persons, property, and public lands and resources, the authorized officer may issue an order to close or restrict use of designated public lands.'' The closure would be for target shooting only and would not affect legal hunting. Any person who violates the above restriction may be tried before a United States Magistrate and fined no more than $1,000, imprisoned for no more than 12 months, or both. Such violations may also be subject to the enhanced fines provided for by 18 U.S.C. 3571.

**Authority:** 43 CFR 8364.1.

**Jenna Whitlock,**

*Associate State Director.*

[FR Doc. 2012–30571 Filed 12–18–12; 8:45 am]

BILLING CODE 4310–DQ–P

## DEPARTMENT OF THE INTERIOR

### Bureau of Ocean Energy Management

**[Docket No. BOEM–2012–0091]**

### Notice of Determination of No Competitive Interest, Offshore Maine

**AGENCY:** Bureau of Ocean Energy Management (BOEM), Interior.

**ACTION:** Notice of Determination of No Competitive Interest (DNCI) for Proposed Commercial Wind Lease Offshore Maine.

**SUMMARY:** This notice provides BOEM's determination that there is no competitive interest in the area requested by Statoil North America (Statoil NA) for a commercial wind lease as described in the Notice of *Potential Commercial Leasing for Wind Power on the Outer Continental Shelf (OCS) Offshore Maine, Request for Interest (RFI),* that BOEM published on August 10, 2012, (77 FR 47877). The RFI described Statoil NA's application for a commercial lease for a four-turbine wind energy project on the OCS off the coast of Maine, and provided an opportunity for the public to submit comments about the proposal.

**DATES:** Effective December 19, 2012.

**FOR FURTHER INFORMATION CONTACT:** Ms. Aditi Mirani, Project Coordinator, BOEM, Office of Renewable Energy Programs, 381 Elden Street, HM 1328, Herndon, Virginia 20170. (703) 787–1320.

**SUPPLEMENTARY INFORMATION:**

#### Authority

This DNCI is published pursuant to subsection 8(p)(3) of the OCS Lands Act, which was added by section 388 of the Energy Policy Act of 2005 (EPAct) (43 U.S.C. 1337(p)(3)), and the implementing regulations at 30 CFR part 585. Subsection 8(p)(3) of the OCS Lands Act requires that OCS renewable energy leases, easements, and rights-of-way be issued ''on a competitive basis unless the Secretary [of the Department of the Interior] determines after public notice of a proposed lease, easement, or right-of-way (ROW) that there is no competitive interest.'' The Secretary delegated the authority to make such determinations to BOEM.

#### Determination and Next Steps

This DNCI provides notice to the public that BOEM has determined there is no competitive interest in the proposed lease area, as no indications of competitive interest were submitted in response to the RFI.

In the RFI, BOEM also solicited public comment on site conditions and multiple uses within the proposed lease area that would be relevant to the proposed project or its impacts. In response to the RFI, BOEM received public comment submissions from eleven entities. BOEM will use the comments that it received to inform its subsequent decisions. After the publication of this DNCI, BOEM will proceed with the noncompetitive lease issuance process outlined at 30 CFR 585.231.

#### Map of the Area

A map of the area proposed for a commercial lease can be found at the following URL: *http://www.boem.gov/Renewable-Energy-Program/State-Activities/Maine.aspx.*

Dated: December 14, 2012.

**Tommy P. Beaudreau,**

*Director, Bureau of Ocean Energy Management.*

[FR Doc. 2012–30624 Filed 12–18–12; 8:45 am]

BILLING CODE 4310–MR–P

## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 337–TA–835]**

### Certain Food Containers, Cups, Plates, Cutlery, and Related Items and Packaging Thereof; Commission Determination Not To Review an Initial Determination Granting a Joint Motion To Terminate the Investigation as to Respondents on the Basis of a Settlement Agreement; Termination of Investigation

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined not to review the presiding administrative law judge's (''ALJ'') initial determination (''ID'') (Order No. 11) granting a joint motion to terminate the above-captioned investigation as to Respondents Trans World International (New York), Inc., Green Wave International, Inc., and John Calarese & Co. (collectively, the ''Green Wave Respondents'') on the basis of a settlement agreement.

**FOR FURTHER INFORMATION CONTACT:** Michael K. Haldenstein, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–3041. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov*. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

**SUPPLEMENTARY INFORMATION:** The Commission instituted this investigation on April 6, 2012, based on a complaint filed by Fabri-Kal Corporation of Kalamazoo, Michigan (''Fabri-Kal''). 77 FR 20846 (April 6, 2012). The complaint, as supplemented, alleged violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain food containers, cups, plates, cutlery, and related items and packaging thereof by reason of infringement of U.S. Trademark Registration No. 3,021,945. The complaint further alleged that an industry in the United States exists as required by subsection (a)(2) of section 337. The complainant requested that the Commission institute an investigation and, after the investigation, issue an exclusion order and cease and desist orders. The notice of investigation named the following companies as respondents: Green Wave International Inc., Brooklyn, NY; Trans World International (New York), Inc., Brooklyn, NY; John Calarese & Co., Inc., Medway, MA; and Eco Greenwares, Fremont, CA.

On October 25, 2012, Fabri-Kal and the Green Wave Respondents filed a joint motion to terminate the investigation as to the Green Wave Respondents on the basis of a settlement agreement. Commission staff filed a response in support of the motion on November 5, 2012.

On November 14, 2012, the ALJ issued the subject ID, granting the joint motion to terminate the Green Wave Respondents from the investigation. The ALJ found that the settlement agreement complies with the requirements of Commission Rule 210.21(b) (19 CFR 210.21(b)) and that terminating the Green Wave Respondents from the investigation would not be contrary to the public interest. None of the parties petitioned for review of the ID.

The Commission has determined not to review the ID and there are no remaining respondents. Accordingly, this investigation is terminated.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in section 210.42 of the Commission's Rules of Practice and Procedure (19 CFR 210.42).

Issued: December 14, 2012.

By order of the Commission.

**Lisa R. Barton,**

*Acting Secretary to the Commission.*

[FR Doc. 2012–30524 Filed 12–18–12; 8:45 am]

**BILLING CODE 7020–02–P**

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## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 337–TA–795]**

### Certain Video Analytics Software, Systems, Components Thereof, and Products Containing Same; Commission Determination Not To Review an Initial Determination Granting Joint Motion for Termination of the Investigation Based on a License Agreement; Termination of Investigation

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination (''ID'') (Order No. 39) of the presiding administrative law judge (''ALJ'') terminating the investigation based on a license agreement.

**FOR FURTHER INFORMATION CONTACT:** Michael Liberman, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–3115. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

**SUPPLEMENTARY INFORMATION:** The Commission instituted this investigation on August 1, 2011, based on a complaint filed by ObjectVideo, Inc. of Reston, Virginia (''ObjectVideo''). 76 FR 45859 (Aug. 1, 2011). The complaint, as amended, alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337), as amended, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain video analytics software, systems, components thereof, and products containing same by reason of infringement of certain claims of U.S. Patent Nos. 6,696,945; 6,970,083; 7,613,324; 7,424,175; 7,868,912; and 7,932,923. The notice of investigation names numerous parties as respondents. Subsequently, the investigation was terminated as to respondents Samsung Techwin Co., Ltd. and Samsung Opto-Electronics America, Inc. The remaining respondents are Bosch Security Systems, Inc.; Robert Bosch GmbH; Bosch Sicherheitssysteme GmbH; Bosch Security Systems B.V.; Bosch Sicherheitssysteme Engineering GmbH; Bosch Security Systems—Sistemas de Seguranca, S.A.; Bosch (Zhuhai) Security Systems, Co., Ltd.; and Extreme CCTV, Inc.

Complainant Object Video and respondents jointly moved to terminate this investigation based upon a license agreement and to suspend the procedural schedule. On November 14, 2012, the ALJ issued an ID (Order No. 39) granting the motion. The ALJ found that termination of the investigation is in the interest of public policy. No party petitioned for review of the ID, and the Commission has determined not to review it.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in sections 210.21 and 210.42(h) of the Commission's Rules of Practice and Procedure, 19 CFR 210.21, 210.42(h).

By order of the Commission.

Issued: December 13, 2012.

**Lisa R. Barton,**

*Acting Secretary to the Commission.*

[FR Doc. 2012–30488 Filed 12–18–12; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 337–TA–843]**

### Certain Electronic Devices Having a Retractable USB Connector; Termination of an Investigation

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined not to review the presiding administrative law judge's (''ALJ'') initial determination (''ID'') (Order No. 36) terminating the investigation as to the last remaining respondent, and thereby terminating the investigation.

**FOR FURTHER INFORMATION CONTACT:** Sidney A. Rosenzweig, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 708–2532. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

**SUPPLEMENTARY INFORMATION:** The Commission instituted this investigation on May 24, 2012, based on a complaint filed by Anu IP LLC of Longview, Texas (''Anu''), alleging a violation of section 337 by reason of the infringement of claims of U.S. Patent Nos. 6,979,210 and 7,090,515. 77 FR 31039–40 (Aug. 12, 2011). The notice of investigation named more than forty respondents. The investigation has since been terminated as to all but one respondent on the basis of withdrawal of the complaint, settlement agreement, or consent order.

On November 14, 2012, Anu moved for termination of the investigation as to respondent Option, Inc. (''Option''), formerly of Alpharetta, Georgia, on the basis of withdrawal of the complaint. Anu stated that Option has been dissolved and is no longer in existence. On November 28, 2012, the ALJ granted the motion as an ID. Order No. 36. The ALJ found termination to be in the public interest. *Id.* at 2. Because Option is the last remaining respondent, termination as to Option terminates the investigation.

No petitions for review of the ID were filed. The Commission has determined not to review the ID.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in sections 210.21 and 210.42 of the Commission's Rules of Practice and Procedure (19 CFR 210.21 and 210.42).

By order of the Commission.

Issued: December 14, 2012.

**Lisa R. Barton,**

*Acting Secretary to the Commission.*

[FR Doc. 2012–30534 Filed 12–18–12; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 337–TA–802]**

### Certain Light-Emitting Diodes and Products Containing Same; Commission Determination Not To Review an Initial Determination Granting a Joint Motion To Terminate the Investigation; Termination of Investigation

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined not to review an ID (Order No. 30) of the administrative law judge (''ALJ'') granting a joint motion to terminate the investigation. The investigation is hereby terminated.

**FOR FURTHER INFORMATION CONTACT:** James A. Worth, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–3065. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

**SUPPLEMENTARY INFORMATION:** This investigation was instituted on August 31, 2011, based on a complaint filed with the U.S. International Trade Commission on July 27, 2011, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of LG Electronics, Inc. of Korea and LG Innotek Co., Ltd. of Korea (collectively, ''LG''). 76 FR 54254 (August 31, 2011). The complaint alleged violations of section 337 in the sale for importation, importation, or sale after importation into the United States of certain light-emitting diodes and products containing same that infringe one or more claims of U.S. Patent Nos. 7,928,465; 7,956,364; 6,841,802; 7,649,210; 7,884,388; 7,821,024; 7,868,348; and 7,768,025. The notice of investigation named as respondents OSRAM GmbH of Munich, Germany; OSRAM Sylvania Inc. of Danvers, MA; and OSRAM Opto Semiconductors GmbH of Regensburg, Germany.

On October 27, 2011, the Commission issued notice of its determination not to review an ID granting a motion inter alia (a) to correct the name of OSRAM GmbH, which recently changed its name to OSRAM AG and (b) to add as respondents Hella KgaA Hueck & Co., Hella Electronics Corp., Hella Corporate Center USA, Hella, Inc., Automotive Lighting Reutlingen GmbH, Automotive Lighting LLC, Tecnologia de Iluminacion Automotriz S.A. de C.V., and OSRAM Opto Semiconductors Inc.

On November 2, 2012, LG and respondents OSRAM AG, OSRAM Sylvania Inc., OSRAM Opto Semiconductors GmbH, OSRAM Opto Semiconductors, Inc., Hella KGaA Hueck & Co., Hella Electronics Corp., Hella Corporate Center USA, Inc., Hella, Inc., Automotive Lighting Reutlingen GmbH, Automotive Lighting, LLC, and

Tecnologia de Iluminacion Automotriz S.A. de C.V. filed a joint motion to terminate the investigation in its entirety based upon a settlement agreement and to stay the investigation.

On November 13, 2012, the ALJ issued Order No. 30, granting the motion to terminate the investigation and denying as moot the motion to stay the investigation. The ALJ found that termination of the investigation in its entirety does not impose any undue burdens on the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers. No petitions for review were filed.

Only that part of the order granting the motion to terminate the investigation constitutes an ID. Having considered the ID and the relevant portions of the record, the Commission has determined not to review the subject ID.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of section 210.42(h) of the Commission's Rules of Practice and Procedure (19 CFR 210.42(h)).

Issued: December 13, 2012.

By order of the Commission.

**Lisa R. Barton,**

*Acting Secretary to the Commission.*

[FR Doc. 2012–30446 Filed 12–18–12; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 337–TA–785]**

### Certain Light-Emitting Diodes and Products Containing Same; Commission Determination Not To Review an Initial Determination Terminating the Investigation as to All Remaining Respondents; Termination of the Investigation

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination (''ID'') (Order No. 39) of the presiding administrative law judge (''ALJ'') terminating the above-captioned investigation as to all remaining respondents based on a settlement agreement. The remaining respondents included the following: LG Electronics, Inc. and LG Innotek Co., Ltd., both of Seoul, South Korea; LG Electronics U.S.A., Inc. of Englewood Cliffs, New Jersey; and LG Innotek U.S.A., Inc. of San Diego, California (collectively, ''LG'').

**FOR FURTHER INFORMATION CONTACT:** Clint Gerdine, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 708–2310. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

**SUPPLEMENTARY INFORMATION:** The Commission instituted this investigation on July 11, 2011, based on two complaints filed by OSRAM AG (''OSRAM'') of Munich, Germany. 76 FR 40746–47. The complaints allege violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain light-emitting diodes and products containing same by reason of infringement of certain claims of U.S. Patent Nos. 7,345,317 (''the '317 patent''); 7,126,162 (''the '162 patent''); 6,812,500; 7,078,732; 7,629,621; 6,459,130 (''the '130 patent''); 6,927,469 (''the '469 patent''); 7,199,454 (''the '454 patent''); and 7,427,806 (''the '806 patent''). The complaints further allege the existence of a domestic industry. The Commission's notice of investigation named Samsung Electronics Co., Ltd. of Gyeonggi-do, Korea; Samsung LED Co., Ltd. of Gyeonggi Province, Korea; Samsung Electronics America, Inc. of Ridgefield Park, New Jersey; Samsung LED America, Inc. of Atlanta, Georgia (collectively, ''Samsung''); and LG as respondents. No Commission investigative attorney is participating in the investigation.

On October 11, 2011, the Commission determined not to review the ALJ's ID (Order No. 8) granting OSRAM's motion to amend the complaint and notice of investigation to reflect a corporate name change from OSRAM GmbH to OSRAM AG, to correct the addresses of Samsung Electronics Co., Ltd. and Samsung LED Co., Ltd., and to make other typographical changes. On February 23, 2012, the Commission determined not to review the ALJ's ID (Order No. 20) terminating the investigation as to the '317 patent and claim 15 of the '162 patent. On June 27, 2012, the Commission determined not to review the ALJ's ID (Order No. 32) terminating the investigation as to the '130, '469, '454, and '806 patents. On September 24, 2012, the Commission determined not to review the ALJ's ID (Order Nos. 37 and 37A) terminating the investigation as to Samsung based on a settlement agreement.

On November 2, 2012, OSRAM and LG moved to terminate LG from the investigation based on a settlement agreement. No party opposed the motion.

The ALJ issued the subject ID (Order No. 39) on November 16, 2012, granting the joint motion for termination of the investigation as to LG. He found that the motion satisfies Commission rules 210.21(a)(2) and (b)(1). He further found, pursuant to Commission rule 210.50(b)(2), that termination of this investigation as to LG is in the public interest. No party petitioned for review of the ID.

The Commission has determined not to review the ID, and has terminated the investigation.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in sections 210.21 and 210.42(h) of the Commission's Rules of Practice and Procedure (19 CFR 210.21, 210.42(h)).

By order of the Commission.

Issued: December 13, 2012.

**Lisa R. Barton,**

*Acting Secretary to the Commission.*

[FR Doc. 2012–30444 Filed 12–18–12; 8:45 am]

**BILLING CODE 7020–02–P**

## DEPARTMENT OF JUSTICE

### Antitrust Division

### Notice Pursuant to The National Cooperative Research and Production Act of 1993—Connected Media Experience, Inc.

Notice is hereby given that, on November 23, 2012, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''),

Connected Media Experience, Inc. (''CMX'') filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Adam Sosinksy (individual member), Mohegan Lake, NY, has been added as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and CMX intends to file additional written notifications disclosing all changes in membership.

On March 12, 2010, CMX filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on April 16, 2010 (75 FR 20003).

The last notification was filed with the Department on September 4, 2012. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on September 24, 2012 (77 FR 58870).

**Patricia A. Brink,**

*Director of Civil Enforcement, Antitrust Division.*

[FR Doc. 2012–30620 Filed 12–18–12; 8:45 am]

BILLING CODE P

## DEPARTMENT OF JUSTICE

### Antitrust Division

### Notice Pursuant to the National Cooperative Research and Production Act of 1993—ODVA, Inc.

Notice is hereby given that, on November 23, 2012, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), ODVA, Inc. (''ODVA'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, YJS Co., Ltd., Bucheon City, Gyeonggi-Do, Republic of Korea; Texas Instruments, Incorporated, Dallas, TX; General Cable Industries, Inc., Highland Heights, KY; Kalkitech, Bangalore, India; Krohne Innovation GmbH, Duisburg, Germany; OFC Fitel, LLC, Norcross, GA; GE Intelligent Platforms, Inc., Charlottesville, VA; General Electric Company—Energy Division, Pittsburg, PA; eWON s.a., Nivelles, Belgium; Broadley-James Ltd., Bedford, United Kingdom; Primes GmbH, Pfungstadt, Germany; Altera Corporation, San Jose, CA; 3S-Smart Software Solutions GmbH, Kempten, Germany; Branson Ultrasonics Corporation, Danbury, CT; Beijing KLT Electric Co., Ltd., Beijing, People's Republic of China; Jacktek Systems Inc., Acheson, Alberta, Canada; and GE Multilin, Markham, Ontario, Canada, have been added as parties to this venture.

Also, West Instruments, Brighton, East Sussex, United Kingdom; Littelfuse, Chicago, IL; ICES, Cheonan-si, ChungNam-do, Republic of Korea; Cooper Interconnect, Maynooth, Ireland; TKSCT, Busan, Republic of Korea; Process Automation International Ltd., Hong Kong, Hong Kong-China; ABT Endüstri Enerji Sistemleri Sanayi Tic. Ltd. Sti., Izmir, Turkey; and Tappan Wire and Cable, Blauvelt, NY, have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and ODVA intends to file additional written notifications disclosing all changes in membership.

On June 21, 1995, ODVA filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on February 15, 1996 (61 FR 6039).

The last notification was filed with the Department on July 18, 2012. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on September 5, 2012 (77 FR 54612).

**Patricia A. Brink,**

*Director of Civil Enforcement, Antitrust Division.*

[FR Doc. 2012–30618 Filed 12–18–12; 8:45 am]

BILLING CODE P

## DEPARTMENT OF LABOR

### Office of the Secretary

### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Records of Preshift and Onshift Inspections of Slope and Shaft Areas of Slope and Shaft Sinking Operations at Coal Mines

**ACTION:** Notice.

**SUMMARY:** The Department of Labor (DOL) is submitting the Mine Safety and Health Administration (MSHA) sponsored information collection request (ICR) titled, ''Records of Preshift and Onshift Inspections of Slope and Shaft Areas of Slope and Shaft Sinking Operations at Coal Mines,'' to the Office of Management and Budget (OMB) for review and approval for continued use in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 et seq.).

**DATES:** Submit comments on or before January 18, 2013.

**ADDRESSES:** A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site, *http://www.reginfo.gov/public/do/PRAMain*, on the day following publication of this notice or by contacting Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–MSHA, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503, Fax: 202–395–6881 (this is not a toll-free number), email: *OIRA_submission@omb.eop.gov.*

**FOR FURTHER INFORMATION CONTACT:** Contact Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov.*

**Authority:** 44 U.S.C. 3507(a)(1)(D).

**SUPPLEMENTARY INFORMATION:** Pursuant to Regulations 30 CFR 77.1901, a coal mine operator must conduct inspections of slope and shaft areas for hazardous conditions, including tests for methane and oxygen deficiency, before and during each shift and before and after blasting. The regulatory requirement also makes it mandatory for the operator to maintain a record of the results of each inspection.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not

display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1219–0082. The current approval is scheduled to expire on January 31, 2013; however, it should be noted that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional information, see the related notice published in the **Federal Register** on September 19, 2012 (77 FR 58172).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1219–0082. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

*Agency:* DOL–MSHA.

*Title of Collection:* Records of Preshift and Onshift Inspections of Slope and Shaft Areas of Slope and Shaft Sinking Operations at Coal Mines.

*OMB Control Number:* 1219–0082.

*Affected Public:* Private Sector—businesses or other for-profits.

*Total Estimated Number of Respondents:* 27.

*Total Estimated Number of Responses:* 11,880.

*Total Estimated Annual Burden Hours:* 14,850.

*Total Estimated Annual Other Costs Burden:* $0.

Dated: December 13, 2012.

**Michel Smyth,**

*Departmental Clearance Officer.*

[FR Doc. 2012–30568 Filed 12–18–12; 8:45 am]

**BILLING CODE 4510–43–P**

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## DEPARTMENT OF LABOR

### Office of the Secretary

### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Pell Grants and the Payment of Unemployment Benefits to Individuals in Approved Training

**ACTION:** Notice.

**SUMMARY:** The Department of Labor (DOL) is submitting the Employment and Training Administration (ETA) sponsored information collection request (ICR) titled, ''Pell Grants and the Payment of Unemployment Benefits to Individuals in Approved Training,'' to the Office of Management and Budget (OMB) for review and approval for continued use in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 et seq.).

**DATES:** Submit comments on or before January 18, 2013.

**ADDRESSES:** A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site, *http://www.reginfo.gov/public/do/PRAMain,* on the day following publication of this notice or by contacting Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–ETA, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503, Fax: 202–395–6881 (this is not a toll-free number), email: *OIRA_submission@omb.eop.gov.*

**FOR FURTHER INFORMATION CONTACT:** Contact Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov.*

**Authority:** 44 U.S.C. 3507(a)(1)(D).

**SUPPLEMENTARY INFORMATION:** To enable more individuals to obtain job training while receiving unemployment benefits so they can develop their skills while the economy recovers, the ETA strongly encourages States to widen their definitions of the types of training and the conditions under which education or training are considered approved training for purposes of the State unemployment insurance law. The ETA also encourages States to notify unemployed individuals of their potential eligibility for Pell Grants and to assist individuals with applications.

Such a Federal request for notification by a State is an information collection subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1205–0473. The current approval is scheduled to expire on December 31, 2012; however, it should be noted that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional information, see the related notice published in the **Federal Register** on September 27, 2012 (77 FR 59420).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1205–0473. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or

other forms of information technology, e.g., permitting electronic submission of responses.

*Agency:* DOL–ETA.

*Title of Collection:* Pell Grants and the Payment of Unemployment Benefits to Individuals in Approved Training.

*OMB Control Number:* 1205–0473.

*Affected Public:* State, Local, and Tribal Governments.

*Total Estimated Number of Respondents:* 53.

*Total Estimated Number of Responses:* 53.

*Total Estimated Annual Burden Hours:* 265.

*Total Estimated Annual Other Costs Burden:* $0.

Dated: December 12, 2012.

**Michel Smyth,**

*Departmental Clearance Officer.*

[FR Doc. 2012–30569 Filed 12–18–12; 8:45 am]

**BILLING CODE 4510–FN–P**

## DEPARTMENT OF LABOR

### Office of the Secretary

### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Applications, Grants, and Administration of Short Time Compensation Provisions

**ACTION:** Notice.

**SUMMARY:** The Department of Labor (DOL) is submitting the Employment and Training Administration (ETA) sponsored information collection request (ICR) titled, ''Applications, Grants, and Administration of Short Time Compensation Provisions,'' to the Office of Management and Budget (OMB) for review and approval for continued use in accordance with the Paperwork Reduction Act (PRA) of 1995.

**DATES:** Submit comments on or before January 18, 2013.

**ADDRESSES:** A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site, *http://www.reginfo.gov/public/do/PRAMain,* on the day following publication of this notice or by contacting Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–ETA, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503, Fax: 202–395–6881 (this is not a toll-free number), email: *OIRA_submission@omb.eop.gov.*

**FOR FURTHER INFORMATION CONTACT:** Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov.*

**SUPPLEMENTARY INFORMATION:**

**Authority:** 44 U.S.C. 3507(a)(1)(D).

Middle Class Tax Relief and Job Creation Act of 2012, Subtitle D, Short-Time Compensation Program, also known as the Layoff Prevention Act of 2012, concerns States that currently participate in, or wish to initiate a new program in, a layoff aversion program known as short time compensation (STC) or worksharing. The law requires applications, new administrative processes, monitoring, and reporting of data between State Workforce Agencies (SWAs) and the ETA. The ETA has principal oversight responsibility for the Unemployment Insurance (UI) program that SWAs operate. The ETA has developed data collections for the proper oversight of State STC programs, because of the many changes to the funding and administration of the UI system introduced in the Layoff Prevention Act.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information if the collection of information does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1205–0499. The current approval is scheduled to expire on December 31, 2012; however, it should be noted that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional information, see the related notice published in the **Federal Register** on August 13, 2012 (77 FR 48175).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1205–0499. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

*Agency:* DOL–ETA.

*Title of Collection:* Applications, Grants, and Administration of Short Time Compensation Provisions.

*OMB Control Number:* 1205–0499.

*Affected Public:* State, Local, and Tribal Governments.

*Total Estimated Number of Respondents:* 52.

*Total Estimated Number of Responses:* 234.

*Total Estimated Annual Burden Hours:* 9,675.

*Total Estimated Annual Other Costs Burden:* $0.

Dated: December 3, 2012.

**Michel Smyth,**

*Departmental Clearance Officer.*

[FR Doc. 2012–30491 Filed 12–18–12; 8:45 am]

**BILLING CODE 4510–FW–P**

## DEPARTMENT OF LABOR

### Office of the Secretary

### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Pharmacy Billing Requirements

**ACTION:** Notice.

**SUMMARY:** The Department of Labor (DOL) is submitting the Office of Workers' Compensation Programs (OWCP) sponsored information collection request (ICR) titled, ''Pharmacy Billing Requirements,'' to

the Office of Management and Budget (OMB) for review and approval for continued use in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 et seq.).

**DATES:** Submit comments on or before January 18, 2013.

**ADDRESSES:** A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site, *http://www.reginfo.gov/public/do/PRAMain*, on the day following publication of this notice or by contacting Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–OWCP, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503, Fax: 202–395–6881 (this is not a toll-free number), email: *OIRA_submission@omb.eop.gov.*

**FOR FURTHER INFORMATION CONTACT:** Contact Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov.*

**Authority:** 44 U.S.C. 3507(a)(1)(D).

**SUPPLEMENTARY INFORMATION:** The OWCP is the agency responsible for administration of the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.,* the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.,* and the Energy Employees Occupational Illness Compensation Program Act of 2000, 42 U.S.C. 7384 *et seq.* All three of these statutes require the OWCP to pay for covered medical treatment provided to beneficiaries; this medical treatment can include medicinal drugs dispensed by pharmacies. In order to determine whether amounts billed for drugs are appropriate, the OWCP must receive the required data elements—including the name of the patient/beneficiary, the National Drug Code number of each drug prescribed, the quantity provided, the prescription number and the date the prescription was filled. The regulations implementing these statutes require the collection of information needed to enable the OWCP to determine whether bills for drugs submitted directly by pharmacies or as reimbursement requests submitted by claimants should be paid. *See* 20 CFR 10.801, 30.701, 725.701 and 725.705.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1240–0050. The current approval is scheduled to expire on December 31, 2012; however, it should be noted that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional information, see the related notice published in the **Federal Register** on September 17, 2012.

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1250–0040. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

*Agency:* DOL–OWCP.

*Title of Collection:* Pharmacy Billing Requirements.

*OMB Control Number:* 1240–0050.

*Affected Public:* Individuals or households and private sector—businesses or other for-profits and not-for-profit institutions.

*Total Estimated Number of Respondents:* 4128.

*Total Estimated Number of Responses:* 1,498,532.

*Total Estimated Annual Burden Hours:* 26,917.

*Total Estimated Annual Other Costs Burden:* $0.

Dated: December 12, 2012.

**Michel Smyth,**

*Departmental Clearance Officer.*

[FR Doc. 2012–30565 Filed 12–18–12; 8:45 am]

**BILLING CODE 4510–CR–P**

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## DEPARTMENT OF LABOR

### Office of the Secretary

### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Solicitation of Nominations for the Iqbal Masih Award for the Elimination of Child Labor

**ACTION:** Notice.

**SUMMARY:** The Department of Labor (DOL) is submitting the Bureau of International Labor Affairs (ILAB) sponsored information collection request (ICR) titled, ''Solicitation of Nominations for the Iqbal Masih Award for the Elimination of Child Labor,'' to the Office of Management and Budget (OMB) for review and approval for continued use in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 et seq.).

**DATES:** Submit comments on or before January 18, 2013.

**ADDRESSES:** A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site, *http://www.reginfo.gov/public/do/PRAMain,* on the day following publication of this notice or by contacting Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503, Fax: 202–395–6881 (this is not a toll-free number), email: *OIRA_submission@omb.eop.gov.*

**FOR FURTHER INFORMATION CONTACT:** Contact Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov.*

**Authority:** 44 U.S.C. 3507(a)(1)(D).

**SUPPLEMENTARY INFORMATION:** The DOL Iqbal Masih Award for the Elimination of Child Labor, presented by the Secretary of Labor, is intended to recognize exceptional efforts to reduce the worst forms of child labor. The Award was created in response to a Senate Committee mandate directing the Secretary of Labor to establish an annual non-monetary award recognizing extraordinary efforts by an individual, company, organization, or national government to reduce the worst forms of child labor. The DOL is proposing to extend this ICR to allow the public to nominate and provide critical information on proposed candidates for this award who have demonstrated extraordinary efforts to combat the worst forms of child labor.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1290–0007. The current approval is scheduled to expire on December 31, 2012; however, it should be noted that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional information, see the related notice published in the **Federal Register** on September 28, 2012 (77 FR 59668).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1290–0007. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

*Agency:* DOL.

*Title of Collection:* Solicitation of Nominations for the Iqbal Masih Award for the Elimination of Child Labor.

*OMB Control Number:* 1290–0007.

*Affected Public:* Private sector—businesses and other for-profits and not-for-profit institutions.

*Total Estimated Number of Respondents:* 50.

*Total Estimated Number of Responses:* 50.

*Total Estimated Annual Burden Hours:* 500.

*Total Estimated Annual Other Costs Burden:* $500.

Dated: December 12, 2012.

**Michel Smyth,**

*Departmental Clearance Officer.*

[FR Doc. 2012–30570 Filed 12–18–12; 8:45 am]

**BILLING CODE 4510–28–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

### Notice of Approval for South Carolina for Avoidance of 2012 Credit Reduction Under the Federal Unemployment Tax Act

**AGENCY:** Employment and Training Administration, Labor.

**ACTION:** Notice.

**SUMMARY:** Sections 3302(c)(2) and 3302(d)(3) of the Federal Unemployment Tax Act (FUTA) provide that employers in a state that has an outstanding balance of advances under Title XII of the Social Security Act at the beginning of January 1 of two or more consecutive years are subject to a reduction in credits otherwise available against the FUTA tax for a calendar year, if a balance of advances remains at the beginning of November 10 of that year. Because the account of South Carolina in the Unemployment Trust Fund had a balance of advances at the beginning of January 1 of 2009, 2010, 2011, and 2012, and still had a balance of advances at the beginning of November 10, 2012, South Carolina employers were potentially liable for a reduction in their FUTA offset credit for 2012.

Section 3302(g) of FUTA provides that a state may avoid credit reduction for a year by meeting certain criteria. South Carolina applied for avoidance of the 2012 credit reduction under this section. Pursuant to delegation of authority to me under Secretary's Order 06–2010, I have determined that South Carolina meets all of the criteria of section 3302(g) and thus qualifies for credit reduction avoidance. Therefore, South Carolina employers will have no reduction in FUTA offset credit for calendar year 2012.

Dated: Signed in Washington, DC, on this 7th day of December, 2012.

**Jane Oates,**

*Assistant Secretary for Employment and Training.*

[FR Doc. 2012–30518 Filed 12–18–12; 8:45 am]

**BILLING CODE 4510–FW–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

### Notice of a Virtual Meeting of the Advisory Committee on Apprenticeship (ACA)

**AGENCY:** Employment and Training Administration (ETA), Labor.

**ACTION:** Notice of a virtual meeting.

**SUMMARY:** Pursuant to Section 10 of the Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2 § 10), notice is hereby given to announce an open virtual meeting of the Advisory Committee on Apprenticeship (ACA) on January 17, 2013, which can be accessed from the Office of Apprenticeship's (OA) homepage: *http://www.doleta.gov/oa/*. The ACA is a discretionary committee established by the Secretary of Labor, in accordance with FACA, as amended in 5 U.S.C. App. 2, and its implementing regulations (41 CFR 101–6 and 102–3). All meetings of the ACA are open to the public. A virtual meeting of the ACA provides a cost savings to the government while still offering a venue that allows for public participation and transparency, as required by FACA.

**DATES:** The meeting will begin at approximately 1 p.m. Eastern Time on Thursday, January 17, 2013, and will adjourn at approximately 3 p.m.

**FOR FURTHER INFORMATION CONTACT:** The Designated Federal Official, Mr. John V. Ladd, Administrator, Office of Apprenticeship, Employment and

Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Room N–5311, Washington, DC 20210, Telephone: (202) 693–2796, (this is not a toll-free number).

**SUPPLEMENTARY INFORMATION:** This virtual meeting will take place via webinar and audio-video conferencing technology. Web and audio instructions to participate in this meeting will be prominently posted on the OA homepage: *http://www.doleta.gov/oa/.* Members of the public are encouraged to attend the meeting virtually. For members of the public wishing to attend in person, a listening room with limited seating will be made available upon request. The location for the listening room will be: U.S. Department of Labor, Frances Perkins Building, 200 Constitution Avenue NW., Washington, DC 20210.

The agenda may be updated should priority items come before the Committee between the time of this publication and the scheduled date of the ACA meeting.

All meeting updates will be posted to OA's homepage: *http://www.doleta.gov/oa/.* All meeting participants, whether attending virtually or in person, should submit a notice of intention to attend by Thursday, January 17, 2013, via email to Mr. John V. Ladd at *oa.administrator@dol.gov,* subject line ''Virtual ACA Meeting.'' The webinar will be limited to 200 participants, unless OA receives more than 200 submissions to attend. If individuals have special needs and/or disabilities that will require special accommodations, please contact Kenya Huckaby on (202) 693–3795 no later than Thursday, January 17, 2013.

Any member of the public who wishes to file written data or comments pertaining to the agenda may do so by sending the data or comments to Mr. John V. Ladd via email at *oa.administrator@dol.gov,* subject line 'Virtual ACA Meeting,'' or submitting to the Office of Apprenticeship, Employment and Training Administration, U.S. Department of Labor, Room N–5311, 200 Constitution Avenue NW., Washington, DC 20210. Such submissions will be included in the record for the meeting if received by Thursday, January 17, 2013.

### Purpose of the Meeting and Topics To Be Discussed

The primary purpose of the meeting is to provide the ACA with an opportunity to reconvene to discuss and finalize their recommendations to the Secretary of Labor, and to consider additional reports, white papers, and upcoming events. The meeting agenda will include the following:

☐ Final Recommendations and Report to the Secretary on 21st Century Registered Apprenticeship

☐ Finalize and Approve a White Paper on Supporting Partnerships with Sponsors of Registered Apprenticeship and Community Based Organizations (CBO)

☐ Update on Efforts to Improve Opportunities for Veterans

☐ Other Matters of Interest to the Apprenticeship Community

☐ Public Comment

Any member of the public who wishes to speak at the meeting should indicate the nature of the intended presentation and the amount of time needed by furnishing a written statement to the Designated Federal Official, Mr. John V. Ladd, by Thursday, January 17, 2013. The Chairperson will announce at the beginning of the meeting the extent to which time will permit the granting of such requests.

Signed at Washington, DC, this 6th day of December, 2012.

**Jane Oates,**

*Assistant Secretary for the Employment and Training Administration.*

[FR Doc. 2012–30529 Filed 12–18–12; 8:45 am]

**BILLING CODE 4510–FR–P**

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## DEPARTMENT OF LABOR

### Bureau of Labor Statistics

### Proposed Collection, Comment Request

**ACTION:** Notice.

**SUMMARY:** The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The Bureau of Labor Statistics (BLS) is soliciting comments concerning the proposed extension of the ''Multiple Worksite Report and the Report of Federal Employment and Wages.'' A copy of the proposed information collection request (ICR) can be obtained by contacting the individual listed below in the Addresses section of this notice.

**DATES:** Written comments must be submitted to the office listed in the Addresses section of this notice on or before February 19, 2013.

**ADDRESSES:** Send comments to Carol Rowan, BLS Clearance Officer, Division of Management Systems, Bureau of Labor Statistics, Room 4080, 2 Massachusetts Avenue NE., Washington, DC 20212. Written comments also may be transmitted by fax to 202–691–5111 (this is not a toll free number).

**FOR FURTHER INFORMATION CONTACT:** Carol Rowan, BLS Clearance Officer, 202–691–7628 (this is not a toll free number). (See Addresses section.)

**SUPPLEMENTARY INFORMATION:**

### I. Background

The Quarterly Census of Employment and Wages (QCEW) program is a Federal/State cooperative effort which compiles monthly employment data, quarterly wages data, and business identification information from employers subject to State Unemployment Insurance (UI) laws. These data are collected from State Quarterly Contribution Reports (QCRs) submitted to State Workforce Agencies (SWAs). The States send micro-level employment and wages data, supplemented with the names, addresses, and business identification information of these employers, to the BLS. The State data are used to create the BLS sampling frame, known as the longitudinal QCEW data. This file represents the best source of detailed industrial and geographical data on employers and is used as the sampling frame for most BLS surveys. The longitudinal QCEW data include the individual employers' employment and wages data along with associated business identification information that is maintained by each State to administer the UI program as well as the Unemployment Compensation for Federal Employees (UCFE) program.

The QCEW Report, produced for each calendar quarter, is a summary of these employer (micro-level) data by industry at the county level. Similar data for Federal Government employees covered by the UCFE program also are included in each State's report. These data are submitted by all 50 States, the District of Columbia, Puerto Rico, and the Virgin Islands to the BLS which then summarizes these micro-level data to produce totals for the States and the Nation. The QCEW Report provides a

virtual census of nonagricultural employees and their wages, with nearly 53 percent of the workers in agriculture covered as well.

For employers having only a single physical location or worksite in the State and, thus, operating under a single assigned industrial and geographical code, the data from the States' UI accounting files are sufficient for statistical purposes. However, such data are not sufficient for statistical purposes for those employers having multiple establishments or are engaged in different industrial activities within the State. In such cases, the employer's QCR reflects only statewide employment and wages and is not disaggregated by establishment or worksite. Although data at this level are sufficient for many purposes of the UI program, more detailed information is required to create a sampling frame and to meet the needs of several ongoing Federal/State statistical programs. The Multiple Worksite Report (MWR) is designed to supplement the QCR when more detailed information is needed.

Because of the data captured by the MWR, improved establishment business identification data elements have been incorporated into and maintained by the longitudinal QCEW database. The MWR collects a physical location address, secondary name (trade name, division, subsidiary, etc.), and reporting unit description (store number, plant name or number, etc.) for each worksite of multi-establishment employers.

Employers with more than one establishment reporting under the same UI account number within a State are requested to complete the MWR if the sum of the employment in all of their secondary establishments is 10 or greater. The primary worksite is defined as the establishment with the greatest number of employees. Upon receipt of the first MWR form, each employer is requested to supply business location identification information. Thereafter, this reported information is printed on the MWR form each quarter. The employer is requested to verify the accuracy of this business location identification information and to provide only the employment and wages for each worksite for that quarter. By using a standardized form, the reporting burden on many large employers, especially those engaged in multiple economic activities at various locations across numerous States, has been reduced.

The function of the Report of Federal Employment and Wages (RFEW) is to collect employment and wages data for Federal establishments covered under the UCFE program. The MWR and RFEW are essentially the same. The MWR/RFEW forms are designed to collect data for each establishment of a multi-establishment employer.

No other standardized report is available to collect current establishment-level monthly employment and wages data by SWAs for statistical purposes each quarter from the private sector or State and local governments. Also, no other standardized report currently is available to collect installation-level Federal monthly employment and wages data each quarter by SWAs for statistical purposes. Completion of the MWR is required by State law in 28 States and territories.

## II. Current Action

Office of Management and Budget clearance is being sought for an extension of the Multiple Worksite Report and the Report of Federal Employment and Wages.

The BLS has taken steps to help reduce employer reporting burden by developing a standardized format for employers to use to send these data to the States in an electronic medium. The BLS also established an Electronic Data Interchange (EDI) Collection Center to improve and expedite the MWR collection process. Employers who complete the MWR for multi-location businesses can now submit employment and wages information on any electronic medium directly to the data collection center, rather than separately to each State agency. The data collection center then distributes the appropriate data to the respective States. The BLS also has been working very closely with firms providing payroll and tax filing services for employers as well as the developers of payroll and tax filing software to include electronic reporting. In addition, the BLS has developed a Web-based system, MWRweb, to collect these data from small to medium-size businesses. All States are participating in MWRweb and BLS has seen much greater utilization of this reporting option.

## III. Desired Focus of Comments

The Bureau of Labor Statistics is particularly interested in comments that:

- 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.
- 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.

*Type of Review:* Extension of currently approved collection.

*Agency*: Bureau of Labor Statistics.

*Title:* Multiple Worksite Report (MWR) and the Report of Federal Employment and Wages (RFEW).

*OMB Number:* 1220–0134.

*Affected Public:* Business or other for-profit institutions, not-for-profit institutions, and the Federal Government.

*Frequency:* Quarterly.

| Form No. | Total respondents | Respondent | Total responses | Average time per response | Total burden (hours) |
|---|---|---|---|---|---|
| BLS 3020 (MWR) | 133,191 | Non-Federal | 532,764 | 22.2 minutes | 197,123 |
| BLS 3021 (RFEW) | 2,867 | Federal | 11,468 | 22.2 minutes | 4,243 |
| Totals | 136,058 | | 544,232 | | 201,366 |

*Total Burden Cost (capital/startup):* $0.

*Total Burden Cost (operating/maintenance):* $0.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they also will become a matter of public record.

Signed at Washington, DC, this 13th day of December 2012.

**Kimberley Hill,**

*Chief, Division of Management Systems, Bureau of Labor Statistics.*

[FR Doc. 2012–30523 Filed 12–18–12; 8:45 am]

**BILLING CODE 4510–24–P**

## MILLENNIUM CHALLENGE CORPORATION

**[MCC FR 12–12]**

### Notice of the December 19, 2012, Millennium Challenge Corporation Board of Directors Meeting; Sunshine Act Meeting

**AGENCY:** Millennium Challenge Corporation.

**TIME AND DATE:** 10:00 a.m. to 12:00 p.m., Wednesday, December 19, 2012.

**PLACE:** Department of State, 2201 C Street NW., Washington, DC 20520.

**FOR FURTHER INFORMATION CONTACT:** Information on the meeting may be obtained from Melvin F. Williams, Jr., Vice President, General Counsel and Corporate Secretary via email at *Corporatesecretary@mcc.gov* or by telephone at (202) 521–3600.

**STATUS:** Meeting will be closed to the public.

**MATTERS TO BE CONSIDERED:** The Board of Directors (the ''Board'') of the Millennium Challenge Corporation (''MCC'') will hold a meeting to discuss the 2013 Selection Process. The agenda items are expected to involve the consideration of classified information and the meeting will be closed to the public.

Dated: December 17, 2012.

**Melvin F. Williams, Jr.,**

*VP/General Counsel and Corporate Secretary, Millennium Challenge Corporation.*

[FR Doc. 2012–30705 Filed 12–17–12; 4:15 pm]

**BILLING CODE 9211–03–P**

## NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

### Meetings of Humanities Panel

**AGENCY:** National Endowment for the Humanities.

**ACTION:** Notice of meetings.

**SUMMARY:** Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App.), notice is hereby given that 4 meetings of the Humanities Panel will be held during January, 2013 as follows. The purpose of the meetings is for panel review, discussion, evaluation, and recommendation of applications for financial assistance under the National Foundation on the Arts and Humanities Act of 1965 (20 U.S.C. 951–960, as amended).

**DATES:** See **SUPPLEMENTARY INFORMATION** section for meeting dates.

**ADDRESSES:** The meetings will be held at the Library of Congress, Thomas Jefferson Building, 10 First St. SE., African & Middle Eastern Reading Room (LJ–220), Washington, DC 20540, or as otherwise indicated.

**FOR FURTHER INFORMATION CONTACT:** Lisette Voyatzis, Committee Management Officer, 1100 Pennsylvania Ave. NW., Room, 529, Washington, DC 20506, or call (202) 606–8322. Hearing-impaired individuals are advised that information on this matter may be obtained by contacting the National Endowment for the Humanities' TDD terminal at (202) 606–8282.

**SUPPLEMENTARY INFORMATION:**

#### Meetings

1. *Date:* January 17, 2013.

*Time:* 8:30 a.m. to 5:00 p.m.

*Location:* WissenschaftsForum Berlin, Markgrafenstraße 37, 10117 Berlin, Germany.

This meeting will discuss applications for the NEH/DFG

Bilateral Digital Humanities Program, submitted to the Office of Digital Humanities.

2. *Date:* January 25, 2013.

*Time:* 8:30 a.m. to 5:00 p.m.

This meeting will discuss applications for Kluge Fellowships, submitted to the Division of Research Programs.

3. *Date:* January 29, 2013.

*Time:* 8:30 a.m. to 5:00 p.m.

This meeting will discuss applications for the Kluge Fellowships, submitted to the Division of Research Programs.

4. *Date:* January 31, 2013.

*Time:* 8:30 a.m. to 5:00 p.m.

This meeting will discuss applications for Kluge Fellowships, submitted to the Division of Research Programs.

Because these meetings will include review of personal and/or proprietary financial and commercial information given in confidence to the agency by grant applicants, the meetings will be closed to the public pursuant to sections 552b(c)(4) and 552b(c)(6) of Title 5 U.S.C., as amended. I have made this determination pursuant to the authority granted me by the Chairman's Delegation of Authority to Close Advisory Committee Meetings dated July 19, 1993.

Dated: December 13, 2012.

**Lisette Voyatzis,**

*Committee Management Officer.*

[FR Doc. 2012–30521 Filed 12–18–12; 8:45 am]

**BILLING CODE 7536–01–P**

## NUCLEAR REGULATORY COMMISSION

**[NRC–2012–0299]**

### Standard Format and Content for Post-Shutdown Decommissioning Activities Report

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Draft regulatory guide; request for comment.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is issuing for public comment draft regulatory guide (DG), DG–1272, ''Standard Format and Content for Post-shutdown Decommissioning Activities Report.'' This guide describes a method that the NRC staff considers acceptable for use in complying with the Commission's requirements regarding the submission of a post-shutdown decommissioning activities report (PSDAR).

**DATES:** Submit comments by February 19, 2013. 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 are publically available, by searching on *http://www.regulations.gov* under Docket ID NRC–2012–0299. 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–2012–0299. 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:** Edward O'Donnell, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–251–7455 or email: *edward.odonnell@nrc.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. Accessing Information and Submitting Comments

### *A. Accessing Information*

Please refer to Docket ID NRC–2012–0299 when contacting the NRC about the availability of information regarding this document. You may access information related to this document by any of the following methods:

• *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0299.

• *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 No. ML111870024. The regulatory analysis may be found under ADAMS Accession No. ML112020240.

Regulatory guides are not copyrighted, and NRC approval is not required to reproduce them.

• *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–2012–0299 in the subject line of your comment submission, in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

The NRC cautions you not to include identifying or contact information that that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *http://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment submissions into ADAMS.

## II. Further Information

The NRC is issuing for public comment a draft guide in the NRC's ''Regulatory Guide'' series. This series was developed to describe and make available to the public such information as methods that are acceptable to the NRC staff for implementing specific parts of the NRC's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

DG–1271 is proposed revision 1 of Regulatory Guide (RG) 1.185, ''Standard Format and Content for Post-shutdown Decommissioning Activities Report,'' which was issued in July 2000. DG–1271 would update RG 1.185 to reflect lessons learned since its original issuance. This regulatory guide identifies the type of information that the PSDAR must contain and establishes a standard format for the PSDAR that the NRC staff considers acceptable. The PSDAR is required of nuclear power plant licensees before or within two years of permanent cessation of operations. The report must include a description of the licensee's planned decommissioning activities, a schedule for the accomplishment of significant milestones, an estimate of expected costs, and a discussion of the licensee's evaluation of the environmental impacts associated with site-specific decommissioning activities.

## III. Backfitting and Issue Finality

As discussed in the ''Implementation'' section of this regulatory guide, the NRC has no current intention to impose this regulatory guide on holders of current operating licenses or combined licenses. Accordingly, the issuance of this regulatory guide would not constitute ''backfitting'' as defined in 10 CFR 50.109(a)(1) of the Backfit Rule or be otherwise inconsistent with the applicable issue finality provisions in 10 CFR part 52.

Dated at Rockville, Maryland, this 12th day of December, 2012.

For the Nuclear Regulatory Commission.

**Thomas H. Boyce,**

*Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.*

[FR Doc. 2012–30610 Filed 12–18–12; 8:45 am]

**BILLING CODE 7590–01–P**

# POSTAL REGULATORY COMMISSION

## Notice of Sunshine Act Meetings

**TIME AND DATE:** Wednesday, January 9, 2013, at 11 a.m.

**PLACE:** Commission Hearing Room, 901 New York Avenue NW., Suite 200, Washington, DC 20268–0001.

**STATUS:** Part of this meeting will be open to the public. The rest of the meeting will be closed to the public. The open session will be audiocast. The audiocast may be accessed via the Commission's Web site at *http://www.prc.gov.* A period for public comment will be offered following consideration of the last numbered item in the open session.

**MATTERS TO BE CONSIDERED:** The agenda for the Commission's January 9, 2013 meeting includes the items identified below.

**PORTIONS OPEN TO THE PUBLIC:** 1. Report on legislative activities.

2. Report on communications with the public.

3. Report from the Office of General Counsel on the status of Commission dockets.

4. Report from the Office of Accountability and Compliance.

5. Report from the Office of the Secretary and Administration.

6. Presentation from Allen Kane, director of the Smithsonian Institution's National Postal Museum, on the activities of the museum and the establishment of the William H. Gross Stamp Gallery.

Chairman's Public Comment Period (Opportunity for brief comments or questions from the public.)

**PORTION CLOSED TO THE PUBLIC:** 7. Discussion of pending litigation.

**CONTACT PERSON FOR MORE INFORMATION:** Stephen L. Sharfman, General Counsel, Postal Regulatory Commission, 901 New York Avenue NW., Suite 200, Washington, DC 20268–0001, at 202–789–6820 (for agenda-related inquiries) and Shoshana M. Grove, Secretary of the Commission, at 202–789–6800 or *shoshana.grove@prc.gov* (for inquiries

related to meeting location, access for handicapped or disabled persons, the audiocast, or similar matters).

By direction of the Commission.

**Shoshana M. Grove,**

*Secretary.*

[FR Doc. 2012–30606 Filed 12–17–12; 11:15 am]

**BILLING CODE 7710–FW–P**

## POSTAL REGULATORY COMMISSION

**[Docket No. CP2013–25; Order No. 1578]**

## New International Mail Contract

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Notice.

**SUMMARY:** The Commission is noticing a recently-filed Postal Service request to enter into an additional international mail contract. This document invites public comments on the request and addresses several related procedural steps.

**DATES:** *Comments are due:* December 21, 2012.

**ADDRESSES:** Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

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

**SUPPLEMENTARY INFORMATION:**

### Table of Contents

I. Introduction
II. Contents of Filing
III. Commission Action
IV. Ordering Paragraphs

### I. Introduction

*Notice of filing.* On December 12, 2012, the Postal Service filed a notice announcing that it is entering into an additional Global Expedited Package Services (GEPS) 3 contract (Agreement).[1] The Notice was filed in accordance with 39 CFR 3015.5. Notice at 1. The Postal Service seeks to have the Agreement included within the GEPS 3 product on grounds of functional equivalence to a previously approved baseline agreement. *Id.* at 2.

*Background.* Customers for GEPS contracts are small- or medium-sized businesses that mail products directly to foreign destinations using Express Mail International, Priority Mail International, or both. *Id.* at 4. The Commission added GEPS 1 to the competitive product list, based on Governors' Decision No. 08–7, by operation of Order No. 86. *Id.* at 1. It later approved the addition of GEPS 3 contracts to the competitive product list as a result of Docket Nos. MC2010–28 and CP2010–71.[2] The Commission designated the contract filed in Docket No. CP2010–71 as the baseline agreement for purposes of establishing the functional equivalency of other agreements proposed for inclusion within the GEPS 3 product. *Id.* at 1–2.

### II. Contents of Filing

The filing includes a Notice, along with the following attachments:

- Attachment 1—a redacted copy of the Agreement;
- Attachment 2—a redacted copy of the certification required under 39 CFR 3015.5(c)(2);
- Attachment 3—a redacted copy of Governors' Decision No. 08–7; and
- Attachment 4—an application for non-public treatment of material filedunder seal.

The material filed under seal consists of unredacted copies of the Agreement and supporting financial documents. *Id.* at 2. The Postal Service filed redacted versions of the sealed financial documents in public Excel spreadsheets.

*Functional equivalency.* The Postal Service asserts that the instant Agreement and the baseline contract are functionally equivalent because they share similar cost and market characteristics. *Id.* at 3. It notes that the pricing formula and classification established in the Governors' Decision No. 08–7 ensure that each GEPS contract meets the criteria of 39 U.S.C. 3633 and related regulations. *Id.* The Postal Service further asserts that the functional terms of the two contracts are the same and the benefits are comparable. *Id.*

The Postal Service states that prices may differ, depending on when an agreement is signed, due to updated costing information. *Id.* at 4. It also identifies other differences in contractual terms, but asserts that the differences do not affect either the fundamental service being offered or the fundamental structure of the Agreement.[3] *Id.*

*Term.* The term of the agreement is one calendar year (from the effective date), unless terminated sooner pursuant to contractual provisions. *Id.* Attachment 1 at 7. The effective date is tied to receipt of regulatory approval, but no later than 30 days after such approval. *Id.*

### III. Commission Action

The Commission establishes Docket No. CP2013–25 for consideration of matters raised in the Notice. Interested persons may submit comments on whether the Agreement is consistent with the requirements of 39 CFR 3015.5 and the policies of 39 U.S.C. 3632 and 3633. Comments are due no later than December 21, 2012. The public portions of the Postal Service's filing can be accessed via the Commission's Web site at *http://www.prc.gov.* Information on how to obtain access to nonpublic material appears at 39 CFR 3007.40.

The Commission appoints Natalie R. Ward to represent the interest of the general public (Public Representative) in this case.

### IV. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. CP2013–25 for consideration of matters raised in the Postal Service's Notice.
2. Pursuant to 39 U.S.C. 505, the Commission designates Natalie R. Ward to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.
3. Comments are due no later than December 21, 2012.
4. The Secretary shall arrange for publication of this order in the **Federal Register.**

By the Commission.

**Shoshana M. Grove,**

*Secretary.*

[FR Doc. 2012–30487 Filed 12–18–12; 8:45 am]

**BILLING CODE 7710–FW–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Investment Company Act Release No. 30305; 812–13797]**

## AllianceBernstein Active ETFs, Inc., et al.; Notice of Application

December 13, 2012.

**AGENCY:** Securities and Exchange Commission (''Commission'').

**ACTION:** Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (''Act'') for an exemption from sections

[1] Notice of United States Postal Service of Filing a Functionally Equivalent Global Expedited Package Services 3 Negotiated Service Agreement and Application for Non-Public Treatment of Materials Filed Under Seal, December 12, 2012 (Notice).

[2] *See* Docket Nos. MC2010–28 and CP2010–71, Order No. 503, Order Approving Global Expedited Package Services 3 Negotiated Service Agreement, July 29, 2010.

2(a)(32), 5(a)(1), 22(d) and 22(e) of the Act and rule 22c–1 under the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act, and under section 12(d)(1)(J) of the Act for an exemption from sections 12(d)(1)(A) and 12(d)(1)(B) of the Act.

**APPLICANTS:** AllianceBernstein Active ETFs, Inc. (''Corporation''), AllianceBernstein L.P. (''Adviser''), and ALPS Distributors, Inc. (''Distributor'').

**SUMMARY:** *Summary of Application:* Applicants request an order that would permit: (a) series of certain open-end management investment companies to issue shares (''Shares'') redeemable in large aggregations only (''Creation Units''); (b) secondary market transactions in Shares to occur at negotiated market prices; (c) certain series to pay redemption proceeds, under certain circumstances, more than seven days from the tender of Shares for redemption; (d) certain affiliated persons of the series to deposit securities into, and receive securities from, the series in connection with the purchase and redemption of Creation Units; and (e) certain registered management investment companies and unit investment trusts outside of the same group of investment companies as the series to acquire Shares.[1]

**DATES:** *Filing Dates:* The application was filed on July 16, 2010, and amended on December 28, 2010, July 28, 2011, February 24, 2012, May 22, 2012, September 20, 2012, and December 11, 2012.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on January 7, 2013, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

**ADDRESSES:** Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090. Applicants: 1345 Avenue of the Americas, New York, NY 10105.

**FOR FURTHER INFORMATION CONTACT:** Courtney S. Thornton, Senior Counsel, at (202) 551–6812 or David P. Bartels, Branch Chief, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

## Applicants' Representations

1. The Corporation, a Maryland corporation, will register with the Commission as an open-end management investment company under the Act. Depending on, among other things, market conditions and anticipated investor demand, the initial series of the Corporation (''Initial Fund'') will be either Style Pure Equity ETF, which will seek to achieve its investment objective by investing primarily in large-capitalization publicly traded U.S. equity securities, or Treasury Inflation Protected Securities ETF, which will invest primarily in Treasury inflation protected securities.

2. The Adviser, a Delaware limited partnership registered as an investment adviser under the Investment Advisers Act of 1940 (the ''Advisers Act''), will be the investment adviser to the Initial Fund. Applicants state that the Adviser reserves the right to enter into sub-advisory agreements with one or more investment advisers, each of which will serve as sub-adviser to a Fund (each, a ''Sub-Adviser''). Each Sub-Adviser will be registered as an investment adviser under the Advisers Act.

3. The Corporation will enter into a distribution agreement with the Distributor or one or more other principal underwriters or distributors. The Distributor, a Colorado corporation, is, and each other principal underwriter or distributor will be, a broker-dealer (''Broker'') registered under the Securities Exchange Act of 1934 (''Exchange Act'') and will act as distributor and principal underwriter for one or more of the Funds. No principal underwriter or distributor is or will be affiliated with any Exchange (as defined below). The principal underwriter or distributor of any Fund may be an ''affiliated person,'' or an affiliated person of an affiliated person, of that Fund's Adviser and/or Sub-Adviser within the meaning of section 2(a)(3) of the Act.

4. Applicants are requesting relief to permit the Trust to create and operate certain actively managed series of the Trust that offer Shares with limited redeemability. Applicants request that the order apply to the Initial Fund, any future additional series of the Corporation and other open-end management investment companies, or series thereof, that may be created in the future (''Future Funds,'' collectively with the Initial Fund, ''Funds''). Any Future Fund will (a) be advised by the Adviser or an entity controlling, controlled by or under common control with the Adviser and (b) comply with the terms and conditions of the application.[2] Each Fund will operate as an actively managed exchange-traded fund (''ETF''). The Funds may invest in equity securities or fixed income securities traded in the U.S. or non-U.S. markets.[3] Funds that invest all or a portion of their assets in foreign equity and/or fixed income securities are ''Foreign Funds.'' Funds may invest in Depositary Receipts.[4]

5. The requested order also would permit management investment companies (''Investing Management Companies'') and unit investment trusts (''Investing Trusts,'' collectively with such Investing Management Companies, ''Funds of Funds'') registered under the Act that are not part of the same ''group of investment companies,'' within the meaning of section 12(d)(1)(G)(ii) of the Act, as the Funds to acquire Shares of the Funds beyond the limitations in section 12(d)(1)(A). The requested order also would permit the Funds, any principal underwriter for the Funds, and any Broker to sell Shares of the Funds beyond the limitations in section 12(d)(1)(B) to Funds of Funds (''Fund of Funds Relief''). Applicants ask that any exemption under section 12(d)(1)(J) from sections 12(d)(1)(A) and (B) apply to each Fund of Funds that enters into a participation agreement (''FOF

[1] Capitalized terms not otherwise defined in this notice have the same meaning ascribed to them in the application.

[2] All entities that currently intend to rely on the order are named as applicants. Any other entity that relies on the order in the future will comply with the terms and conditions of the application.

[3] If a Fund invests in derivatives, then (a) the Fund's Board will periodically review and approve the fund's use of derivatives and how the Fund's investment adviser assesses and manages risk with respect to the Fund's use of derivatives and (b) the Fund's disclosure of its use of derivatives in its offering documents and periodic reports will be consistent with relevant Commission and staff guidelines.

[4] A Fund will not invest in any Depositary Receipt that the Adviser or Sub-Adviser deems to be illiquid or for which pricing information is not readily available.

Participation Agreement'') with a Fund.[5]

6. Applicants state that Creation Units will consist of a fixed number of Shares and that the price of a Share will range from $20 to $100. All orders to purchase Creation Units must be placed with the Distributor by or through a party that has entered into a participant agreement with the Distributor and the transfer agent of the Fund (''Authorized Participant'') with respect to the creation and redemption of Creation Units. An Authorized Participant is either (a) a Broker or other participant in the Continuous Net Settlement System (''CNS'') of the National Securities Clearing Corporation (''NSCC''), a clearing agency registered with the Commission and affiliated with the Depository Trust Company (''DTC''), or (b) a participant in DTC (such participant, a ''DTC Participant'').

7. The Shares will be purchased and redeemed in Creation Units and generally on an in-kind basis. Except where the purchase or redemption will include cash under the limited circumstances specified below, purchasers will be required to purchase Creation Units by making an in-kind deposit of specified instruments (''Deposit Instruments''), and shareholders redeeming their Shares will receive an in-kind transfer of specified instruments (''Redemption Instruments'').[6] On any given Business Day,[7] the names and quantities of the instruments that constitute the Deposit Instruments and the names and quantities of the instruments that constitute the Redemption Instruments will be identical, and these instruments may be referred to, in the case of either a purchase or redemption, as the ''Creation Basket.'' In addition, the Creation Basket will correspond *pro rata* to the positions in a Fund's portfolio (including cash positions),[8] except: (a) In the case of bonds, for minor differences when it is impossible to break up bonds beyond certain minimum sizes needed for transfer and settlement; (b) for minor differences when rounding is necessary to eliminate fractional shares or lots that are not tradeable round lots;[9] or (c) TBA Transactions and other positions that cannot be transferred in kind[10] will be excluded from the Creation Basket.[11] If there is a difference between the net asset value (''NAV'') attributable to a Creation Unit and the aggregate market value of the Creation Basket exchanged for the Creation Unit, the party conveying instruments with the lower value will also pay to the other an amount in cash equal to that difference (the ''Cash Amount'').

8. Purchases and redemptions of Creation Units may be made in whole or in part on a cash basis, rather than in kind, solely under the following circumstances: (a) To the extent there is a Cash Amount, as described above; (b) if, on a given Business Day, a Fund announces before the open of trading that all purchases, all redemptions or all purchases and redemptions on that day will be made entirely in cash; (c) if, upon receiving a purchase or redemption order from an Authorized Participant, a Fund determines to require the purchase or redemption, as applicable, to be made entirely in cash; (d) if, on a given Business Day, a Fund requires all Authorized Participants purchasing or redeeming Shares on that day to deposit or receive (as applicable) cash in lieu of some or all of the Deposit Instruments or Redemption Instruments, respectively, solely because: (i) such instruments are not eligible for transfer through either the NSCC or DTC; or (ii) in the case of Foreign Funds, such instruments are not eligible for trading due to local trading restrictions, local restrictions on securities transfers or other similar circumstances; or (e) if a Fund permits an Authorized Participant to deposit or receive (as applicable) cash in lieu of some or all of the Deposit Instruments or Redemption Instruments, respectively, solely because: (i) such instruments are, in the case of the purchase of a Creation Unit, not available in sufficient quantity; (ii) such instruments are not eligible for trading by an Authorized Participant or the investor on whose behalf the Authorized Participant is acting; or (iii) a holder of Shares of a Foreign Fund would be subject to unfavorable income tax treatment if the holder receives redemption proceeds in kind.[12]

9. Each Business Day, before the open of trading on the primary national securities exchange (''Exchange''), as defined in section 2(a)(26) of the Act, on which Shares are listed (''Listing Exchange''), each Fund will cause to be published through the NSCC the names and quantities of the instruments comprising the Creation Basket, as well as the estimated Cash Amount (if any), for that day. The published Creation Basket will apply until a new Creation Basket is announced on the following Business Day, and there will be no intra-day changes to the Creation Basket except to correct errors in the published Creation Basket. An Exchange will disseminate every 15 seconds throughout the trading day an amount representing, on a per Share basis, the sum of the current value of each Fund's Portfolio Securities and other assets.

10. An investor purchasing or redeeming a Creation Unit from a Fund will be charged a fee (''Transaction Fee'') to protect existing shareholders from the dilutive costs associated with the purchase of Creation Units.[13] The Distributor will deliver a confirmation and prospectus (''Prospectus'') to the purchaser. In addition, the Distributor will maintain a record of the instructions given to the Corporation to implement the delivery of Shares.

11. Purchasers of Shares in Creation Units may hold the Shares or sell the Shares on an Exchange. Shares will be listed and traded on the New York Stock Exchange (''NYSE'') or another Listing Exchange. It is expected that one or more Exchange member firms will be designated by the Exchange to act as a market maker (''Market Maker'').[14] The

[5] A Fund of Funds (as defined below) may rely on the order only to invest in the Funds and not in any other registered investment company.

[6] The Funds must comply with the federal securities laws in accepting Deposit Instruments and satisfying redemptions with Redemption Instruments, including that the Deposit Instruments and Redemption Instruments are sold in transactions that would be exempt from registration under the Securities Act of 1933 (''Securities Act''). In accepting Deposit Instruments and satisfying redemptions with Redemption Instruments that are restricted securities eligible for resale pursuant to Rule 144A under the Securities Act, the Funds will comply with the conditions of Rule 144A.

[7] Each Fund will sell and redeem Creation Units on any day the Fund is open, including as required by section 22(e) of the Act (each, a ''Business Day'').

[8] The portfolio used for this purpose will be the same portfolio used to calculate the Fund's NAV for that Business Day.

[9] A tradeable round lot for a security will be the standard unit of trading in that particular type of security in its primary market.

[10] This includes instruments that can be transferred in kind only with the consent of the original counterparty to the extent the Fund does not intend to seek such consents.

[11] Because these instruments will be excluded from the Creation Basket, their value will be reflected in the determination of the Cash Amount (defined below).

[12] A ''custom order'' is any purchase or redemption of Shares made in whole or in part on a cash basis in reliance on clause (e)(i) or (e)(ii).

[13] Where a Fund permits a purchaser to substitute cash in lieu of depositing a portion of the requisite Deposit Instruments, the purchaser may be assessed a higher Transaction Fee to offset the cost to the Fund of purchasing those Deposit Instruments. In all cases, the Transaction Fee will be limited in accordance with requirements of the Commission applicable to management investment companies offering redeemable securities.

[14] If Shares are listed on Nasdaq or a similar electronic Exchange (including NYSE Arca (''Arca'')), one or more member firms of that Exchange will act as Market Maker and maintain a market for Shares trading on the Exchange. On Nasdaq, no particular Market Maker would be contractually obligated to make a market in Shares. However, the listing requirements on Nasdaq, for example, stipulate that at least two Market Makers must be registered in Shares to maintain a listing. In addition, on Nasdaq and Arca, registered Market

price of Shares trading on an Exchange will be based on a current bid/offer market. Transactions involving the sale of Shares on an Exchange will be subject to customary brokerage commissions and charges.

12. Applicants expect that purchasers of Creation Units will include institutional investors and arbitrageurs (which could include institutional investors). Applicants expect that secondary market purchasers of Shares will include both institutional investors and retail investors.[15] Applicants submit that in light of the full portfolio transparency and efficient arbitrage mechanism inherent in each Fund's structure, the secondary market prices for Shares of such Funds should be close to NAV and should reflect the value of each Fund's portfolio securities (''Portfolio Securities''). Applicants do not believe that the Shares will persistently trade in the secondary market at a material premium or discount in relation to the Fund's NAV.

13. The Corporation will not be advertised or marketed or otherwise held out as a traditional open-end investment company or a mutual fund. Instead, each Fund will be marketed as an ''actively managed exchange-traded fund.'' All marketing materials that describe the features or method of obtaining, buying or selling Creation Units, or Shares traded on an Exchange, or refer to redeemability, will prominently disclose that Shares are not individually redeemable shares and will disclose that the Beneficial Owners may acquire those Shares from the Fund, or tender those Shares for redemption to the Fund, in Creation Units only. The same approach will be followed in connection with the statement of additional information (''SAI''), shareholder reports and investor educational materials issued or circulated in connection with the Shares.

14. The Corporation intends to maintain a Web site that will include the Prospectus and additional quantitative information for each Fund that is updated on a daily basis, including daily trading volume, closing price and closing NAV for each Fund. The Web site will contain, on a per Share basis for each Fund, the prior Business Day's NAV and the market closing price or mid-point of the bid/ask spread at the time of calculation of such NAV (''Bid/Ask Price''), and a calculation of the premium or discount of the market closing price or Bid/Ask Price against such NAV. On each Business Day, before commencement of trading in Shares on the primary Listing Exchange, the Fund will disclose on its Web site the identities and quantities of the Portfolio Securities and other assets held by the Fund that will form the basis for the Fund's calculation of NAV at the end of the Business Day.[16]

**Applicants' Legal Analysis**

1. Applicants request an order under section 6(c) of the Act for an exemption from sections 2(a)(32), 5(a)(1), 22(d) and 22(e) of the Act and rule 22c–1 under the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and (a)(2) of the Act, and under section 12(d)(1)(J) of the Act for an exemption from sections 12(d)(1)(A) and 12(d)(1)(B) of the Act.

2. Section 6(c) of the Act provides that the Commission may exempt any person, security or transaction, or any class of persons, securities or transactions, from any provision of the Act, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Section 17(b) of the Act authorizes the Commission to exempt a proposed transaction from section 17(a) of the Act if evidence establishes that the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and the proposed transaction is consistent with the policies of the registered investment company and the general provisions of the Act. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provision of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors.

*Sections 5(a)(1) and 2(a)(32) of the Act*

3. Section 5(a)(1) of the Act defines an ''open-end company'' as a management investment company that is offering for sale or has outstanding any redeemable security of which it is the issuer. Section 2(a)(32) of the Act defines a redeemable security as any security, other than short-term paper, under the terms of which the holder, upon its presentation to the issuer, is entitled to receive approximately a proportionate share of the issuer's current net assets, or the cash equivalent. Because Shares will not be individually redeemable, applicants request an order to permit the Corporation to register as an open-end management investment company and issue Shares that are redeemable in Creation Units only. Applicants state that beneficial owners of Shares may sell their Shares in the secondary market, but must accumulate enough Shares to constitute a Creation Unit in order to redeem through the Corporation. Applicants further state that, because of the arbitrage possibilities created by the redeemability of Creation Units, applicants expect that the market price of an individual Share will not deviate materially from its NAV.

*Section 22(d) of the Act and Rule 22c–1 Under the Act*

4. Section 22(d) of the Act, among other things, prohibits a dealer from selling a redeemable security that is currently being offered to the public by or through a principal underwriter, except at a current public offering price described in the prospectus. Rule 22c–1 under the Act generally requires that a dealer selling, redeeming, or repurchasing a redeemable security do so only at a price based on its NAV. Applicants state that secondary market trading in Shares will take place at negotiated prices, rather than at the current offering price described in the Fund's Prospectus or at a price based on NAV. Thus, purchases and sales of Shares in the secondary market will not comply with section 22(d) of the Act and rule 22c–1 under the Act. Applicants request an exemption under section 6(c) from these provisions.

5. Applicants assert that the concerns sought to be addressed by section 22(d) of the Act and rule 22c–1 under the Act with respect to pricing are equally satisfied by the proposed method of pricing Shares. Applicants maintain that while there is little legislative history regarding section 22(d), its provisions, as well as those of rule 22c–1, appear to have been intended (a) to prevent dilution caused by certain riskless-

Makers are required to make a continuous two-sided market or subject themselves to regulatory sanctions. No Market Maker will be an affiliated person, or an affiliated person of an affiliated person, of the Funds, except within section 2(a)(3)(A) or (C) of the Act due solely to ownership of Shares.

[15] Shares will be registered in book-entry form only. DTC or its nominee will be the registered owner of all outstanding Shares. DTC or DTC Participants will maintain records reflecting owners of Shares (''Beneficial Owners'').

[16] Under accounting procedures to be followed by the Funds, trades made on the prior Business Day (''T'') will be booked and reflected in NAV on the current Business Day (''T+1''). Accordingly, the Funds will be able to disclose at the beginning of the Business Day the portfolio that will form the basis for the NAV calculation at the end of the Business Day.

trading schemes by principal underwriters and contract dealers, (b) to prevent unjust discrimination or preferential treatment among buyers, and (c) to ensure an orderly distribution system of shares by contract dealers by eliminating price competition from non-contract dealers who could offer investors shares at less than the published sales price and who could pay investors a little more than the published redemption price.

6. Applicants believe that none of these purposes will be thwarted by permitting Shares to trade in the secondary market at negotiated prices. Applicants state that (a) secondary market transactions in Shares would not cause dilution for owners of such Shares because such transactions do not directly involve Fund assets, and (b) to the extent different prices exist during a given trading day, or from day to day, such variances occur as a result of third-party market forces. Therefore, applicants assert that secondary market transactions in Shares will not lead to discrimination or preferential treatment among purchasers. Finally, applicants contend that the structure of the Funds will enable efficient arbitrage, thereby ensuring that secondary market transactions in Shares should generally occur at prices at or close to NAV.

*Section 22(e)*

7. Section 22(e) of the Act generally prohibits a registered investment company from suspending the right of redemption or postponing the date of payment of redemption proceeds for more than seven days after the tender of a security for redemption. Applicants observe that the settlement of redemptions of Creation Units of Foreign Funds is contingent not only on the settlement cycle of the U.S. securities markets but also on the delivery cycles present in foreign markets in which those Funds invest. Applicants have been advised that, under certain circumstances, the delivery cycles for transferring Portfolio Securities to redeeming investors, coupled with local market holiday schedules, will require a delivery process of longer than seven days. Applicants therefore request relief from section 22(e) in order to provide payment or satisfaction of redemptions within the maximum number of calendar days required for such payment or satisfaction in the principal local markets where transactions in the Portfolio Securities of each Foreign Fund customarily clear and settle, but in all cases no later than 14 days following the tender of a Creation Unit.[17]

8. Applicants submit that Congress adopted section 22(e) to prevent unreasonable, undisclosed or unforeseen delays in the actual payment of redemption proceeds. Applicants state that allowing redemption payments for Creation Units of a Foreign Fund to be made within the number of days indicated above would not be inconsistent with the spirit and intent of section 22(e). Applicants state that the SAI will disclose those local holidays (over the period of at least one year following the date of the SAI), if any, that are expected to prevent the delivery of redemption proceeds in seven calendar days and the maximum number of days needed to deliver the proceeds for each affected Foreign Fund. Applicants are not seeking relief from section 22(e) with respect to Foreign Funds that do not effect creations or redemptions in-kind.

*Section 12(d)(1)*

9. Section 12(d)(1)(A) of the Act prohibits a registered investment company from acquiring shares of an investment company if the securities represent more than 3% of the total outstanding voting stock of the acquired company, more than 5% of the total assets of the acquiring company, or, together with the securities of any other investment companies, more than 10% of the total assets of the acquiring company. Section 12(d)(1)(B) of the Act prohibits a registered open-end investment company, its principal underwriter, or any other Broker from selling its shares to another investment company if the sale will cause the acquiring company to own more than 3% of the acquired company's voting stock, or if the sale will cause more than 10% of the acquired company's voting stock to be owned by investment companies generally.

10. Applicants request relief to permit Funds of Funds to acquire Shares in excess of the limits in section 12(d)(1)(A) of the Act and to permit the Funds, their principal underwriters and any Broker to sell Shares to Funds of Funds in excess of the limits in section 12(d)(1)(B) of the Act. Applicants submit that the concerns underlying section 12(d)(1) of the Act and the potential and actual abuses identified in the Commission's 1966 report to Congress[18] are not present in the proposed transactions and that, in any event, applicants have proposed a number of conditions to address those concerns.

11. Applicants submit that their proposed conditions address any concerns regarding the potential for undue influence. A Fund of Funds or Fund of Funds Affiliate[19] will not cause any existing or potential investment in a Fund to influence the terms of any services or transactions between the Fund of Funds or a Fund of Funds Affiliate and the Fund or a Fund Affiliate.[20] A Fund of Funds Advisory Group[21] or a Fund of Funds Sub-Advisory Group[22] will not control a Fund within the meaning of section 2(a)(9) of the Act. Applicants also propose a condition to ensure that no Fund of Funds or Fund of Funds Affiliate will cause a Fund to purchase a security from an Affiliated Underwriting.[23]

[17] Applicants acknowledge that no relief obtained from the requirements of section 22(e) will affect any obligations that they may otherwise have under rule 15c6–1 under the Exchange Act. Rule 15c6–1 requires that most securities transactions be settled within three business days of the trade date.

[18] Report of the Securities and Exchange Commission on the Public Policy Implications of Investment Company Growth, H.R. Rep. No. 2337, 89th Cong., 2d Sess., 311–324.

[19] A ''Fund of Funds Affiliate'' is defined as the Fund of Funds Adviser, Fund of Funds Sub-Adviser(s), any Sponsor, promoter or principal underwriter of a Fund of Funds and any person controlling, controlled by or under common control with any of these entities.

[20] A ''Fund Affiliate'' is defined as an investment adviser, promoter or principal underwriter of a Fund and any person controlling, controlled by or under common control with any of these entities.

[21] A ''Fund of Funds Advisory Group'' is the Fund of Funds Adviser, Sponsor, any person controlling, controlled by or under common control with the Fund of Funds Adviser or Sponsor, and any investment company or issuer that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act, that is advised or sponsored by the Fund of Funds Adviser, Sponsor or any person controlling, controlled by or under common control with the Fund of Funds Adviser or Sponsor. In this regard, each Investing Management Company's investment adviser within the meaning of Section 29(a)(20)(A) of the Act is the ''Fund of Funds Adviser.'' Similarly, each Investing Trust's sponsor is the ''Sponsor.'' Each Fund of Funds Adviser will be registered as an investment adviser under the Advisers Act. No Fund of Funds Adviser or Sponsor will control, be controlled by, or be under common control with the Adviser.

[22] A ''Fund of Funds Sub-Advisory Group'' is any Fund of Funds Sub-Adviser, any person controlling, controlled by, or under common control with the Fund of Funds Sub-Adviser, and any investment company or issuer that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act (or portion of such investment company or issuer) advised or sponsored by the Fund of Funds Sub-Adviser or any person controlling, controlled by or under common control with the Fund of Funds Sub-Adviser.

[23] An ''Affiliated Underwriting'' is an offering of securities during the existence of an underwriting or selling syndicate of which a principal underwriter is an Underwriting Affiliate. An ''Underwriting Affiliate'' is a principal underwriter in any underwriting or selling syndicate that is an officer, director, member of an advisory board, Fund of Funds Adviser, Fund of Funds Sub-

12. Applicants propose several conditions to address the potential for excessive layering of fees. Applicants note that the board of directors or trustees of an Investing Management Company, including a majority of the independent directors or trustees who are not ''interested persons'' within the meaning of section 2(a)(19) of the Act (''independent directors or trustees''), will be required to find that any fees charged under the Investing Management Company's advisory contract(s) are based on services provided that will be in addition to, rather than duplicative of, services provided under the advisory contract(s) of any Fund in which the Investing Management Company may invest. Applicants state that any sales charges and/or service fees charged with respect to shares of a Fund of Funds will not exceed the limits applicable to a fund of funds set forth in NASD Conduct Rule 2830. [24]

13. Applicants submit that the proposed arrangement will not create an overly complex fund structure. Applicants note that a Fund will be prohibited from acquiring securities of any investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except to the extent permitted by exemptive relief from the Commission permitting the Fund to purchase shares of other investment companies for short-term cash management purposes or engage in interfund borrowing and lending transactions.

14. To ensure that a Fund of Funds is aware of the terms and conditions of the requested order, the Fund of Funds must enter into an FOF Participation Agreement with the respective Fund. The FOF Participation Agreement will include an acknowledgment from the Fund of Funds that it may rely on the order only to invest in the Fund and not in any other investment company.

*Sections 17(a)(1) and (2) of the Act*

15. Section 17(a)(1) and (2) of the Act generally prohibit an affiliated person of a registered investment company, or an affiliated person of such a person (''second tier affiliate''), from selling any security to or purchasing any security from the company. Section 2(a)(3) of the Act defines ''affiliated person'' to include any person directly or indirectly owning, controlling, or holding with power to vote 5% or more of the outstanding voting securities of the other person and any person directly or indirectly controlling, controlled by, or under common control with, the other person. Section 2(a)(9) of the Act defines ''control'' as the power to exercise a controlling influence over the management or policies of a company and provides that a control relationship will be presumed where one person owns more than 25% of another person's voting securities. The Funds may be deemed to be controlled by the Adviser or an entity controlling, controlled by or under common control with the Adviser and hence affiliated persons of each other. In addition, the Funds may be deemed to be under common control with any other registered investment company (or series thereof) advised by the Adviser or an entity controlling, controlled by or under common control with the Adviser (an ''Affiliated Fund'').

16. Applicants request an exemption from section 17(a) under sections 6(c) and 17(b) to permit in-kind purchases and redemptions by persons that are affiliated persons or second tier affiliates of the Funds solely by virtue of one or more of the following: (a) Holding 5% or more, or more than 25%, of the outstanding Shares of the Corporation or one or more Funds; (b) an affiliation with a person with an ownership interest described in (a); or (c) holding 5% or more, or more than 25%, of the shares of one or more Affiliated Funds.

17. Applicants assert that no useful purpose would be served by prohibiting the affiliated persons described above from making in-kind purchases or in-kind redemptions of Shares of a Fund in Creation Units. Absent the unusual circumstances discussed in the application, the Deposit Instruments and Redemption Instruments available for a Fund will be the same for all purchases and redemptions, respectively, and will correspond *pro rata* to the Fund's Portfolio Securities. Both the deposit procedures for in-kind purchases of Creation Units and the redemption procedures for in-kind redemptions will be effected in exactly the same manner for all purchases and redemptions. Deposit Instruments and Redemption Instruments will be valued in the same manner as those Portfolio Securities currently held by the Funds. Therefore, applicants state that the in-kind purchases and redemptions will afford no opportunity for the specified affiliated persons of a Fund to effect a transaction detrimental to other holders of Shares. Applicants do not believe that in-kind purchases and redemptions will result in abusive self-dealing or overreaching of the Fund.

18. Applicants also request an exemption in order to permit a Fund to sell its Shares to and redeem its Shares from, and engage in the in-kind transactions that would accompany such sales and redemptions with, a Fund of Funds of which the Fund is an affiliated person or a second tier affiliate.[25]

19. Applicants also submit that the sale of Shares to and redemption of Shares from a Fund of Funds satisfies the standards for relief under sections 17(b) and 6(c) of the Act. Any consideration paid for the purchase or redemption of Shares directly from a Fund will be based on the NAV of the Fund.[26] The FOF Participation Agreement will require any Fund of Funds that purchases Creation Units directly from a Fund to represent that the purchase will be accomplished in compliance with the investment restrictions of the Fund of Funds and will be consistent with the investment objectives and policies of the Fund of Funds. Applicants believe that the proposed transactions are consistent with the general purposes of the Act and appropriate in the public interest.

**Applicants' Conditions**

Applicants agree that any order of the Commission granting the requested relief will be subject to the following conditions:

Adviser, Sponsor, or employee of the Fund of Funds, or a person of which any such officer, director, member of an advisory board, Fund of Funds Adviser, Fund of Funds Sub-Adviser, Sponsor, or employee is an affiliated person, except any person whose relationship to the Fund is covered by section 10(f) of the Act is not an Underwriting Affiliate.

[24] Any references to NASD Conduct Rule 2830 include any successor or replacement rule that may be adopted by the Financial Industry Regulatory Authority.

[25] Applicants anticipate that most Funds of Funds will purchase Shares in the secondary market and will not purchase or redeem Creation Units directly from a Fund. Relief from Section 17(a) is not required when a Fund of Funds that is an affiliate or Second Tier Affiliate of a Fund purchases or sells Shares in the secondary market, as such transactions are not principal transactions with the fund. However, the requested relief would apply to direct sales of Shares in Creation Units by a Fund to a Fund of Funds and redemptions of those Shares in Creation Units. The requested relief is intended to cover transactions that would accompany such sales and redemptions. Applicants are not seeking relief from section 17(a) for, and the requested relief will not apply to, transactions where a Fund could be deemed an affiliated person, or an affiliated person of an affiliated person of a Fund of Funds or an entity controlling, controlled by, or under common control with the Adviser is also an investment adviser to that Fund of Funds.

[26] Applicants acknowledge that the receipt of compensation by (a) an affiliated person of a Fund of Funds or an affiliated person of such person, for the purchase by the Fund of Funds of Shares or (b) an affiliated person of a Fund, or an affiliated person of such person, for the sale by the Fund of its Shares to a Fund of Funds, may be prohibited by section 17(e)(1) of the Act. The FOF Participation Agreement also will include this acknowledgment.

*Actively-Managed ETF Relief*

1. The requested relief to permit ETF operations will expire on the effective date of any Commission rule under the Act that provides relief permitting the operation of actively managed ETFs.

2. As long as a Fund operates in reliance on the requested order, the Shares of such Fund will be listed on an Exchange.

3. Neither the Corporation nor any Fund will be advertised or marketed as an open-end investment company or mutual fund. Any advertising material that describes the purchase or sale of Creation Units or refers to redeemability will prominently disclose that the Shares are not individually redeemable and that owners of the Shares may acquire those Shares from the Fund and tender those Shares for redemption to the Fund in Creation Units only.

4. The Web site for the Funds, which is and will be publicly accessible at no charge, will contain, on a per Share basis for each Fund, the prior Business Day's NAV and the market closing price or Bid/Ask Price, and a calculation of the premium or discount of the market closing price or Bid/Ask Price against such NAV.

5. No Adviser or any Sub-Adviser, directly or indirectly, will cause any Authorized Participant (or any investor on whose behalf an Authorized Participant may transact with the Fund) to acquire any Deposit Instrument for a Fund through a transaction in which the Fund could not engage directly.

6. On each Business Day, before commencement of trading in Shares on each Fund's Listing Exchange, each Fund will disclose on its Web site the identities and quantities of the Portfolio Securities and other assets held by the Fund that will form the basis for the Fund's calculation of NAV at the end of the Business Day.

*Fund of Funds Relief*

7. The members of the Fund of Funds Advisory Group will not control (individually or in the aggregate) a Fund within the meaning of section 2(a)(9) of the Act. The members of the Fund of Funds Sub-Advisory Group will not control (individually or in the aggregate) a Fund within the meaning of section 2(a)(9) of the Act. If, as a result of a decrease in the outstanding voting securities of a Fund, the Fund of Funds Advisory Group or the Fund of Funds Sub-Advisory Group, each in the aggregate, becomes a holder of more than 25 percent of the outstanding voting securities of a Fund, it will vote its voting securities of the Fund in the same proportion as the vote of all other holders of the Fund's voting securities. This condition does not apply to the Fund of Funds Sub-Advisory Group with respect to a Fund for which the Fund of Funds Sub-Adviser or a person controlling, controlled by, or under common control with the Fund of Funds Sub-Adviser acts as the investment adviser within the meaning of section 2(a)(20)(A) of the Act.

8. No Fund of Funds or Fund of Funds Affiliate will cause any existing or potential investment by the Fund of Funds in a Fund to influence the terms of any services or transactions between the Fund of Funds or a Fund of Funds Affiliate and the Fund or a Fund Affiliate.

9. The board of directors or trustees of an Investing Management Company, including a majority of the independent directors or trustees, will adopt procedures reasonably designed to ensure that the Fund of Funds Adviser and any Fund of Funds Sub-Adviser are conducting the investment program of the Investing Management Company without taking into account any consideration received by the Investing Management Company or a Fund of Funds Affiliate from a Fund or a Fund Affiliate in connection with any services or transactions.

10. Once an investment by a Fund of Funds in Shares exceeds the limits in section 12(d)(1)(A)(i) of the Act, the board of directors of the Corporation (''Board''), including a majority of the independent directors, will determine that any consideration paid by the Fund to the Fund of Funds or a Fund of Funds Affiliate in connection with any services or transactions: (i) is fair and reasonable in relation to the nature and quality of the services and benefits received by the Fund; (ii) is within the range of consideration that the Fund would be required to pay to another unaffiliated entity in connection with the same services or transactions; and (iii) does not involve overreaching on the part of any person concerned. This condition does not apply with respect to any services or transactions between a Fund and its investment adviser(s), or any person controlling, controlled by or under common control with such investment adviser(s).

11. The Fund of Funds Adviser, or Trustee or Sponsor, as applicable, will waive fees otherwise payable to it by the Fund of Funds in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by a Fund under rule 12b–1 under the Act) received from a Fund by the Fund of Funds Adviser, or Trustee or Sponsor, or an affiliated person of the Fund of Funds Adviser, or Trustee or Sponsor, other than any advisory fees paid to the Fund of Funds Adviser, or Trustee or Sponsor, or its affiliated person by the Fund, in connection with the investment by the Fund of Funds in the Fund. Any Fund of Funds Sub-Adviser will waive fees otherwise payable to the Fund of Funds Sub-Adviser, directly or indirectly, by the Investing Management Company in an amount at least equal to any compensation received from a Fund by the Fund of Funds Sub-Adviser, or an affiliated person of the Fund of Funds Sub-Adviser, other than any advisory fees paid to the Fund of Funds Sub-Adviser or its affiliated person by the Fund, in connection with any investment by the Investing Management Company in the Fund made at the direction of the Fund of Funds Sub-Adviser. In the event that the Fund of Funds Sub-Adviser waives fees, the benefit of the waiver will be passed through to the Investing Management Company.

12. No Fund of Funds or Fund of Funds Affiliate (except to the extent it is acting in its capacity as an investment adviser to a Fund) will cause a Fund to purchase a security in any Affiliated Underwriting.

13. The Board, including a majority of the independent directors, will adopt procedures reasonably designed to monitor any purchases of securities by the Fund in an Affiliated Underwriting, once an investment by a Fund of Funds in the securities of the Fund exceeds the limit of section 12(d)(1)(A)(i) of the Act, including any purchases made directly from an Underwriting Affiliate. The Board will review these purchases periodically, but no less frequently than annually, to determine whether the purchases were influenced by the investment by the Fund of Funds in the Fund. The Board will consider, among other things: (i) whether the purchases were consistent with the investment objectives and policies of the Fund; (ii) how the performance of securities purchased in an Affiliated Underwriting compares to the performance of comparable securities purchased during a comparable period of time in underwritings other than Affiliated Underwritings or to a benchmark such as a comparable market index; and (iii) whether the amount of securities purchased by the Fund in Affiliated Underwritings and the amount purchased directly from an Underwriting Affiliate have changed significantly from prior years. The Board will take any appropriate actions based on its review, including, if appropriate, the institution of procedures designed to ensure that

purchases of securities in Affiliated Underwritings are in the best interest of shareholders of the Fund.

14. Each Fund will maintain and preserve permanently in an easily accessible place a written copy of the procedures described in the preceding condition, and any modifications to such procedures, and will maintain and preserve for a period of not less than six years from the end of the fiscal year in which any purchase in an Affiliated Underwriting occurred, the first two years in an easily accessible place, a written record of each purchase of securities in Affiliated Underwritings, once an investment by a Fund of Funds in the securities of the Fund exceeds the limit of section 12(d)(1)(A)(i) of the Act, setting forth from whom the securities were acquired, the identity of the underwriting syndicate's members, the terms of the purchase, and the information or materials upon which the Board's determinations were made.

15. Before investing in a Fund in excess of the limits in section 12(d)(1)(A), a Fund of Funds will execute a FOF Participation Agreement with the Fund stating, without limitation, that their respective boards of directors or trustees and their investment advisers, or Trustee and Sponsor, as applicable, understand the terms and conditions of the order, and agree to fulfill their responsibilities under the order. At the time of its investment in Shares of a Fund in excess of the limit in section 12(d)(1)(A)(i), a Fund of Funds will notify the Fund of the investment. At such time, the Fund of Funds will also transmit to the Fund a list of the names of each Fund of Funds Affiliate and Underwriting Affiliate. The Fund of Funds will notify the Fund of any changes to the list of the names as soon as reasonably practicable after a change occurs. The Fund and the Fund of Funds will maintain and preserve a copy of the order, the FOF Participation Agreement, and the list with any updated information for the duration of the investment and for a period of not less than six years thereafter, the first two years in an easily accessible place.

16. Before approving any advisory contract under section 15 of the Act, the board of directors or trustees of each Investing Management Company, including a majority of the independent directors or trustees, will find that the advisory fees charged under such contract are based on services provided that will be in addition to, rather than duplicative of, the services provided under the advisory contract(s) of any Fund in which the Investment Management Company may invest. These findings and their basis will be recorded fully in the minute books of the appropriate Investing Management Company.

17. Any sales charges and/or service fees charged with respect to shares of a Fund of Funds will not exceed the limits applicable to a fund of funds as set forth in NASD Conduct Rule 2830.

18. No Fund will acquire securities of any investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except to the extent that such Fund: (i) Receives securities of another investment company as a dividend or as a result of a plan of reorganization of a company (other than a plan devised for the purpose of evading section 12(d)(1) of the Act); or (ii) acquires (or is deemed to have acquired) securities of another investment company pursuant to exemptive relief from the Commission permitting such Fund to (a) acquire securities of one or more investment companies for short-term cash management purposes or (b) engage in interfund borrowing and lending transactions.

For the Commission, by the Division of Investment Management, under delegated authority.

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2012–30551 Filed 12–18–12; 8:45 am]

**BILLING CODE 8011–01–P**

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## SECURITIES AND EXCHANGE COMMISSION

**[Investment Company Act Release No. 30304; File No. 812–14064]**

## The Adams Express Company and Petroleum & Resources Corporation; Notice of Application

December 13, 2012.

**AGENCY:** Securities and Exchange Commission (''Commission'').

**ACTION:** Notice of application under section 6(c) of the Investment Company Act of 1940 (''Act'') for an exemption from section 19(b) of the Act and rule 19b–1 under the Act.

**SUMMARY:** *Summary of Application:* Applicants request an order to permit certain registered closed-end investment companies to make periodic distributions of long-term capital gains with respect to their outstanding common shares as frequently as monthly in any one taxable year, and as frequently as distributions are specified by or in accordance with the terms of any outstanding preferred shares that such investment companies may issue.

**APPLICANTS:** The Adams Express Company and Petroleum & Resources Corporation (the ''Funds'').

**DATES:** *Filing Dates:* The application was filed on July 27, 2012 and amended on November 20, 2012.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on January 7, 2013, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

**ADDRESSES:** Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090; Applicants, Seven Saint Paul Street, Suite 1140, Baltimore, MD 21202.

**FOR FURTHER INFORMATION CONTACT:** Marilyn Mann, Special Counsel, at (202) 551–6813, or Mary Kay Frech, Branch Chief, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm*, or by calling (202) 551–8090.

### Applicants' Representations

1. The Funds are internally-managed closed-end management investment companies registered under the Act and are organized as Maryland corporations.[1] The common shares of the Funds are currently listed on the New York Stock Exchange and in the future will be listed on the New York Stock Exchange or another national securities exchange as defined in section 2(a)(26) of the Act (each, an ''Exchange''). The Funds currently do not intend to issue any preferred shares, but may do so in the future. The Funds

[1] Applicants request that the order also apply to any successor in interest to the Funds. A successor in interest is limited to entities that result from a reorganization into another jurisdiction or a change in the type of business organization.

are non-control (within the meaning of section 2(a)(9) of the Act) affiliates that are internally-managed by shared personnel, including a common board of directors, and common executive officers and portfolio managers. As of June 30, 2012, The Adams Express Company held approximately 8.5% of the outstanding shares of Petroleum & Resources Corporation. Both Funds' investment objectives are preservation of capital, the attainment of reasonable income from investments, and an opportunity for capital appreciation. Applicants believe that investors in the common shares of the Funds may prefer an investment vehicle that provides regular distributions and a consistent cash flow.

2. Applicants represent that, before a Fund implements a proposed distribution policy with respect to its common shares in reliance on the order, the Fund's board of directors (the ''Board''), including a majority of the members of the Board who are not ''interested persons'' of the respective Fund, as defined in section 2(a)(19) of the Act (the ''Independent Directors''), will approve the Fund's adoption of the proposed distribution policy. Applicants represent that the Board will request and evaluate, and the Fund will furnish, such information as may be reasonably necessary to make an informed determination of whether the Board should adopt and implement the proposed distribution policy. Applicants state that, in particular, the Board, including the Independent Directors, will review information regarding the purpose and terms of the proposed distribution policy, any reasonably foreseeable material effect of such policy on the Fund's long-term total return (in relation to market price and net asset value per common share (''NAV'')), the relationship between such Fund's distribution rate on its common shares under the policy and such Fund's total return (in relation to NAV), and whether the rate of distribution will exceed such Fund's expected total return (in relation to NAV). Applicants represent that the Independent Directors also will consider what conflicts of interest the affiliated persons of the Fund might have with respect to the adoption or implementation of such policy. Applicants state that, after considering such information, the Board of the relevant Fund, including the Independent Directors, will only approve a distribution policy with respect to the Fund's common shares (the ''Plan''), if the Board, including the Independent Directors, determines that the Plan is consistent with the Fund's investment objective(s) and in the best interests of the Fund's common shareholders.

3. Applicants state that the purpose of any Plan will be to permit a Fund to provide its common shareholders with periodic distributions as nearly equal as practicable and any required special distributions over the course of each year. Applicants represent that, under the Plan of a Fund, such Fund will distribute to its respective common shareholders a fixed percentage of the market price of such Fund's common shares at a particular point in time, or a fixed percentage of NAV at a particular time or a fixed amount per common share, any of which may be adjusted from time to time. Applicants state that the minimum annual distribution rate with respect to such Fund's common shares would be independent of the Fund's performance during any particular period but would be expected to correlate with the Fund's performance over time. Except for extraordinary distributions and potential increases or decreases in the final dividend periods in light of the Fund's performance for the entire calendar or taxable year and to enable the Fund to comply with the distribution requirements of Subchapter M and section 4982 of the Internal Revenue Code of 1986, as amended (the ''Code'') for the calendar or taxable year, each distribution on the common shares would be at the stated rate then in effect.

4. Applicants state that, in conjunction with approving a Plan, the Board of each Fund will also approve the Fund's adoption of compliance policies and procedures under rule 38a–1 under the Act that: (i) Are reasonably designed to ensure that all notices required to be sent to each Fund's shareholders pursuant to section 19(a) of the Act, rule 19a–1 thereunder and condition 4 below (each a ''19(a) Notice'') include the disclosure required by rule 19a–1 and by condition 2(a) below, and that all other written communications by the Fund or its agents described in condition 3(a) below about the distributions under the Plan include the disclosure required by condition 3(a) below, and (ii) require each such Fund to keep records that demonstrate its compliance with all of the conditions of the order and that are necessary for the Fund to form the basis for, or demonstrate the calculation of, the amounts disclosed in its 19(a) Notices.

**Applicants' Legal Analysis**

1. Section 19(b) generally makes it unlawful for any registered investment company to make long-term capital gains distributions more than once every twelve months. Rule 19b–1 under the Act limits the number of capital gains dividends, as defined in section 852(b)(3)(C) of the Code (''distributions''), that a fund may make with respect to any one taxable year to one, plus a supplemental ''clean up'' distribution made pursuant to section 855 of the Code not exceeding 10% of the total amount distributed for the year, plus one additional capital gain dividend made in whole or in part to avoid the excise tax under section 4982 of the Code.

2. Section 6(c) of the Act provides that the Commission may, by order upon application, conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provision of the Act or any rule under the Act, if and to the extent that the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

3. Applicants state that the one of the concerns leading to the enactment of section 19(b) and adoption of rule 19b–1 was that shareholders might be unable to distinguish between frequent distributions of capital gains and dividends from investment income. Applicants state, however, that rule 19a–1 effectively addresses this concern by requiring that distributions (or the confirmation of the reinvestment thereof) estimated to be sourced in part from capital gains or capital be accompanied by a separate statement showing the sources of the distribution (*e.g.,* estimated net income, net short-term capital gains, net long-term capital gains and/or return of capital). Applicants state that similar information is included in the Funds' annual reports to shareholders and IRS Form 1099–DIV, which is sent to each shareholder who received distributions during a particular year (including shareholders who have sold shares during the year).

4. Applicants further state that each of the Funds will make the additional disclosures required by the conditions set forth below, and each of them will adopt compliance policies and procedures in accordance with rule 38a-1 under the Act to ensure that all required 19(a) Notices and disclosures are sent to shareholders. Applicants

argue that by providing the information required by section 19(a) and rule 19a-1, and by complying with the procedures adopted under the Plan and the conditions listed below, each Fund's shareholders would be provided sufficient information to understand that their periodic distributions are not tied to the Fund's net investment income (which for this purpose is the Fund's taxable income other than from capital gains) and realized capital gains to date, and may not represent yield or investment return. Accordingly, applicants assert that continuing to subject the Funds to section 19(b) and rule 19b–1 would afford shareholders no extra protection.

5. Applicants note that section 19(b) of the Act and rule 19b–1 were intended to prevent certain improper sales practices, including, in particular, the practice of urging an investor to purchase shares of a fund on the basis of an upcoming capital gains dividend (''selling the dividend''), where the dividend would result in an immediate corresponding reduction in NAV and would be in effect a taxable return of the investor's capital. Applicants submit that the ''selling the dividend'' concern should not apply to closed-end investment companies, such as the Funds, which do not continuously distribute shares. According to applicants, if the underlying concern extends to secondary market purchases of shares of closed-end funds that are subject to a large upcoming capital gains dividend, adoption of a periodic distribution plan actually helps minimize the concern by avoiding, through periodic distributions, any buildup of large end-of-the-year distributions.

6. Applicants also note that common shares of closed-end funds often trade in the marketplace at a discount to the funds' NAV. Applicants believe that this discount may be reduced if the Funds are permitted to pay relatively frequent dividends on their common shares at a consistent rate, whether or not those dividends contain an element of capital gain.

7. Applicants assert that the application of rule 19b–1 to a Plan actually could have an inappropriate influence on portfolio management decisions. Applicants state that, in the absence of an exemption from rule 19b–1, the adoption of a periodic distribution plan imposes pressure on management (i) not to realize any net long-term capital gains until the point in the year that the fund can pay all of its remaining distributions in accordance with rule 19b–1 and (ii) not to realize any long-term capital gains during any particular year in excess of the amount of the aggregate pay-out for the year (since as a practical matter excess gains must be distributed and, accordingly, would not be available to satisfy pay-out requirements in following years), notwithstanding that purely investment considerations might favor realization of long-term gains at different times or in different amounts. Applicants assert that by limiting the number of capital gain distributions that a fund may make with respect to any one year, rule 19b–1 may prevent the normal and efficient operation of a periodic distribution plan whenever that fund's realized net long-term capital gains in any year exceed the total of the periodic distributions that may include such capital gains under the rule.

8. Applicants also assert that rule 19b–1 may force the fixed regular periodic distributions under a periodic distribution plan to be funded with returns of capital [2] (to the extent net investment income and realized short term capital gains are insufficient to fund the distribution), even though realized net long-term capital gains otherwise could be available. To distribute all of a fund's long-term capital gains within the limits in rule 19b–1, a fund may be required to make total distributions in excess of the annual amount called for by its periodic distribution plan or to retain and pay taxes on the excess amount. Applicants assert that the requested order would minimize these anomalous effects of rule 19b–1 by enabling the Funds to realize long-term capital gains as often as investment considerations dictate without fear of violating rule 19b–1.

9. Applicants state that Revenue Ruling 89–81 under the Code requires that a fund that seeks to qualify as a regulated investment company under the Code and that has both common shares and preferred shares outstanding designate the types of income, *e.g.,* investment income and capital gains, in the same proportion as the total distributions distributed to each class for the tax year. To satisfy the proportionate designation requirements of Revenue Ruling 89–81, whenever a fund has realized a long term capital gain with respect to a given tax year, the fund must designate the required proportionate share of such capital gain to be included in common and preferred share dividends. Applicants state that although rule 19b–1 allows a fund some flexibility with respect to the frequency of capital gains distributions, a fund might use all of the exceptions available under the rule for a tax year and still need to distribute additional capital gains allocated to the preferred shares to comply with Revenue Ruling 89–81.

10. Applicants assert that the potential abuses addressed by section 19(b) and rule 19b–1 do not arise with respect to preferred shares issued by a closed-end fund. Applicants assert that such distributions are either fixed or are determined in periodic auctions or remarketings by reference to short-term interest rates rather than by reference to performance of the issuer, and Revenue Ruling 89–81 determines the proportion of such distributions that are comprised of the long-term capital gains.

11. Applicants also submit that the ''selling the dividend'' concern is not applicable to preferred shares, which entitle a holder to no more than a periodic dividend at a fixed rate or the rate determined by the market, and, like a debt security, are priced based upon their liquidation value, dividend rate, credit quality, and frequency of payment. Applicants state that investors buy preferred shares for the purpose of receiving payments at the frequency bargained for and do not expect the liquidation value of their shares to change.

12. Applicants request an order pursuant to section 6(c) of the Act granting an exemption from section 19(b) of the Act and rule 19b–1 thereunder to permit each Fund to distribute periodic capital gain dividends (as defined in section 852(b)(3)(C) of the Code) as often as monthly in any one taxable year in respect of its common shares and as often as specified by or determined in accordance with the terms thereof in respect of its preferred shares (if any).

**Applicants' Conditions**

Applicants agree that, with respect to each Fund seeking to rely on the order, the order will be subject to the following conditions:

1. *Compliance Review and Reporting.* The Fund's chief compliance officer will (a) report to the Fund's Board, no less frequently than once every three months or at the next regularly scheduled quarterly Board meeting, whether (i) the Fund has complied with the conditions of the order and (ii) a material compliance matter (as defined in rule 38a–1(e)(2) under the Act) has occurred with respect to such conditions; and (b) review the adequacy of the policies and procedures adopted by the Board no less frequently than annually.

2. *Disclosures To Fund Shareholders.*

[2] Returns of capital as used in the application means return of capital for financial accounting purposes and not for tax accounting purposes.

(a) Each 19(a) Notice disseminated to the holders of the Fund's common shares, in addition to the information required by section 19(a) and rule 19a–1:

(i) will provide, in a tabular or graphical format:

(1) The amount of the distribution, on a per common share basis, together with the amounts of such distribution amount, on a per common share basis and as a percentage of such distribution amount, from estimated: (A) net investment income; (B) net realized short-term capital gains; (C) net realized long-term capital gains; and (D) return of capital or other capital source;

(2) the fiscal year-to-date cumulative amount of distributions, on a per common share basis, together with the amounts of such cumulative amount, on a per common share basis and as a percentage of such cumulative amount of distributions, from estimated: (A) Net investment income; (B) net realized short-term capital gains; (C) net realized long-term capital gains; and (D) return of capital or other capital source;

(3) the average annual total return in relation to the change in NAV for the 5-year period ending on the last day of the month ended immediately prior to the most recent distribution record date compared to the current fiscal period's annualized distribution rate expressed as a percentage of NAV as of the last day of the month prior to the most recent distribution record date; and

(4) the cumulative total return in relation to the change in NAV from the last completed fiscal year to the last day of the month prior to the most recent distribution record date compared to the fiscal year-to-date cumulative distribution rate expressed as a percentage of NAV as of the last day of the month prior to the most recent distribution record date.

Such disclosure shall be made in a type size at least as large and as prominent as the estimate of the sources of the current distribution; and

(ii) will include the following disclosure:

(1) ''You should not draw any conclusions about the Fund's investment performance from the amount of this distribution or from the terms of the Fund's Plan'';

(2) ''The Fund estimates that it has distributed more than its income and net realized capital gains; therefore, a portion of your distribution may be a return of capital. A return of capital may occur, for example, when some or all of the money that you invested in the Fund is paid back to you. A return of capital distribution does not necessarily reflect the Fund's investment performance and should not be confused with 'yield' or 'income' ''; [3] and

(3) ''The amounts and sources of distributions reported in this 19(a) Notice are only estimates and are not being provided for tax reporting purposes. The actual amounts and sources of the amounts for tax reporting purposes will depend upon the Fund's investment experience during the remainder of its fiscal year and may be subject to changes based on tax regulations. The Fund will send you a Form 1099–DIV for the calendar year that will tell you how to report these distributions for federal income tax purposes.''

Such disclosure shall be made in a type size at least as large as and as prominent as any other information in the 19(a) Notice and placed on the same page in close proximity to the amount and the sources of the distribution.

(b) On the inside front cover of each report to shareholders under rule 30e–1 under the Act, the Fund will:

(i) Describe the terms of the Plan (including the fixed amount or fixed percentage of the distributions and the frequency of the distributions);

(ii) include the disclosure required by condition 2(a)(ii)(1) above;

(iii) state, if applicable, that the Plan provides that the Board may amend or terminate the Plan at any time without prior notice to Fund shareholders; and

(iv) describe any reasonably foreseeable circumstances that might cause the Fund to terminate the Plan and any reasonably foreseeable consequences of such termination.

(c) Each report provided to shareholders under rule 30e–1 under the Act, and each prospectus filed with the Commission on Form N–2 under the Act, will provide the Fund's total return in relation to changes in NAV in the financial highlights table and in any discussion about the Fund's total return.

3. *Disclosure to Common Shareholders, Prospective Common Shareholders and Third Parties.*

(a) The Fund will include the information contained in the relevant 19(a) Notice, including the disclosure required by condition 2(a)(ii) above, in any written communication (other than a Form 1099) about the Plan or distributions under the Plan by the Fund, or agents that the Fund has authorized to make such communication on the Fund's behalf, to any Fund common shareholder, prospective common shareholder or third-party information provider;

(b) The Fund will issue, contemporaneously with the issuance of any 19(a) Notice, a press release containing the information in the 19(a) Notice and file with the Commission the information contained in such 19(a) Notice, including the disclosure required by condition 2(a)(ii) above, as an exhibit to its next filed Form N–CSR; and

(c) The Fund will post prominently a statement on its Web site containing the information in each 19(a) Notice, including the disclosure required by condition 2(a)(ii) above, and will maintain such information on such Web site for at least 24 months.

4. *Delivery of 19(a) Notices to Beneficial Owners.* If a broker, dealer, bank or other person (''financial intermediary'') holds common shares issued by a Fund in nominee name, or otherwise, on behalf of a beneficial owner, the Fund: (a) will request that the financial intermediary, or its agent, forward the 19(a) Notice to all beneficial owners of the Fund's shares held through such financial intermediary; (b) will provide, in a timely manner, to the financial intermediary, or its agent, enough copies of the 19(a) Notice assembled in the form and at the place that the financial intermediary, or its agent, reasonably requests to facilitate the financial intermediary's sending of the 19(a) Notice to each beneficial owner of the Fund's shares; and (c) upon the request of any financial intermediary, or its agent, that receives copies of the 19(a) Notice, will pay the financial intermediary, or its agent, the reasonable expenses of sending the 19(a) Notice to such beneficial owners.

5. *Additional Board Determinations for Funds Whose Common Shares Trade at a Premium.*

If:

(a) The Fund's common shares have traded on the Exchange that they primarily trade on at the time in question at an average premium to NAV equal to or greater than 10%, as determined on the basis of the average of the discount or premium to NAV of the Fund's common shares as of the close of each trading day over a 12-week rolling period (each such 12-week rolling period ending on the last trading day of each week); and

(b) The Fund's annualized distribution rate for such 12-week rolling period, expressed as a percentage of NAV as of the ending date of such 12-week rolling period, is greater than the Fund's average annual total return in relation to the change in NAV over the

[3] The disclosure in this condition 2(a)(ii)(2) will be included only if the current distribution or the fiscal year-to-date cumulative distributions are estimated to include a return of capital.

2-year period ending on the last day of such 12-week rolling period; then:

(i) At the earlier of the next regularly scheduled meeting or within four months of the last day of such 12-week rolling period, the Board, including a majority of the Independent Directors:

(1) Will request and evaluate, and the Fund will furnish, such information as may be reasonably necessary to make an informed determination of whether the Plan should be continued or continued after amendment;

(2) will determine whether continuation, or continuation after amendment, of the Plan is consistent with the Fund's investment objective(s) and policies and in the best interests of the Fund and its shareholders, after considering the information in condition 5(b)(i)(1) above; including, without limitation:

(A) Whether the Plan is accomplishing its purpose(s);

(B) the reasonably foreseeable material effects of the Plan on the Fund's long-term total return in relation to the market price and NAV of the Fund's common shares; and

(C) the Fund's current distribution rate, as described in condition 5(b) above, compared with the Fund's average annual taxable income or total return over the 2-year period, as described in condition 5(b), or such longer period as the Board deems appropriate; and

(3) based upon that determination, will approve or disapprove the continuation, or continuation after amendment, of the Plan; and

(ii) The Board will record the information considered by it including its consideration of the factors listed in condition 5(b)(i)(2) above and the basis for its approval or disapproval of the continuation, or continuation after amendment, of the Plan in its meeting minutes, which must be made and preserved for a period of not less than six years from the date of such meeting, the first two years in an easily accessible place.

6. *Public Offerings.* The Fund will not make a public offering of the Fund's common shares other than:

(a) A rights offering below NAV to holders of the Fund's common shares;

(b) an offering in connection with a dividend reinvestment plan, merger, consolidation, acquisition, spin off or reorganization of the Fund; or

(c) an offering other than an offering described in conditions 6(a) and 6(b) above, provided that, with respect to such other offering:

(i) The Fund's annualized distribution rate for the six months ending on the last day of the month ended immediately prior to the most recent distribution record date, expressed as a percentage of NAV as of such date, is no more than 1 percentage point greater than the Fund's average annual total return for the 5-year period ending on such date; and

(ii) the transmittal letter accompanying any registration statement filed with the Commission in connection with such offering discloses that the Fund has received an order under section 19(b) to permit it to make periodic distributions of long-term capital gains with respect to its common shares as frequently as twelve times each year, and as frequently as distributions are specified by or determined in accordance with the terms of any outstanding preferred shares that such Fund may issue.

7. *Amendments to Rule 19b–1.* The requested order will expire on the effective date of any amendment to rule 19b–1 that provides relief permitting certain closed-end investment companies to make periodic distributions of long-term capital gains with respect to their outstanding common shares as frequently as twelve times each year.

For the Commission, by the Division of Investment Management, under delegated authority.

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2012–30548 Filed 12–18–12; 8:45 am]

**BILLING CODE 8011–01–P**

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–68433; File No. S7–13–12]**

## Order Granting Conditional Exemptions Under the Securities Exchange Act of 1934 in Connection With Portfolio Margining of Swaps and Security-Based Swaps

December 14, 2012.

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Exemptive order; request for comment.

**SUMMARY:** The Securities and Exchange Commission (''SEC'' or ''Commission'') is issuing an order granting conditional exemptive relief from compliance with certain provisions of the Securities Exchange Act of 1934 (''Exchange Act'') in connection with a program to commingle and portfolio margin customer positions in cleared credit default swaps (''CDS''), which include both swaps and security-based swaps, in a segregated account established and maintained in accordance with Section 4d(f) of the Commodity Exchange Act (''CEA'').

**DATES:** *Effective Date:* This exemptive order is effective on December 19, 2012. Comments Due Date: Comments must be received on or before February 19, 2013.

**ADDRESSES:** Comments may be submitted, identified by File Number S7–13–12, by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/other.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number S7–13–12 on the subject line; or
- Use the Federal Rulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

*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 S7–13–12. This file number should be included on the subject line if email is used. To help us 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/other.shtml*). Comments are also 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. All comments received will be posted without charge; the Commission does not edit personal identifying information from submissions. You should only submit information that you wish to make publicly available.

**FOR FURTHER INFORMATION CONTACT:** Emily Westerberg Russell, Senior Special Counsel, Catherine Moore, Senior Special Counsel, and Natasha Vij Greiner, Special Counsel, at 202–551–5550, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–7010.

### I. Introduction

On July 21, 2010, President Barack Obama signed the Dodd-Frank Act into

law.[1] Title VII of the Dodd-Frank Act (''Title VII'') establishes a regulatory regime applicable to the over-the-counter (''OTC'') derivatives markets. Title VII provides the Commission and the Commodity Futures Trading Commission (''CFTC'') with tools to oversee these markets.[2] Under the comprehensive framework established in Title VII, the SEC is given regulatory authority over security-based swaps, and the CFTC is given regulatory authority over swaps.[3] The Dodd-Frank Act amended the Exchange Act to require, among other things, that transactions in security-based swaps be cleared through a clearing agency that is registered with the Commission or that is exempt from registration, if the security-based swaps are of a type that the Commission determines must be cleared, unless an exception or exemption from mandatory clearing applies.[4] The Dodd-Frank Act similarly amended the CEA.[5] In addition, the Dodd-Frank Act provided the SEC and CFTC with explicit authority to facilitate portfolio margining by allowing cash and securities to be held in a futures account, and futures and options on futures and related collateral to be held in a securities account, subject to certain conditions.[6]

On December 16, 2011, the Commission approved a request by a clearing agency for portfolio margining of clearing members' proprietary security-based swaps and swap positions consisting of single-name CDS and CDS indices, respectively.[7] Under such a portfolio margining arrangement, clearing members are able to maintain reduced levels of margin that are commensurate with the risks of the portfolio based on correlations in a member's cleared CDS positions consisting of both swaps and security-based swaps.

Market participants have also sought the use of similar portfolio margining arrangements in the context of customer positions in CDS. On November 7, 2011, ICE Clear Credit, LLC (''ICE Clear Credit'') filed with the Commission a petition for rulemaking, regulation or order to provide exemptive relief from certain Exchange Act provisions to allow portfolio margining treatment for customer-related positions in anticipation of ICE Clear Credit offering clearing of security-based swaps for customer-related transactions.[8] ICE Clear Credit requested exemptive relief from the application of certain provisions of the Exchange Act to allow ICE Clear Credit, and any ICE Clear Credit member that is a dually-registered broker-dealer and futures commission merchant (''BD/FCM''), to, among other things: (1) Hold customer assets used to margin, secure, or guarantee customer positions consisting of cleared CDS, which include both 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.[9] ICE Clear Europe Limited (''ICE Clear Europe'') also requested substantially similar relief for itself and its members.[10]

The Commission has received four comment letters, one of which was provided by ICE Clear Credit. All of these letters supported ICE Clear Credit's request for relief.[11] Commenters generally argued that portfolio margining of customer positions in CDS removes economic barriers to customer clearing and would encourage greater clearing, thereby reducing systemic risk.[12] One commenter stated that a portfolio margining program for customer accounts could also improve competitiveness between market participants who are not clearing members and those that are clearing members who are already permitted to portfolio margin in their proprietary accounts.[13] Certain commenters addressed additional issues associated with the approval of ICE Clear Credit's request for relief, including concerns relating to a potential requirement to provide customers the ability to choose an account type and a request for certainty about the applicable bankruptcy regime, which are more specifically addressed, where appropriate, below.[14] Additionally, one commenter argued that the Commission should provide equivalent relief to all clearing agencies seeking exemptive relief, stating that different approaches could lead to inefficiencies in the market because market participants may choose to clear at a particular clearinghouse based on the applicable regulatory standards rather than market efficiencies.[15]

## II. Discussion

Portfolio margining of index CDS (subject to CFTC regulations)[16] and single-name CDS (subject to SEC regulations) can offer many benefits to investors and the markets, including promoting greater efficiencies in clearing with respect to off-setting positions and thereby aligning costs more closely with overall risks presented by an investor's portfolio. Further, portfolio margining may help to alleviate excessive margin calls, improve cash flows and liquidity, and reduce volatility.

At the same time, facilitating portfolio margining for customer-owned swaps requires careful consideration to ensure that customer protection concerns are appropriately addressed, as well as to promote appropriate risk management and disclosure. The Commission is

[1] The Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203,124 Stat. 1376 (2010).

[2] Generally, Subtitle A of Title VII creates and relates to the regulatory regime for swaps, while Subtitle B of Title VII creates and relates to the regulatory regime for security-based swaps.

[3] *See* Section 3(a)(68) of the Exchange Act, 15 U.S.C. 78c(a)(68) (as added by Section 761(a)(6) of the Dodd-Frank Act) and Section 1a(47) of the CEA, 7 U.S.C. 1a(47) (as added by Section 721(a) of the Dodd-Frank Act) for the definitions of security-based swap and swap, respectively. *See also Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping,* Exchange Act Release No. 67453 (Jul. 18, 2012), 77 FR 48207 (Aug. 13, 2012) (Joint Final Rule with the CFTC) (''Product Definitions Adopting Release''), further defining the terms swap and security-based swap.

[4] *See* Section 763(a) of the Dodd-Frank Act (adding new Section 3C(a)(1) to the Exchange Act). 15 U.S.C. 78c–2.

[5] *See* Section 723(a)(3) of the Dodd-Frank Act (adding new Section 2(h)(1)(A) to the CEA).

[6] *See* Section 713 of the Dodd-Frank Act. Under Section 713 of the Dodd-Frank Act, dually-registered broker-dealers and futures commission merchants may portfolio margin pursuant to an approved portfolio margin program, subject to certain requirements, including regulatory action by the SEC and CFTC (pursuant to an exemption, or by rule or regulation). *See* Exchange Act Section 15(c)(3)C and CEA Section 4d(h). *See also infra* note 23.

[7] *See Order Approving Proposed Rule Change to Adopt ICC's Enhanced Margin Methodology,* Exchange Act Release No. 66001 (Dec. 16, 2011).

[8] ICE Clear Credit formally petitioned the Commission to grant exemptive relief from the application of Section 15(c)(3), Rule 15c3–3 and related rules under the Exchange Act. *See* Letter from Michael M. Phillip, Partner, Winston & Strawn LLP (Nov. 7, 2011) (the petition and comments received on the petition are on file at the Commission's Web site at *http://www.sec.gov/rules/petitions.shtml*).

[9] *Id.*

[10] *See* Letter from Paul Swann, President and Chief Operating Office, ICE Clear Europe Limited (May 31, 2012) (on file as a comment to the ICE Clear Credit petition at *http://www.sec.gov/comments/4-641/4641-5.pdf*).

[11] *See* letter from Managed Funds Association dated June 13, 2012 (''MFA Letter''); letter from Investment Company Institute (''ICI Letter'') dated April 9, 2012; letter from ICE Clear Credit LLC dated December 22, 2011 (''ICE Letter''); and letter from Association of Institutional Investors dated December 22, 2011.

[12] *Id.*

[13] *See, e.g.,* MFA Letter.

[14] *See* ICE Letter, MFA Letter, and ICI Letter.

[15] *See* ICI Letter.

[16] Index CDS that are currently cleared are generally swaps subject to CFTC regulation. The definition of ''narrow-based security index'' is used to help in distinguishing between certain swaps, such as index CDS, and security-based swaps. *See Product Definitions Adopting Release.*

mindful of the need to address these issues.

Accordingly, after careful consideration of the requests before the Commission, comments received, and the relevant statutory provisions, the Commission is acting to provide conditional exemptive relief to facilitate portfolio margining treatment for customer-related positions in CDS that are cleared pursuant to the terms of this Order.

*A. Relevant Provisions*

Section 3E of the Exchange Act, as established pursuant to Section 763 of the Dodd-Frank Act, sets forth the framework for the segregation of assets held as collateral in security-based swap transactions. Section 3E(b)(1) of the Exchange Act provides that a broker, dealer, or security-based swap dealer shall treat and deal with all money, securities, and property of any security-based swap customer received to margin, guarantee, or secure a cleared security-based swap transaction as belonging to the customer.[17] Section 3E(b)(2) of the Exchange Act provides that the money, securities, and property shall be separately accounted for and shall not be commingled with the funds of the broker, dealer, or security-based swap dealer or used to margin, secure, or guarantee any trades or contracts of any security-based swap customer or person other than the person for whom the money, securities, or property are held.[18] Section 3E(c)(1) of the Exchange Act provides that, notwithstanding Section 3E(b) of the Exchange Act, money, securities, and property of cleared security-based swap customers of a broker, dealer, or security-based swap dealer may, for convenience, be commingled and deposited in the same one or more accounts with any bank, trust company, or clearing agency.[19] Section 3E(c)(2) of the Exchange Act further provides that the Commission may, notwithstanding Section 3E(b) of the Exchange Act, by rule, regulation, or order prescribe terms and conditions under which any money, securities, or property of a customer with respect to cleared security-based swaps may be commingled and deposited with any other money, securities, or property received by the broker, dealer, or security-based swap dealer and required by the Commission to be separately accounted for and treated and dealt with as belonging to the security-based swap customer of the broker, dealer, or security-based swap dealer.[20] Section 3E(d) of the Exchange Act restricts the ability to invest such money, securities, and property of the security-based swap customer,[21] and Section 3E(e) of the Exchange Act places certain prohibitions on the disposition and use of customer money, securities, and property of a security-based swap customer by any person, including any clearing agency and any depository institution that has received any money, securities, or property for deposit in a separate account or accounts, as provided in Section 3E(b) of the Exchange Act.[22] Finally, Section 3E(g) of the Exchange Act provides that an account holding a security-based swap, other than a portfolio margining account referred to in Section 15(c)(3)(C) of the Exchange Act, shall be considered to be a securities account, as defined in 11 U.S.C. 741.[23]

Section 15(c)(3) of the Exchange Act and Rule 15c3–3 [24] also provide for the protection of customer securities and funds. Specifically, under Section 15(c)(3) of the Exchange Act, the SEC may prescribe rules and regulations ''to provide safeguards with respect to the financial responsibility and related practices of brokers and dealers, including, but not limited to, the acceptance of custody and use of customers' securities and the carrying and use of customers' deposits or credit balances.'' [25] Under Exchange Act Rule 15c3–3, a broker-dealer must, in essence, segregate customer funds and fully paid and excess margin securities held by the firm for the accounts of customers. The intent of the rule is, among other things, to ''facilitate the liquidations of insolvent broker-dealers and to protect customer assets in the event of a SIPC liquidation through a clear delineation in Exchange Act Rule 15c3–3 of specifically identifiable property of customers.'' [26] Absent an exemption, a broker-dealer would be required to comply with applicable provisions of Section 15(c)(3) of the Exchange Act and Rule 15c3–3 thereunder as they relate to all securities, including security-based swaps.[27]

Section 724 of the Dodd-Frank Act added provisions to Section 4d of CEA that perform functions similar to those in Section 3E of the Exchange Act in creating a segregation framework for swap customers.[28] Accordingly, in order to permit collateral related to cleared security-based swaps to be commingled with that related to cleared swaps for purposes of portfolio margining and to operate under the segregation framework for swaps, a broker-dealer would need relief from the applicable provisions of Section 3E and Section 15(c)(3) of the Exchange Act as well as Rule 15c3–3 thereunder. Similarly, a clearing agency would need relief from applicable provisions of Section 3E of the Exchange Act.[29]

[17] *See* Section 3E(b)(1) of the Exchange Act (15 U.S.C. 78c–5(b)(1)) (as added by Section 763(d) of the Dodd-Frank Act).

[18] *See* Section 3E(b)(2) of the Exchange Act (15 U.S.C. 78c–5(b)(2)) (as added by Section 763(d) of the Dodd-Frank Act).

[19] *See* Section 3E(c)(1) of the Exchange Act (15 U.S.C. 78c–5(c)(1)) (as added by Section 763(d) of the Dodd-Frank Act).

[20] *See* Section 3E(c)(2) of the Exchange Act (15 U.S.C. 78c–5(c)(2) (as added by Section 763(d) of the Dodd-Frank Act).

[21] 15 U.S.C. 78c–5(d) (as added by Section 763(c) of the Dodd-Frank Act).

[22] 15 U.S.C. 78c–5(e) (as added by Section 763(c) of the Dodd-Frank Act).

[23] Solely for purposes of Section 3E(g) of the Exchange Act, the Commission interprets ''a portfolio margining account referred to in section 15(c)(3)(C)'' to include a portfolio margining account that is maintained in accordance with the terms of this Order.

[24] 17 CFR 240.15c3–3.

[25] 15 U.S.C. 78o(c)(3).

[26] *See Broker-Dealers; Maintenance of Certain Basic Reserves,* Exchange Act Release No. 9856 (Nov. 10 1972), 37 FR 25224 (Nov. 29, 1972).

[27] In addition to the Exchange Act provisions specific to security-based swaps, there are Exchange Act provisions applicable to ''securities'', which would apply to security-based swaps. Section 761 of the Dodd-Frank Act amended the definition of ''security'' under the Exchange Act to include security-based swaps. *See* Exchange Act Section 3(a)(10), 15 U.S.C. 78c(a)(10) (as revised by Section 761 of the Dodd-Frank Act). The Commission approved an order granting temporary relief and providing interpretive guidance to make it clear that a substantial number of the requirements of the Exchange Act would not apply to security-based swaps when the revised definition of ''security'' went into effect on July 16, 2011. *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,* Exchange Act Release No. 64795 (July 1, 2011) (''Exchange Act Exemptive Order''). While the Exchange Act Exemptive Order provided registered broker-dealers a limited exemption from Section 15(c)(3) of the Exchange Act and rules thereunder in connection with security based-swaps (to the extent that these provisions do not apply to security-based swap activities or positions as of July 15, 2011), the exemption from Exchange Act Rule 15c3–3 is not available for the broker-dealer's activities and positions related to cleared security-based swaps, to the extent that the broker-dealer is a member of a clearing agency that functions as a central counterparty for security-based swaps, and holds customer funds or securities in connection with cleared security-based swaps, because at the time the exemption was granted no clearing agencies were clearing security-based swaps. *Id.* Accordingly, relief separate from Section 15(c)(3) of the Exchange Act and Rule 15c3–3, and certain other Exchange Act provisions applicable to ''securities'' discussed herein, is necessary to permit the commingling and portfolio margining of customer positions in cleared CDS.

[28] *See* 7 U.S.C. 6d(f) (as added by Section 724 of the Dodd-Frank Act).

[29] The CFTC would also need to provide relief to allow security-based swaps to be commingled with swaps in an account maintained in accordance with Section 4d(f) of the CEA. The Commission notes that the CFTC has also received similar requests for relief. *See* Letter from Michael M. Phillip, Partner,

Continued

Moreover, Exchange Act Rules 8c–1 and 15c2–1 (''hypothecation rules'') prohibit, among other things, a broker-dealer from commingling customer securities (the term ''customer'' for this purpose generally includes affiliates of the broker-dealer) with its own proprietary securities under a lien for a loan made to such broker-dealer.[30] However, pursuant to the CFTC Part 22 Rules, the money, securities, and property of an affiliate (as defined in association with the definition of ''Cleared Swaps Proprietary Account'' pursuant to CFTC Rule 22.1)[31] of an intermediary (*i.e.,* BD/FCM) must be held in a Cleared Swaps Proprietary Account in accordance with the CFTC regime in order to permit such affiliates to use portfolio margining for CDS.[32] Absent an exemption, affiliates of a broker-dealer that are not excluded from the definition of customer in the hypothecation rules are customers whose securities positions cannot be commingled with the broker-dealer's proprietary securities and therefore could not be held in a Cleared Swap Proprietary Account, as required by the CFTC's Part 22 Rules.[33]

*B. Exemptive Relief*

Given the above requirements for the segregation of assets held as collateral under the Exchange Act, absent relief by the Commission, participants would not be able to operate in accordance with both the Exchange Act and the CEA and establish a program to commingle and portfolio margin cleared customer positions in CDS, which include both swaps and security-based swaps. The Commission has received requests to provide certain exemptive relief[34] to facilitate the establishment of a program providing for portfolio margining of cleared customer positions in CDS. Such a program has the potential to reduce clearing costs through the integration of clearing functions and the potential reduction of margin requirements by taking into account offsetting positions. As discussed above, Section 3E(c)(2) of the Exchange Act provides that, notwithstanding Section 3E(b) of the Exchange Act, in accordance with any terms and conditions the Commission may prescribe by rule, regulation, or order, any money, securities, or property of the security-based swaps customer of a broker, dealer, or security-based swap dealer described in Section 3E(b) of the Exchange Act may be commingled and deposited as provided in Section 3E of the Exchange Act with any other money, securities, or property received by the broker, dealer, or security-based swap dealer and required by the Commission to be separately accounted for and treated and dealt with as belonging to the security-based swaps customer of the broker, dealer, or security-based swap dealer.

In addition, Section 36 of the Exchange Act authorizes the Commission to conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from certain provisions of the Exchange Act or certain rules or regulations thereunder, by rule, regulation, or order, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.[35]

After careful consideration, the Commission believes that providing certain conditional exemptive relief to facilitate portfolio margining, as outlined below, is necessary or appropriate in the public interest, and is consistent with the protection of investors, because it would promote a more accurate measure of the risk of the total position of the customer based on off-setting positions. Portfolio margining would also increase efficiency and reduce costs by closely aligning the costs of maintaining a portfolio of cleared CDS to the risks presented by such a portfolio. Moreover, the conditions to the exemption will provide restrictions designed to protect money, securities, and property of a security-based swap customer, to address certain differences in the statutory requirements of the Exchange Act and CEA, and to promote appropriate risk management and disclosure.

Specifically, consistent with the discussion on the need for relief to facilitate portfolio margining outlined above under the heading ''Relevant Provisions,'' pursuant to Section 3E(c)(2) and Section 36 of the Exchange Act, the Commission finds that it is necessary or appropriate in the public interest and is consistent with the protection of investors to exercise its authority to grant the following conditional exemptions:[36]

(1) An exemption from Sections 3E(b), (d), and (e) of the Exchange Act and any rules thereunder for a clearing agency registered pursuant to Section 17A of the Exchange Act and registered as a derivatives clearing organization pursuant to Section 5b of the CEA (''clearing agency/DCO''),[37] solely to perform the functions of a clearing agency for CDS under a program to commingle and portfolio margin CDS for customer positions; and

(2) An exemption from Sections 3E(b), (d), and (e) of the Exchange Act and Section 15(c)(3) of the Exchange Act and Rule 15c3–3 thereunder,[38] and from any

Winston & Strawn LLP (Oct. 4, 2011) (the petition and comments received on the petition are on file at the CFTC's Web site at *http://sirt.cftc.gov/sirt/sirt.aspx?Topic=CommissionOrdersandOtherActionsAD&Key=22685).*

[30] 17 CFR 240.8c–1 and 17 CFR 240.15c2–1. The term '''customer'' is defined in paragraph (b)(1) of the hypothecation rules and excludes any general or special partner or any director or officer of such broker-dealer, or any participant, as such, in any joint, group or syndicate account with such broker-dealer or with any partner, officer, or director thereof.

[31] Cleared Swaps Proprietary Account means an account for cleared swaps and associated collateral that is carried on the books and records of a FCM for persons with certain relationships with that FCM, including applicable affiliates. In association with the definition of a Cleared Swaps Proprietary Account, an ''affiliate'' is defined to include a person, directly or indirectly, controls such individual, partnership, corporation or association or, directly or indirectly, is controlled by or is under common control with, such individual, partnership, corporation or association. *See* CFTC Rule 22.1, 17 CFR 22.1.

[32] Under CFTC Rule 22.1, a firm that is an affiliate of a FCM would not be a cleared swaps customer, which is defined as any person entering into a cleared swap, excluding any owner or holder of a Cleared Swaps Proprietary Account with respect to the cleared swaps in such account and a clearing member of a DCO with respect to cleared swaps cleared on that DCO. *See* CFTC Rule 22.1, 17 CFR 22.1. Thus, such an affiliate would not be a customer for purposes of a customer portfolio margining program with respect to swaps and security-based swaps.

[33] The Exchange Act Exemptive Order provided registered broker-dealers a temporary exemption from these rules, which expires on February 11, 2013. While the Commission 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, including Exchange Act Rules 8c–1 and 15c2–1, the Commission believes that it is appropriate to provide relief from these rules in the context of this order. *See Product Definitions Adopting Release.*

[34] See supra notes 8 and 10.

[35] 15 U.S.C. 78mm(a)(1).

[36] The following conditional exemptions do not in any way limit the Commission's authority to oversee or regulate security-based swaps under the Exchange Act with respect to provisions that are not subject to the exemptions, including, among others, the antifraud and anti-manipulation provisions and the Commission's examination authority provisions.

[37] An entity that clears both security-based swaps and swaps is required to be dually registered as a clearing agency/DCO. *See* Section 17A(g) of the Exchange Act, (requiring that clearing agencies that clear security-based swaps be registered with the Commission) and Section (h) of the CEA (requiring that DCOs that clear swaps be registered with the CFTC).

[38] ICE Clear Credit and ICE Clear Europe also requested exemptive relief from Rules 15c3–1, 17a–3, 17a–4, 17a–5 and 17a–11(c)(2) of the Exchange Act for their members engaged in the portfolio margining program. However, compliance with these rules depends upon the application of Exchange Act Rule 15c3–3 to CDS covered by the

requirement to treat an affiliate (as defined in association with the definition of ''Cleared Swaps Proprietary Account'' pursuant to CFTC Rule 22.1) as a customer for purposes of Exchange Act Rules 8c–1 and 15c2–1, for BD/FCMs that elect to offer a program to commingle and portfolio margin customer positions in CDS in customer accounts maintained in accordance with Section 4d(f) of the CEA and the rules thereunder.

As discussed in more detail below, this relief is subject to certain conditions that are designed to help ensure the protection of money, securities, and property received from a security-based swap customer, as well as to address certain differences in the statutory requirements of the Exchange Act and CEA and promote appropriate risk management and disclosure. In particular, the conditions seek to preserve customers' ability to select between the segregation requirements and customer protections afforded a securities account subject to the Exchange Act and the requirements and protections afforded a swap account subject to the CEA, help ensure that BD/FCMs collect sufficient margin from customers to address the risk presented by this business, and help ensure that customers receive relevant disclosures about the legal framework that will apply to their CDS transactions.

*C. Conditional Exemptions for Clearing Agencies/DCOs From Sections 3E(b), (d) and (e) of the Exchange Act*

As summarized above, pursuant to Section 3E(c)(2) and Section 36 of the Exchange Act from Sections 3E(b), (d), and (e) of the Exchange Act and any rules thereunder, the Commission is issuing an exemption to a clearing agency/DCO. This exemption is available to a clearing agency/DCO solely to perform the functions of a clearing agency for CDS under a program to commingle and portfolio margin cleared CDS for customer positions. This exemption is subject to five conditions that are designed to help safeguard customer money, securities, and property and promote the ability of customers to select an appropriate framework for the segregation of assets.

The first two conditions are intended to provide for portfolio margining within a securities account as an alternative for customers that may desire to conduct portfolio margining under a securities account structure as opposed to in a swaps account, once the Commission adopts final rules setting forth margin and segregation requirements applicable to security-based swaps consistent with Section 3E of the Exchange Act (''final margin and segregation rules for security-based swaps'').[39]

Specifically, the first condition requires that the clearing agency/DCO, by the later of (i) six months after the adoption date of the final margin and segregation rules for security-based swaps or (ii) the compliance date of such rules, take all necessary action within its control to obtain any relief needed to permit its BD/FCM clearing members to maintain customer money, securities, and property received by the BD/FCM to margin, guarantee, or secure customer positions in CDS in a segregated account established and maintained in accordance with Section 3E of the Exchange Act and any rules thereunder for the purpose of clearing (as a clearing member of the clearing agency/DCO) such customer positions under a program to commingle and portfolio margin CDS. Under this condition, a clearing agency/DCO would be required to have taken steps, by the later of six months after the adoption date of final rules or the compliance date of such rules, that are within its control to obtain relief from all appropriate regulatory agencies, including submitting any applicable request for relief and working diligently to address any questions or issues raised by regulators.[40]

The second condition requires that the clearing agency/DCO, by the later of (i) six months after the adoption date of final margin and segregation rules for security-based swaps or (ii) the compliance date of such rules, take all necessary action within its control to establish rules and operational practices to permit a BD/FCM (at the BD/FCM's election) to maintain customer money, securities, and property received by the BD/FCM to margin, guarantee, or secure customer positions in cleared CDS, which include both swaps and security-based swaps, in a segregated account established and maintained in accordance with Section 3E of the Exchange Act and any rules thereunder for the purpose of clearing (as a clearing member of the clearing agency/DCO) such customer positions under a program to commingle and portfolio margin CDS. Until the clearing agency/DCO has developed such rules and operational practices, the clearing agency/DCO must have in place rules requiring BD/FCM clearing members to maintain customer money, securities, and property received to margin, guarantee, or secure customer positions consisting of cleared CDS, which include both swaps and security-based swaps, in a segregated account established and maintained in accordance with Section 4d(f) of the CEA and rules thereunder for the purpose of clearing (as a clearing member of the clearing agency/DCO) such customer positions under a program to commingle and portfolio margin CDS. This condition would ensure that all customer assets are segregated and subject to appropriate regulatory oversight.

Some commenters raised certain issues associated with a requirement that market participants be provided a choice in account structure. Specifically, ICE Clear Credit stated that offering customers a choice would require changes at ICE Clear Credit and each of its participant BD/FCMs and result in needless additional costs.[41] ICE Clear Credit stated that few, if any, customers would choose an account established in accordance with Section 3E of the Exchange Act instead of an account established in accordance with Section 4d(f) of the CEA.[42] Another commenter also stated that granting the petition now would not prohibit customers from later choosing a different portfolio margining option under a Section 3E account structure, if made available.[43]

The Commission appreciates the benefits of providing relief to facilitate portfolio margining now while maintaining discretion for customers to later choose a different portfolio

portfolio margining program contemplated under this Order. Therefore, because the Commission is already providing conditional exemptive relief from Section 15(c)(3) of the Exchange Act and Rule 15c3–3 thereunder, the Commission does not need to provide separate exemptive relief from these provisions with respect to the portfolio margining program contemplated under this Order.

[39] The Commission has proposed margin, and segregation requirements for security-based swap dealers and major security-based swap participants. *See Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers (''Capital, Margin, and Segregation Requirements Adopting Release''),* Exchange Act Release No. 68071 (Oct. 18, 2012), 77 FR 70213 (Nov. 23, 2012), at *http://www.gpo.gov/fdsys/pkg/FR–2012–11–23/pdf/2012–26164.pdf.* Once adopted, the Commission's rules would help establish a more permanent framework for the availability of a securities account as an alternative for customer accounts holding both security-based swaps and swaps. As a result, the Commission may provide further guidance on the application of the exemptive relief provided in this Order after the final rules related to margin and the segregation requirements of security-based swaps are adopted by the Commission.

[40] The Commission anticipates that the CFTC will consider appropriate regulatory action to facilitate portfolio margining.

[41] *See* ICE Letter.

[42] *Id.*

[43] *See* MFA Letter.

margining option under a Section 3E account structure when it becomes available. The Commission believes that it is important to ultimately provide market participants with the ability to select an account structure to manage their individual risks by taking into account the different regulatory provisions that may apply to different accounts types and that any costs incurred in providing such an option would be based on existing obligations that clearing agencies and markets participants have under Section 3E of the Exchange Act in connection with the clearing of security-based swaps in accordance with Section 3E of the Exchange Act. Accordingly, the Commission is imposing these two conditions in order to facilitate the ability of customers to choose an alternative account option in the future, once the Commission adopts final margin and segregation rules for security-based swaps.[44]

The third condition requires the clearing agency/DCO to have obtained any other relief needed to permit a BD/FCM that is a clearing member (at the BD/FCM's election) to maintain customer money, securities, and property received by the BD/FCM to margin, guarantee, or secure customer positions in cleared CDS, which include both swaps and security-based swaps, in a segregated account established and maintained in accordance with Section 4d(f) of the CEA and rules thereunder for the purpose of clearing (as a clearing member of the clearing agency/DCO) such customer positions under a program to commingle and portfolio margin CDS. The conditional exemptions from the requirements under the Exchange Act are based in part on the applicability of the regulatory regime under the CEA. This condition is designed to help ensure the exemption from the Exchange Act regulatory framework would apply only in circumstances where the regulatory regime under the CEA is applicable.

The fourth condition requires the clearing agency/DCO to have appropriate rules and operational practices to permit a BD/FCM that is a clearing member (at the BD/FCM's election) to maintain customer money, securities, and property received by the BD/FCM to margin, guarantee, or secure customer positions in cleared CDS, which include both swaps and security-based swaps, in a segregated account established and maintained in accordance with Section 4d(f) of the CEA and rules thereunder for the purpose of clearing (as a clearing member of the clearing agency/DCO) such customer positions under a program to commingle and portfolio margin CDS. Similar to the prior condition, this condition is designed to help ensure the exemption from the Exchange Act regulatory framework would apply only in circumstances where the regulatory regime under the CEA is applicable.

The fifth condition requires the clearing agency/DCO to have rules mandating that each customer of the BD/FCM participating in a program to commingle and portfolio margin CDS shall be an ''eligible contract participant'' as defined in Section 1a(18) of the CEA. Persons that are not eligible contract participants may lack the expertise or resources to effectively determine the risks associated with engaging in these types of transactions.[45] Accordingly, the Commission believes it is appropriate to provide conditions that would limit the applicability of the exemptions to customers that are eligible contract participants.

*D. Conditional Exemption for BD/FCMs That Elect To Offer a Program To Commingle and Portfolio Margin Customer Positions in CDS in Customer Accounts Maintained in Accordance With Section 4d(f) of the CEA and Rules Thereunder*

As summarized above, the Commission is issuing an exemption to BD/FCMs from Exchange Act Sections 3E(b), (d), and (e), and Section 15(c)(3) and Rule 15c3–3 thereunder, as well as an exemption from any requirement to treat an affiliate (as defined in association with the definition of ''Cleared Swaps Proprietary Account'' pursuant to CFTC Rule 22.1)[46] as a customer for purposes of Exchange Act Rules 8c–1 and 15c2–1, provided that the BD/FCM complies with the conditions to the exemption discussed below. This exemption is available to BD/FCMs solely to perform the functions of a BD/FCM for CDS with respect to any customer money, securities, and property received by the BD/FCM to margin, guarantee, or secure cleared customer positions in security-based swaps included in a segregated account established and maintained in accordance with Section 4d(f) of the CEA and the rules thereunder under a program to commingle and portfolio margin customer positions in cleared CDS.

The exemption is subject to six conditions that are designed to permit such BD/FCMs to participate in a program to commingle and portfolio margin customer positions in cleared CDS while helping to ensure the protection of customer securities and funds. The first two conditions of this exemption relate to the segregation of customer positions in CDS and impose separate requirements for customers that are not affiliates of the BD/FCM and customers that are affiliates of the BD/FCM.[47] The remaining conditions apply generally to all BD/FCMs participating in the program—regardless of whether they deal with customers that are affiliates of the BD/FCM—and relate to the risk management and other safeguards the BD/FCM must have in place in order to rely on the exemption. Among other things, these conditions

[44] The choice of the type of portfolio margining account structure (*i.e.,* security account or swap account) would be made by each intermediary (*i.e.,* BD/FCM) for the benefit of its customers, while the clearing agency would be expected to maintain the capacity to allow the intermediary, acting as a clearing member, to select either option. This optionality also will further efforts to achieve more fully the benefits of risk-based portfolio margining, by giving to customers the choice of portfolio margining in a single futures or securities account at a dually-registered BD/FCM. *See A Joint Report of the SEC and the CFTC on Harmonization of Regulation* (Oct. 19, 2009) ''Joint Report''.

[45] The Dodd-Frank Act limits the swaps and security-based swap transactions that may be entered into by parties that are not eligible contract participants. For example, under the Dodd-Frank Act, only an eligible contract participant may enter into security-based swaps that are not on a national securities exchange. *See* Exchange Act Section 6(l), 15 U.S.C. 78f(l) (added by Section 763(e) of the Dodd-Frank Act). In addition, security-based swaps that are not registered pursuant to the Securities Act of 1933 (''Securities Act'') can only be sold to eligible contract participants. *See* Securities Act Section 5(d), 15 U.S.C. 77e(d) (added by Section 768(b) of the Dodd-Frank Act). Securities Act Section 5(d) specifically provides that it is unlawful to offer to buy, purchase, or sell a security-based swap to any person that is not an eligible contract participant, unless the transaction is registered under the Securities Act. *Id.* Given that Congress determined it is appropriate to include these limitations in the Dodd-Frank Act with respect to eligible contract participants, we believe it is appropriate to limit the exemptions in this Order to CDS entered into with eligible contract participants.

[46] 17 CFR 22.1. The definition of ''Cleared Swaps Proprietary Account'' was recently adopted by the CFTC and is substantially similar to the definition of ''Proprietary Account'' for futures contracts in regulation 1.3. *See Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions,* 77 FR 6336 (Feb. 7, 2012).

[47] ''Customer'' for purposes of this exemption has the same meaning as in Exchange Act Rules 15c2–1 and 8c2–1.

establish minimum margin levels and disclosure requirements.

The first condition consists of two requirements and applies with respect to transactions involving customers that are not affiliates [48] of the BD/FCM.

First, the BD/FCM must maintain customer money, securities, and property received to margin, guarantee or secure customer positions consisting of cleared CDS, which include both swaps and security-based swaps, in a segregated account established and maintained in accordance with Section 4d(f) of the CEA and rules thereunder for the purpose of clearing (as a clearing member or through a clearing member of a clearing agency/DCO operating pursuant to the exemption in this Order) such customer positions under a program to commingle and portfolio margin CDS. This condition is designed to help ensure that the exemption under this Order would apply only in circumstances where customer money, securities, and property are maintained in a segregated account pursuant to the regulatory regime under the CEA.

Second, the BD/FCM must enter into a non-conforming subordination agreement [49] with each customer that is not an affiliate regarding all customer money, securities, or property held in a segregated account established and maintained in accordance with Section 4d(f) of the CEA and rules thereunder under a program to commingle and portfolio margin CDS. The non-conforming subordination agreement must contain: (i) A specific acknowledgment by the customer that such money, securities or property will not receive customer treatment under the Exchange Act or Securities Investor Protection Act of 1970 (''SIPA'') or be treated as customer property as defined in 11 U.S.C. 741 in a liquidation of the BD/FCM, and that such money, securities or property will be subject to any applicable protections under Subchapter IV of Chapter 7 of Title 11 of the United States Code and rules and regulations thereunder; and (ii) an affirmation by the customer that all of its claims with respect to such money, securities, or property against the BD/FCM will be subordinated to the claims of other securities customers and security-based swaps customers not operating under a program to commingle and portfolio margin CDS pursuant to this Order. The Commission believes that this condition, along with the disclosure conditions discussed below, should help to ensure that customers clearly understand that any customer protection treatment otherwise available with respect to securities transactions under the Exchange Act, SIPA or the stockbroker liquidation provisions will not be available for CDS held in an account maintained in accordance with Section 4d(f) of the CEA.

One commenter similarly requested clarity about how CDS commingled in a Section 4d(f) account would be treated in the event of the bankruptcy of a BD/FCM.[50] The commenter requested that the Commission and the CFTC clarify and confirm in any approval of ICE Clear Credit's request for relief that commingled accounts held in accordance with the segregation requirements of Section 4d(f) of the CEA would be a cleared swaps customer account for customers trading swaps and would be treated as such under the Bankruptcy Code (rather than a securities account subject to SIPA).[51] The Commission believes it is critical for the protection of customer's assets to clarify at the outset the rights of customers, generally, in the event of a bankruptcy of the BD/FCM, and believes that the subordination agreement condition discussed herein, in conjunction with disclosure condition described below, should help provide customers with clarity that the segregation requirements of the Exchange Act and any protections of SIPA and the stockbroker liquidation provisions will not apply to customer positions in CDS that are security-based swaps and are held in a Section 4d(f) account.[52]

The second condition applies with respect to transactions involving customers that are affiliates of the BD/FCM and consists of three requirements.

First, the BD/FCM must maintain affiliate money, securities, and property received to margin, guarantee, or secure positions consisting of cleared CDS, which include both swaps and security-based swaps, in a Cleared Swaps Proprietary Account for the purpose of clearing (as a clearing member of a clearing agency/DCO operating pursuant to the exemption in this Order) such positions under a program to commingle and portfolio margin CDS. The purpose of this requirement is to ensure that a program to commingle and portfolio margin CDS will conform to the regulatory regime of the CFTC, under which certain affiliates are not treated as customers.[53] Specifically, the money, securities, and property of a customer that is an affiliate of the BD/FCM must be held in a Cleared Swaps Proprietary Account in accordance with the CFTC regime.[54]

[48] See *supra* notes 31 and 32 and accompanying text.

[49] The term ''non-conforming subordination agreement'' is used broadly to refer to a subordination agreement between a broker-dealer and its client where the client agrees to subordinate its claims to the claims of all customers and other creditors of the broker-dealer. Non-conforming subordination agreements have previously been used in limited circumstances to permit broker-dealer affiliates to be treated as non-customers for purposes of Exchange Act Rule 15c3–3 to allow the positions of the affiliate to be commingled with the positions of the clearing member. *See, e.g.,* Letter from Michael A. Macchiaroli, Associate Director, Division of Market Regulation, to William H. Navin, EVP and General Counsel, The Options Clearing Corporation (June 15, 2000). *See also Statement of the SEC Division of Trading and Markets Regarding the Protection of Customer Assets,* Sept. 20, 2008 (available at *http://www.sec.gov/news/press/2008/2008-216.htm*).

[50] *See* ICI Letter.

[51] *Id.*

[52] In response to statements in the ICE Letter regarding what occurs when there is a shortfall in customer property in a broker-dealer bankruptcy or SIPA liquidation versus an FCM bankruptcy, the Commission notes that SIPA provide protections to customers that give them priority over general creditors. *See* Joint Report, *supra,* note 44, at 39–40. First, in the case of a shortfall in customer property held by a broker-dealer, SIPA and the stockbroker liquidation provisions of the Bankruptcy Code provide that customer property may be supplemented with other property in certain circumstances. *See* 15 U.S.C. 78lll(4)(E); 15 U.S.C. 78fff–2(c)(3); 11 U.S.C. 741(4)(A)(iv); and 11 U.S.C. 749. In a SIPA liquidation, to the extent customer property and SIPC advances (up to $500,000 per customer, including a maximum of $250,000 for cash claims) are not sufficient to pay or otherwise satisfy in full the net equity claims of customers, such customers are entitled, to the extent only of their respective unsatisfied net equities, to participate in the general estate as unsecured creditors.

In response to statements in the ICE Letter that the SIPA insolvency rules do not appear to provide assurances for a prompt liquidation, the Commission notes that SIPA and Commission regulations contemplate expeditious transfer of customer accounts through self-liquidation or a proceeding under SIPA. In general, if the books and records of the broker-dealer are in order and customer accounts are properly margined, customer accounts may be transferred to another broker-dealer in a process known as a bulk transfer. *See* Joint Report, *supra,* note 44, at 40.

[53] Under CFTC regulations, an account in which Cleared Swaps and associated collateral of applicable affiliates of an FCM are held is classified as a proprietary account. *See* 17 CFR 22.1. As previously noted, the Commission believes the relief being provided with respect to affiliates of a BD/FCM is appropriate because absent an exemption, affiliates of a BD/FCM that are not otherwise excluded from the definition of customer in the hypothecation rules (*i.e.,* Exchange Act Rules 8c–1 and 15c2–1) are customers whose securities positions cannot be commingled with the broker-dealer's own proprietary securities positions and therefore could not be held in Cleared Swap Proprietary Account as required under the CFTC regime.

[54] The Commission has previously granted similar relief to non-broker-dealer affiliates of members of a registered clearing agency. *See* Letter from Michael A. Macchiaroli, Associate Director, Division of Market Regulation, to William H. Navin, EVP and General Counsel, The Options Clearing Corporation (June 15, 2000). The no-action relief included terms that required each non-broker-dealer member affiliate whose securities positions

Continued

Second, the BD/FCM must enter into a non-conforming subordination agreement[55] with each affiliate regarding all customer money, securities, or property held in a segregated account established and maintained in accordance with Section 4d(f) of the CEA and rules thereunder under a program to commingle and portfolio margin CDS. The non-conforming subordination agreement must contain: (i) A specific acknowledgment by the affiliate that such money, securities or property will not receive customer treatment under the Exchange Act or SIPA or be treated as customer property as defined in 11 U.S.C. 741 in a liquidation of the BD/FCM, and that such money, securities or property will be held in a proprietary account in accordance with the CFTC requirements and will be subject to any applicable protections under Subchapter IV of Chapter 7 of Title 11 of the United States Code and rules and regulations thereunder; and (ii) an affirmation by the affiliate that all of its claims with respect to such money, securities, or property against the BD/FCM will be subordinated to the claims of other securities customers and security-based swap customers not operating under a program to commingle and portfolio margin CDS pursuant to this Order. The Commission believes that this requirement should help to ensure that affiliates clearly understand that any customer protection treatment otherwise available with respect to securities transactions under the Exchange Act, SIPA or the stockbroker liquidation provisions will not be available and the account would be treated as a proprietary account (and not a customer account) under the CEA.

Third, the BD/FCM must obtain from the affiliate an opinion of counsel that the affiliate is legally authorized to subordinate all of its claims against the BD/FCM to those of other customers. The Commission believes that this condition is appropriate to help ensure that affiliates of the BD/FCM do not place in a proprietary account any assets that the affiliate is not legally authorized to subordinate.

The remaining conditions are applicable generally to all BD/FCMs operating pursuant to the exemption in this Order, regardless of whether they deal with customers that are affiliates of the BD/FCM.

The third condition to this exemption states that the BD/FCM must set minimum margin levels, with respect to any customer transaction in a program to commingle and portfolio margin CDS, at least equal to the amount determined using a margin methodology established and maintained by the BD/FCM that has been approved in writing by the Commission or the Commission staff. In conducting this review function, the Commission intends that the Commission staff will consult with the CFTC staff and take into consideration the margin methodology used by the clearing agency/DCO in setting customer margin levels under the CFTC risk management regulations.[56] This condition is designed to help assure that consistent customer margin requirements apply to the BD/FCM, regardless of the type of account in which a security (including security-based swap) is held, and that the BD/FCM is requiring minimum margin that adequately measures the risk in the customer's CDS portfolio in a manner consistent with its appropriate internal risk management procedures.[57] This approach will promote the establishment of consistent margin levels for securities across account types, which in turn will mitigate the risk that clearing agency/DCOs will compete by implementing lower margin levels and help ensure that margin levels are set at sufficiently prudent levels to reduce systemic risk. Finally, the Commission intends that the Commission staff will work with the CFTC staff to see that trading under the program will facilitate both capital efficiency and prudent risk management.

A BD/FCM seeking approval for a margin methodology would be expected to submit sufficient information for the Commission or Commission staff[58] to be able to make a determination regarding the performance of the firm's margin methodology.[59] In reviewing this information, the Commission or the Commission staff will be guided by the standards prescribed in Appendix E of Exchange Act Rule 15c3–1, to the extent relevant to the portfolio margining of cleared CDS that are swaps and security-based swaps.[60] In reviewing the BD/FCM's submitted margin methodology, we expect that the Commission or Commission staff would consider, among other things, whether the type and amount of securities permitted to be held for margin purposes are restricted to those which would facilitate the portfolio margining program and whether the BD/FCM's VaR model meets the standards set forth in Appendix E to Exchange Act Rule 15c3–1, as applicable.[61] In cases where a BD/FCM proposes to use a standardized, rather than model-based, methodology, the Commission or Commission staff would consider whether the methodology could be expected to be at least as conservative in setting margin amounts as a model meeting the requirements just described.

By conducting this review, the Commission will be approving margin methodologies for customer positions in securities as well as non-securities held in a portfolio margin account. Due to the nature of portfolio margining, in which

would be hypothecated to consent to being treated as a non-customer and to execute a non-conforming subordination agreement meeting certain criteria accompanied by an opinion of counsel regarding the legal authority of the member affiliate to so subordinate its claims. In connection with the no action relief, the Commission approved a proposed rule change filed by OCC to allow an affiliate of an OCC clearing member to designate itself as a non-customer under the Commission's hypothecation rules and OCC's By-Laws and Rules in order for the affiliate's transactions and positions to be commingled in its clearing member's firm and/or proprietary cross-margin account. *See Self-Regulatory Organizations; The Options Clearing Corporation; Order Granting Approval of Proposed Rule Change Relating to Clearing Member Affiliates,* Exchange Act Release No. 43668 (Dec. 4, 2000), 65 FR 77413 (Dec. 11, 2000).

[55] Under Exchange Act Rule 15c3–1, a broker-dealer can exclude from its liabilities a subordinated loan that has been approved by its designated examining authority (''DEA'') for purposes determining its net capital. *See* 17 CFR 240.15c3–1(c)(2)(ii) and 15c3–1d. A non-conforming subordinated loan is one that the DEA has not approved and, therefore, cannot be used to exclude the liability arising from the loan agreement. *See* Letter from Michael A. Macchiaroli, Associate Director, Division of Market Regulation, to William H. Navin, EVP and General Counsel, The Options Clearing Corporation (June 15, 2000).

[56] See 17 CFR 39.13 (CFTC risk management regulations applicable to DCOs). In appropriate circumstances, the Commission or the Commission staff may provide temporary approval of a BD/FCM's margin methodology while the methodology is still being evaluated prior to granting final approval.

[57] Nothing in this Order will preclude an FCM from setting a higher margin level for some or all of its customers. *See* 17 CFR 39.13(g)(8).

[58] The Commission expects and intends that the Financial Industry Regulatory Authority (''FINRA'') will be actively involved in reviewing risk management systems and procedures, including margin methodologies, used by BD/FCMs seeking to participate in the program. FINRA has a defined and vital interest in seeing that its members use portfolio margining arrangements involving securities, including security-based swaps, in a manner that is prudent and fully accounts for all the risks that they incur in connection with such arrangements.

[59] If a BD/FCM's margin methodology is approved for purposes of this exemption, the performance of the methodology would be subject to ongoing regulatory supervision, and the BD/FCM would be expected to submit for approval any material changes to its margin methodology.

[60] *See generally* 17 CFR 240.15c3–1e(a). Information submitted as part of such application shall be accorded confidential treatment, subject to provisions of applicable law.

[61] The amount and type of securities held for margin purposes should be commensurate with the risk and activity contained in the portfolio margining program and must not be designed to evade the requirements generally applicable to securities pursuant to Exchange Act Rule 15c3–3.

the margin methodology is applied to all positions in an account as a single portfolio, security-based swaps cannot be singled out for margin treatment that differs from the treatment applied to swaps. This order by its terms does not apply to, and the Commission is not seeking to establish margin requirements with respect to, accounts that hold no positions in security-based swaps.

The fourth condition requires that the BD/FCM be in compliance with applicable laws and regulations relating to risk management, capital, and liquidity, and be in compliance with applicable clearing agency/DCO rules and CFTC requirements (including segregation and related books and records provisions) for accounts established and maintained in accordance with Section 4d(f) of the CEA and rules thereunder and subject to a program to commingle and portfolio margin CDS. The purpose of this condition is to help assure that the exemption under this Order is available only where the applicable regulatory requirements are appropriately followed.

The fifth condition requires that each customer of the BD/FCM participating in a program to commingle and portfolio margin CDS be an ''eligible contract participant'' as defined in Section 1a(18) of the CEA. Similar to the condition under the exemption for clearing agencies/DCOs, the Commission believes that it is appropriate to limit the availability of this exemption to eligible contract participants, as persons that are not eligible contract participants may lack the expertise or resources to effectively determine the risks associated with engaging in these types of transactions.

The sixth and final condition requires that, before receiving any money, securities, or property of a customer to margin, guarantee, or secure positions consisting of cleared CDS, which include both swaps and security-based swaps, under a program to commingle and portfolio margin CDS, the BD/FCM must furnish to the customer a disclosure document containing (i) a statement indicating that the customer's money, securities, and property will be held in an account maintained in accordance with the segregation requirements of Section 4d(f) of the CEA and that the customer has elected to seek protections under Subchapter IV of Chapter 7 of Title 11 of the United States Code and the rules and regulations thereunder with respect to such money, securities, and property, and (ii) a statement that the broker-dealer segregation requirements of Section 15(c)(3) and Section 3E of the Exchange Act and the rules thereunder, and any customer protections under SIPA and the stockbroker liquidation provisions, will not apply to such customer money, securities, and property. The disclosure document may be provided to a customer at or prior to the time that the customer opens an account to commingle and portfolio margin CDS positions in accordance with Section 4d(f) of the CEA, but must be provided prior to the BD/FCM receiving any money, securities or property to margin, guarantee or secure positions consisting of cleared CDS, which include both swaps and security-based swaps, under a program to commingle and portfolio margin CDS. The Commission believes that this condition will help to provide market participants that elect to participate in a portfolio margining arrangement, as contemplated under this Order, with important disclosures regarding the legal framework that will govern their transactions. As noted above, the Commission views the disclosure requirements as essential to highlight to customers who elect to commingle and portfolio margin their positions in CDS in accounts maintained in accordance with Section 4d(f) of the CEA that the account will be governed by the segregation requirements under the CFTC's regulatory regime and that any protections under the SIPA will not be available to the account in the event of insolvency.[62]

## III. Solicitation of Comments

The Commission requests comment on this exemption for clearing agencies/DCOs and BD/FCMs. The Commission is soliciting public comment on all aspects of this exemption, including whether other conditions should apply. If so, what conditions and why?

## IV. Conclusion

*It is hereby ordered,* pursuant to Section 3E(c)(2) and Section 36(a) of the Exchange Act, the following exemptions from Exchange Act requirements will apply:

(a) *Exemption for dually registered clearing agencies/derivatives clearing organizations.* A clearing agency registered pursuant to Section 17A of the Exchange Act and registered as a derivatives clearing organization pursuant to Section 5b of the CEA (a ''clearing agency/DCO'') shall be exempt from Sections 3E(b), (d), and (e) of the Exchange Act and any rules thereunder, solely to perform the functions of a clearing agency for CDS under a program to commingle and portfolio margin cleared CDS for customer positions, subject to the following conditions:

(1) The clearing agency/DCO, by the later of (i) six months after the adoption date of final rules setting forth margin and segregation requirements applicable to security-based swaps consistent with Section 3E of the Exchange Act or (ii) the compliance date of such rules, takes all necessary action within its control to obtain any relief needed to permit its clearing members that are registered under Section 15(b) of the Exchange Act (other than paragraph (11) thereof) and also registered as a futures commission merchant pursuant to Section 4f(a)(1) of the CEA (a ''BD/FCM'') (at the BD/FCM's election), to maintain customer money, securities, and property received by the BD/FCM to margin, guarantee, or secure customer positions in cleared CDS, which include both swaps (as defined in Section 1(a)(47) of the CEA and the rules thereunder) and security-based swaps (as defined in Section 3(g)(68) of the Exchange Act and the rules thereunder), in a segregated account established and maintained in accordance with Section 3E of the Exchange Act and any rules thereunder for the purpose of clearing (as a clearing member of the clearing agency/DCO) such customer positions under a program to commingle and portfolio margin CDS.

(2) The clearing agency/DCO, by the later of (i) six months after the adoption date of final rules setting forth margin and segregation requirements applicable to security-based swaps consistent with Section 3E of the Exchange Act or (ii) the compliance date of such rules, takes all necessary action within its control to establish rules and operational practices to permit a BD/FCM (at the BD/FCM's election) to maintain customer money, securities, and property received by the BD/FCM to margin, guarantee, or secure customer positions in cleared CDS, which include both swaps and security-based swaps, in a segregated account established and maintained in accordance with Section 3E of the Exchange Act and any rules thereunder for the purpose of clearing (as a clearing member of the clearing agency/DCO) such customer positions under a program to commingle and portfolio margin CDS. Until such rules and operational practices have been developed, pursuant to the clearing agency/DCO's rules, clearing members that are BD/FCMs must maintain customer money, securities, and property received to margin, guarantee, or secure customer positions consisting of cleared CDS, which include both

[62] *See supra* note 52 and associated text.

swaps and security-based swaps, in a segregated account established and maintained in accordance with Section 4d(f) of the CEA and rules thereunder for the purpose of clearing (as a clearing member of the clearing agency/DCO) such customer positions under a program to commingle and portfolio margin CDS.

(3) The clearing agency/DCO has obtained any other relief needed to permit a BD/FCM that is a clearing member (at the BD/FCM's election) to maintain customer money, securities, and property received by the BD/FCM to margin, guarantee, or secure customer positions in cleared CDS, which include both swaps and security-based swaps, in a segregated account established and maintained in accordance with Section 4d(f) of the CEA and rules thereunder for the purpose of clearing (as a clearing member of the clearing agency/DCO) such customer positions under a program to commingle and portfolio margin CDS.

(4) The clearing agency/DCO has appropriate rules and operational practices to permit a BD/FCM that is a clearing member (at the BD/FCM's election) to maintain customer money, securities, and property received by the BD/FCM to margin, guarantee, or secure customer positions in cleared CDS, which include both swaps and security-based swaps, in a segregated account established and maintained in accordance with Section 4d(f) of the CEA and rules thereunder for the purpose of clearing (as a clearing member of the clearing agency/DCO) such customer positions under a program to commingle and portfolio margin CDS.

(5) The rules of the clearing agency/DCO require that each customer of the BD/FCM participating in a program to commingle and portfolio margin CDS shall be an ''eligible contract participant'' as defined in Section 1a(18) of the CEA.

(b) Exemption for certain BD/FCMs that elect to offer a program to commingle and portfolio margin customer positions in CDS in customer accounts maintained in accordance with Section 4d(f) of the CEA and rules thereunder.

Solely to perform the functions of a BD/FCM for cleared CDS, with respect to any customer money, securities, and property received by the BD/FCM to margin, guarantee, or secure customer positions in security-based-swaps included in a segregated account established and maintained in accordance with Section 4d(f) of the CEA and rules thereunder under a program to commingle and portfolio margin customer positions in CDS, a BD/FCM shall be exempt from Exchange Act Sections 3E(b), (d), and (e), and Section 15(c)(3) and Rule 15c3–3 thereunder and any requirement to treat an affiliate (as defined in association with the definition of ''Cleared Swaps Proprietary Account'' pursuant to CFTC Rule 22.1) as a customer for purposes of Exchange Act Rules 8c–1 and 15c2–1, subject to the following conditions:

(1) With respect to customers that are not affiliates of the BD/FCM,

(i) the BD/FCM shall maintain customer money, securities, and property received to margin, guarantee or secure customer positions consisting of cleared CDS, which include both swaps and security-based swaps, in a segregated account established and maintained in accordance with Section 4d(f) of the CEA and rules thereunder for the purpose of clearing (as a clearing member or through a clearing member of a clearing agency/DCO operating pursuant to the exemption in paragraph (a) above) such customer positions under a program to commingle and portfolio margin CDS; and

(ii) the BD/FCM shall enter into a non-conforming subordination agreement with each customer. The agreement must contain a specific acknowledgment by the customer that such money, securities or property will not receive customer treatment under the Exchange Act or SIPA or be treated as customer property as defined in 11 U.S.C. 741 in a liquidation of the BD/FCM and that such money, securities or property will be subject to any applicable protections under Subchapter IV of Chapter 7 of Title 11 of the United States Code and rules and regulations thereunder; as well as an affirmation by the customer that all of its claims with respect to such money, securities, or property against the BD/FCM will be subordinated to the claims of other securities customers and security-based swap customers not operating under a program to commingle and portfolio margin CDS pursuant to this Order.

(2) With respect to customers that are affiliates of the BD/FCM,

(i) The BD/FCM maintains money, securities, and property of affiliates received to margin, guarantee, or secure positions consisting of cleared CDS, which include both swaps and security-based swaps, in a Cleared Swaps Proprietary Account for the purpose of clearing (as a clearing member of a clearing agency/DCO operating pursuant to the exemption in paragraph (a) above) such positions under a program to commingle and portfolio margin CDS;

(ii) The BD/FCM enters into a non-conforming subordination agreement with each affiliate. The agreement must contain a specific acknowledgment by the affiliate that such money, securities or property will not receive customer treatment under the Exchange Act or SIPA or be treated as customer property as defined in 11 U.S.C. 741 in a liquidation of the BD/FCM, and that such money, securities or property will be held in a proprietary account in accordance with the CFTC requirements and will be subject to any applicable protections under Subchapter IV of Chapter 7 of Title 11 of the United States Code and rules and regulations thereunder; as well as an affirmation by the affiliate that all of its claims with respect to such money, securities, or property against the BD/FCM will be subordinated to the claims of other securities customers and security-based swap customers not operating under a program to commingle and portfolio margin CDS pursuant to this Order; and

(iii) The BD/FCM obtains from the affiliate an opinion of counsel that the affiliate is legally authorized to subordinate all of its claims against the BD/FCM to those of customers.

(3) The BD/FCM requires minimum margin levels with respect to any customer transaction in a program to commingle and portfolio margin CDS at least equal to the amount determined using a margin methodology established and maintained by the BD/FCM that has been approved by the Commission or the Commission staff.

(4) The BD/FCM must be in compliance with applicable laws and regulations relating to risk management, capital, and liquidity, and shall be in compliance with applicable clearing agency/DCO rules and CFTC requirements (including segregation and related books and records provisions) for accounts established and maintained in accordance with Section 4d(f) of the CEA and rules thereunder and subject to a program to commingle and portfolio margin CDS.

(5) Each customer of the BD/FCM participating in a program to commingle and portfolio margin CDS is an ''eligible contract participant'' as defined in Section 1a(18) of the CEA.

(6) Before receiving any money, securities, or property of a customer to margin, guarantee, or secure positions consisting of cleared CDS, which include both swaps and security-based swaps, under a program to commingle and portfolio margin CDS, the BD/FCM must furnish to the customer a disclosure document containing the following information:

(i) a statement indicating that the customer's money, securities, and property will be held in an account maintained in accordance with the segregation requirements of Section 4d(f) of the CEA and that the customer has elected to seek protections under Subchapter IV of Chapter 7 of Title 11 of the United States Code and the rules and regulations thereunder with respect to such money, securities, and property; and

(ii) a statement that the broker-dealer segregation requirements of Section 15(c)(3) and Section 3E of the Exchange Act and the rules thereunder, and any customer protections under SIPA and the stockbroker liquidation provisions, will not apply to such customer money, securities, and property.

## V. Paperwork Reduction Act

Certain provisions of this Order contain ''collection of information requirements'' within the meaning of the Paperwork Reduction Act of 1995.[63] The Commission has submitted this Order to the Office of Management and Budget (''OMB'') for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. 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.

### *A. Collection of Information*

The Commission found it necessary or appropriate in the public interest and consistent with the protection of investors to grant the conditional exemptions discussed in this Order. Among other things, the Order would require BD/FCMs that elect to offer a program to commingle and portfolio margin customer positions in CDS in customer accounts maintained in accordance with Section 4d(f) of the CEA and rules thereunder, to obtain certain agreements and opinions from its customers regarding the applicable regulatory regime, and to make certain disclosures to its customers before receiving any money, securities, or property of a customer to margin, guarantee, or secure positions consisting of cleared CDS, which include both swaps and security-based swaps, under a program to commingle and portfolio margin CDS. The Order would also require BD/FCMs that elect to offer a program to commingle and portfolio margin CDS positions in customer accounts maintained in accordance with Section 4d(f) of the CEA and rules thereunder, to maintain minimum margin levels using a margin methodology approved by the Commission or the Commission staff.

### *B. Proposed Use of Information*

The collection of information requirements are designed, among other things, to provide appropriate agreements, disclosures, and opinions to BD/FCM customers to clarify key aspects of the regulatory framework that will govern their participation in a program to commingle and portfolio margin CDS positions and to ensure that appropriate levels of margin are collected.

### *C. Respondents*

The collections of information as required by this Order would apply to those BD/FCMs that are seeking to offer a program to commingle and portfolio margin customer positions in CDS in customer accounts maintained in accordance with Section 4d(f) of the CEA. Based on conversations with industry participants and the Commission's market oversight experience, the Commission estimates that approximately 57 firms would be likely to participate in the CDS market in the future.[64] Consequently, the Commission estimates that approximately 57 firms may seek to avail themselves of the conditional exemptive relief provided in this Order.

### *D. Total Annual Reporting and Recordkeeping Burden*

Paragraph IV(b)(1)(ii) of this Order applies with respect to customers that are not affiliates of the BD/FCM and requires BD/FCMs that elect to offer a program to commingle and portfolio margin customer positions in CDS in customer accounts maintained in accordance with Section 4d(f) of the CEA and rules thereunder to enter into a non-conforming subordination agreement with the non-affiliate customer. The non-conforming subordination agreement must contain: (i) A specific acknowledgment by the customer that such money, securities or property will not receive customer treatment under the Exchange Act or SIPA or be treated as customer property as defined in 11 U.S.C. 741 in a liquidation of the BD/FCM and that such money, securities or property will be subject to any applicable protections under Subchapter IV of Chapter 7 of Title 11 of the United States Code and rules and regulations thereunder; and (ii) an affirmation by the customer that all of its claims with respect to such money, securities, or property against the BD/FCM will be subordinated to the claims of other securities customers and security-based swap customers not operating under a program to commingle and portfolio margin CDS pursuant to this Order.

The Commission estimates that the average number of non-affiliate CDS customers of a BD/FCM to be approximately 1,000[65] and the average number of hours to develop a subordination agreement for each non-affiliate CDS customer to be approximately 20 hours. In addition, based on a consultation with industry representatives, the Commission estimates that each non-affiliate customer will do business with more than one BD/FCM, averaging out to 2.5 BD/FCMs per customer. Consequently, the Commission estimates the total one-time burden associated with this requirement to be 2,850,000 hours.[66] In addition, because the BD/FCM would enter into these agreements with CDS customers, the Commission staff estimates that a BD/FCM would have outside counsel review a standard non-conforming subordination agreement and that the review would take approximately 100 hours at a cost of

[63] 44 U.S.C. 3501 *et seq.*

[64] Based on a review of FOCUS reports filed with the Commission there are approximately 57 broker-dealers that also completed the Commodity Futures Account segregation page on the FOCUS report and therefore would be BD/FCMs. The Commission is assuming that all 57 BD/FCMs would be likely to participate in the CDS market. In addition, the Commission notes it had previously estimated that approximately 50 entities may fit within the definition of security-based swap dealer (''SBSD'') and up to 5 entities may fit within the definition of major security-based swap participant (''MSBSP''). *See Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants,* Exchange Act Release No. 65543 (Oct. 12, 2011), 76 FR 65784 (Oct. 24, 2011), at 65808. The Commission believes that the number of BD/FCMs likely to engage in the CDS business would be approximately equal to the previously estimated number of security-based swap dealers and major security-based swap participants given that CDS make up a significant portion of the current security-based swap market.

[65] This estimate is based on a previous estimate in the Capital Margin and Segregation Release that each of SBSD and MSBSP has 1,000 counterparties at any given time. *See Capital, Margin, and Segregation Requirements Adopting Release.* Commission staff believes that the number of counterparties of a SBSD or MSBSP may likely be equivalent to the number of customers of a BD/FCM that may participate in a portfolio margining program for customer positions in cleared CDS offered by the BD/FCM. However, as portfolio margining programs are not yet being offered for CDS customers, it is difficult to estimate with precision the number of customers that may participate in customer clearing of CDS. Furthermore, the number of customers that seek to clear CDS through a portfolio margining program may change after final mandatory clearing determinations are made with respect to various product types within CDS.

[66] 57 BD/FCMs × 1,000 non-affiliate customers per dealer × 2.5 BD/FCMs used by each customer × 20 hours for each agreement.

approximately $400 per hour.[67] As a result, the Commission staff estimates that each BD/FCM would incur one-time costs of approximately $40,000, resulting in an industry-wide one-time cost of approximately $2,280,000.[68]

Paragraph IV(b)(2)(ii) of this Order applies with respect to customers that are affiliates of the BD/FCM and requires BD/FCMs that elect to offer a program to commingle and portfolio margin customer positions in CDS in customer accounts maintained in accordance with Section 4d(f) of the CEA and rules thereunder to enter into a non-conforming subordination agreement. The non-conforming subordination agreement must contain: (i) A specific acknowledgment by the affiliate that such money, securities or property will not receive customer treatment under the Exchange Act or SIPA or be treated as customer property as defined in 11 U.S.C. 741 in a liquidation of the BD/FCM, and that such money, securities or property will be held in a proprietary account in accordance with the CFTC requirements and will be subject to any applicable protections under Subchapter IV of Chapter 7 of Title 11 of the United States Code and rules and regulations thereunder; and (ii) an affirmation by the affiliate that all of its claims with respect to such money, securities, or property against the BD/FCM will be subordinated to the claims of other securities customers and security-based swap customers not operating under a program to commingle and portfolio margin CDS pursuant to this Order. The Commission estimates that the average number of customers that are affiliates of the BD/FCM to be approximately 11[69] and the average number of hours to develop a subordination agreement for a non-affiliate CDS customer to be approximately 20 hours based on the Commission's prior experiences with the development of subordination agreements.[70] Consequently, the Commission estimates that the total one-time burden associated with this requirement to be 12,540 hours.[71] As stated previously, the Commission staff believes that a BD/FCM would have outside counsel review a standard non-conforming subordination agreement and that review would result in a one-time industry cost of $2,280,000. Because the same requirements and acknowledgements in the non-conforming subordination agreements with non-affiliate customers must be included in the non-conforming subordination agreements with affiliate customers (with an additional acknowledgement by the affiliate that its money, securities, or property will be held in a proprietary account in accordance with CFTC requirements), we believe that a BD/FCM would not need to engage an outside counsel to perform a review of a separate review of a standard non-conforming subordination agreement for affiliate customers.

Paragraph IV(b)(2)(iii) of this Order applies with respect to customers that are affiliates of the BD/FCM and requires BD/FCMs that elect to offer a program to commingle and portfolio margin customer positions in CDS in customer accounts maintained in accordance with Section 4d(f) of the CEA and rules thereunder to obtain from its affiliates an opinion of counsel that the affiliate is legally authorized to subordinate all of its claims against the BD/FCM to those of customers. Again, the Commission estimates that the average number of customers that are affiliates of the BD/FCM to be approximately 11 and the average number of hours to develop the required opinion for an affiliate CDS customer to be approximately 2 hours.[72] Consequently, the Commission estimates that the total one-time burden associated with this requirement to be 1,254 hours.[73] The Commission staff also estimates that the BD/FCM will engage outside counsel to review a standard opinion of counsel and that the outside counsel would need approximately 20 hours at a cost of approximately $400 per hour. As a result, the Commission staff estimates that the BD/FCM would incur a one-time cost of approximately $8,000, resulting in an industry-wide one-time cost of approximately $456,000.[74]

Paragraph IV(b)(5) of this Order requires that BD/FCMs that elect to offer a program to commingle and portfolio margin customer positions in CDS in customer accounts maintained in accordance with Section 4d(f) of the CEA and rules thereunder, to maintain minimum margin levels with respect to any customer transaction in a program to commingle and portfolio margin CDS at least equal to the amount determined using a margin methodology established and maintained by the BD/FCM that has been approved by the Commission or its staff. As part of the approval process, a BD/FCM would be expected to submit certain information in order to make a determination regarding the performance of the margin methodology. The Commission anticipates that information would be substantially similar to information required in Appendix E to Exchange Act Rule 15c3–1 to the extent relevant to portfolio margining CDS that are swaps and security-based swaps. Based on similar estimates, the Commission estimates that each BD/FCM that seeks approval from the Commission would spend approximately 1,000 hours to create and compile the various documents to provide to Commission staff and to work with Commission staff through the approval process.[75] This includes approximately 100 hours for an in-house attorney to complete a review of the information and documentation provided to the Commission staff. Consequently, the Commission estimates the total one-time burden associated with this requirement to be 57,000 hours.[76]

Paragraph IV(b)(6) of this Order requires each BD/FCM receiving any

[67] *See* PRA Analysis in *Capital, Margin, and Segregation Requirements Adopting Release* (providing an estimate of $400 an hour to engage an outside attorney).

[68] 57 BD/FCMs × 100 hours to review × $400 per hour.

[69] FINRA CRD data indicate that the 17 largest broker-dealers (i.e., those with total assets of $50 billion or more) reported a total of 188 affiliates that are themselves registered with the SEC (*i.e.,* they have their own CRD numbers), representing approximately 11 affiliates per broker-dealer. The Commission believes that this would be a useful approximation of the average number of customers that are affiliates of the BD/FCM, as many affiliates of a BD/FCM that would seek to use portfolio margining are likely to be subject to some form of a registration requirement with the SEC. Furthermore, the assumption that all such registered affiliates would seek to engage in portfolio margining (when some may not) should help to offset any discrepancy associated with customers that are affiliates but would not be subject to an SEC registration requirement.

[70] The Commission has previously considered the development of subordination agreements in other contexts. *See* Letter from Michael A. Macchiaroli, Associate Director, Division of Market Regulation, to William H. Navin, EVP and General Counsel, The Options Clearing Corporation (June 15, 2000).

[71] 57 BD/FCMs × 11 affiliate customers × 20 hours.

[72] This estimate is based on the Commission's currently approved Collection of Information Supporting Statement for Rule 15c3–1 of the Exchange Act, which discusses obtaining an opinion of counsel as required by Appendix C to Rule 15c3–1 of the Exchange Act (available at *http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201006-3235-004*). The Commission believes that obtaining an opinion of counsel as required by this order will require additional time to adequately research the issue to provide an opinion of counsel and, therefore, has provided additional time in its estimation.

[73] 57 BD/FCMs × 11 affiliate customers × 2 hours.

[74] 57 BD/FCMs × 20 hours for outside counsel to review × $400 per hour.

[75] This estimate is based on the Commission's currently approved Collection of Information Supporting Statement for Rule 15c3–1 of the Exchange Act, which discusses the reporting burden for broker-dealers to apply and receive approval from the Commission to use Appendix E to Rule 15c3–1 of the Exchange Act (available at *http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201006-3235-004*).

[76] 1,000 hours × 57 BD/FCMs.

money, securities, or property of a customer to margin, guarantee or secure positions consisting of cleared CDS, which include both swaps and security-based swaps, under a program to commingle and portfolio margin CDS in an account maintained in accordance with Section 4d(f) of the CEA and the rules thereunder to disclose to its customers that (i) the customer's money, securities, and property will be held in an account maintained in accordance with the segregation requirements of Section 4(d)f of the CEA and that the customer has elected to seek protections under Subchapter IV of Chapter 7 of Title 11 of the United States Code and the rules and regulations thereunder with respect to such money, securities, and property and (ii) that the broker-dealer segregation requirements of Section 15(c)(3) and Section 3E of the Exchange Act, and any customer protections under SIPA and the stockbroker liquidation provisions, will not apply to such customer money, securities, and property. These disclosures provide customers important disclosures regarding the legal framework that will govern their transactions if a liquidation were to occur. The Commission believes that the BD/FCM could use the language in the Order that describes the disclosure that must be made as a template to draft the disclosure statement. Consequently, the Commission estimates that it would take a BD/FCM clearing member approximately 8 hours to draft the disclosure statement.[77] Further, the Commission believes the BD/FCM will include this disclosure statement with other documents or agreements provided to cleared CDS customers and as a result the BD/FCM should not be subject to any additional burden associated with relaying this information to the customer. Therefore, the Commission estimates that aggregate burden from this requirement will be 456 hours [78] to comply with this requirement.

*E. Collection of Information Is Mandatory*

The collections of information contained in the conditions to this Order are mandatory for any entity wishing to rely on the conditional exemptions granted by this Order.

*F. Confidentiality*

The Commission expects to receive confidential information in connection with the proposed collections of information. To the extent that the Commission receives confidential information pursuant to these collections of information, the Commission is committed to protecting the confidentiality of such information, subject to the provisions of applicable law.[79]

*G. Request for Comment on Paperwork Reduction Act*

The Commission requests, pursuant to 44 U.S.C. 3506(c)(2)(B), comment on the collections of information contained in this Order to:

(i) Evaluate whether the collections of information are necessary for the proper performance of the functions of the Commission, including whether the information would have practical utility;

(ii) Evaluate the accuracy of the Commission's estimates of the burden of the collections of information;

(iii) Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and

(iv) evaluate whether there are ways to minimize the burden of the collections of information on those required to respond, including through the use of automated collection techniques or other forms of information technology.

Persons who desire to submit comments on the collection of information requirements should direct their comments to the OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090, and refer to File No. S7–13–12. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication of this document in the **Federal Register**; therefore, comments to OMB are best assured of having full effect if OMB receives them within 30 days of this publication. The Commission has submitted the proposed collections of information to OMB for approval. Requests for the materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7–13–12, and be submitted to the Securities and Exchange Commission, Records Management Office, 100 F Street NE., Washington, DC 20549.

By the Commission.

**Elizabeth M. Murphy,**

*Secretary.*

[FR Doc. 2012–30553 Filed 12–18–12; 8:45 am]

**BILLING CODE 8011–01–P**

[77] This estimate is based on the Commission's currently approved Collection of Information Supporting Statement for Rule 15c3–3 of the Exchange Act, which discusses the reporting burden to prepare a disclosure statement pursuant to Rule 15c3–3 of the Exchange Act (*http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201103-3235-025*).

[78] 57 BD/FCMs × 8 hours.

[79] *See, e.g.,* Exchange Act Section 24, 15 U.S.C. 78x (governing the public availability of information obtained by the Commission) and 5 U.S.C. 552 *et seq.* (Freedom of Information Act—''FOIA''). FOIA Exemption 4 provides an exemption for ''trade secrets and commercial or financial information obtained from a person and privileged or confidential.'' 5 U.S.C. 552(b)(4). FOIA Exemption 8 provides an exemption for matters that are ''contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.'' 5 U.S.C. 552(b)(8).

## SECURITIES AND EXCHANGE COMMISSION

**[File No. 500–1]**

## Spencer Pharmaceutical Inc.; Order of Suspension of Trading

December 17, 2012.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Spencer Pharmaceutical Inc. (''Spencer'') because of questions regarding the accuracy of publicly disseminated information, concerning, among other things: (1) The company's current financial condition; and (2) statements made by Spencer in press releases concerning, among other things, an unsolicited buyout offer of Spencer by a foreign company.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company.

*Therefore, it is ordered,* pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company, and any equity securities of any entity purporting to succeed to this issuer, is suspended for the period from 9:30 a.m. EST on Monday, December 17, 2012, through 11:59 p.m. EST on Monday, December 31, 2012.

By the Commission.

**Elizabeth M. Murphy,**

*Secretary.*

[FR Doc. 2012–30665 Filed 12–17–12; 11:15 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–68426; File No. SR–NYSEArca–2012–135]**

## Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Commentary .02 to NYSE Arca Options Rule 6.72 To Extend the Penny Pilot in Options Classes in Certain Issues Through March 31, 2013

December 13, 2012.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder, [3] notice is hereby given that on November 29, 2012, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Commentary .02 to NYSE Arca Options Rule 6.72 in order to extend the Penny Pilot in options classes in certain issues (''Pilot Program'') previously approved by the Securities and Exchange Commission (''Commission'') through March 31, 2013. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the Exchange's principal office and at the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

*A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange hereby proposes to amend Commentary .02 to Exchange Rule 6.72 to extend the time period of the Pilot Program,[4] which is currently scheduled to expire on December 31, 2012 through March 31, 2013. The Exchange also proposes that the date to replace issues in the Pilot Program that have been delisted be revised to the second trading day following January 1, 2013.[5]

This filing does not propose any substantive changes to the Pilot Program: all classes currently participating will remain the same and all minimum increments will remain unchanged. The Exchange believes the benefits to public customers and other market participants who will be able to express their true prices to buy and sell options have been demonstrated to outweigh the increase in quote traffic.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) [6] of the Securities Exchange Act of 1934 (the ''Act''), in general, and furthers the objectives of Section 6(b)(5),[7] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system. The Exchange believes that the Pilot Program promotes just and equitable principles of trade by enabling public customers and other market participants to express their true prices to buy and sell options.

*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.

[4] *See* Securities Exchange Act Release No. 67307 (June 28, 2012), 77 FR 40110 (July 6, 2012) (SR–NYSEArca–2012–65).

[5] The Exchange will announce the replacement issues to the Exchange's membership through a Trader Update.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

No written comments were solicited or received with respect to the proposed rule change.

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [8] and Rule 19b–4(f)(6) thereunder.[9] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [10] and Rule 19b–4(f)(6)(iii) thereunder.[11]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative prior to 30 days after the date of the filing.[12] However, pursuant to Rule 19b–4(f)(6)(iii),[13] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because doing so will allow the Pilot Program to continue without interruption in a manner that is consistent with the Commission's prior approval of the extension and expansion of the Pilot Program and will allow the Exchange and the Commission additional time to analyze the impact of the Pilot Program.[14] Accordingly, the

[8] 15 U.S.C. 78s(b)(3)(A)(iii).

[9] 17 CFR 240.19b–4(f)(6).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6)(iii).

[12] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change along with a brief description and 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. The Exchange has satisfied this pre-filing requirement.

[13] 17 CFR 240.19b–4(f)(6)(iii).

[14] *See* Securities Exchange Act Release No. 61061 (November 24, 2009), 74 FR 62857 (December 1,

Commission designates the proposed rule change as operative upon filing with the Commission.[15]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2012–135 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–NYSEArca–2012–135.* 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–NYSEArca–2012–135* and should be submitted on or before January 9, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2012–30499 Filed 12–18–12; 8:45 am]

**BILLING CODE 8011–01–P**

2009) (SR–NYSEArca–2009–44). *See also supra* note 4.

[15] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[16] 17 CFR 200.30–3(a)(12).

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–68418; File No. SR–NYSEMKT–2012–79]**

## Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Adding New Rule 956.1NY, Which Will Govern the Submission of Automated Trading Data

December 12, 2012.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that on December 7, 2012, NYSE MKT LLC (the ''Exchange'' or ''NYSE MKT'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change**

The Exchange proposes to add new Rule 956.1NY, which will govern the submission of automated trading data. 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, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange proposes to adopt new Rule 956.1NY, which will govern the automated submission of trading data. The proposed rule is substantially similar to NYSE Arca Rule 10.2(e) and therefore will harmonize the rules between the Exchange and NYSE Arca with respect to the automated submission of trading data for options trading.

The Exchange's rule previously governing the automated submission of trading data was NYSE MKT Rule 153A—Automated Submission of Trading Data.[4] Because the Exchange has a rule specific to the automated submission of equities trading data, the Exchange believes it should also have a rule specific to the automated submission of options trading data. Accordingly, the Exchange proposes to adopt a rule governing automated submission of trading data that is based upon NYSE Arca Rule 10.2(e). To avoid any potential confusion of which rules govern options trading, the Exchange also proposes to add New Rule 956.1NY to the existing rule set relating to the trading of option contracts.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[5] in general, and furthers the

[4] On November 14, 2012, the Exchange filed a proposal to delete out-of-date and obsolete rules, including Rule 153A, because it was duplicative of an existing equities rule governing the automated submission of trading data (NYSE MKT Rule 410A—Equities) (both of which are substantially similar to proposed Rule 956.1NY). *See* Securities Exchange Act Release No. 68306 (November 28, 2012), 77 FR 71846 (December 4, 2012) (NYSEMKT–2012–68).

[5] 15 U.S.C. § 78f(b).

objectives of Section 6(b)(5) of the Act,[6] in particular, in that, by adopting a rule that is based on an existing rule that addresses the industry standard for automated submission of trading data, it promotes just and equitable principles of trade, removes impediments to and perfects the mechanism of a free and open market and a national market system, and, in general, helps to protect investors and the public interest by assuring that the Exchange has proper data to further its regulatory and surveillance programs. The Exchange further believes that the proposal to add the rule to the section relating to options trading removes impediments to and perfects the mechanism of a free and open market by ensuring that members, regulators and the public can more easily navigate the Exchange's rulebook and better understand what obligations attach and when.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[7] and Rule 19b-4(f)(6) thereunder.[8] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.[9]

A proposed rule change filed under Rule 19b–4(f)(6)[10] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[11] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest.

The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because the proposal is substantially similar to NYSE Arca Rule 10.2(e), as well as former NYSE MKT Rule 153A and current NYSE MKT Rule 410A, which have all been approved by the Commission and govern the submission of trading data. Additionally, the effectiveness of this rule will bring NYSE MKT's Rules in line with an industry-wide standard governing the submission of trading data. Waiver of the operative delay will ensure the Exchange is not without an operative rule governing the submission of trading data, as the deletion of former NYSE MKT Rule 153A becomes effective Dec. 14, 2012. Therefore, the Commission designates the proposal operative upon filing.[12]

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–2012–79 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–2012–79. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEMKT–2012–79, and should be submitted on or before January 9, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2012–30494 Filed 12–18–12; 8:45 am]

**BILLING CODE 8011–01–P**

[6] 15 U.S.C. § 78f(b)(5).

[7] 15 U.S.C. 78s(b)(3)(A)(iii).

[8] 17 CFR 240.19b–4(f)(6).

[9] *Id.* In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[10] 17 CFR 240.19b–4(f)(6).

[11] 17 CFR 240.19b–4(f)(6)(iii).

[12] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[13] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–68427; File No. SR–NYSEMKT–2012–75]**

## Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Commentary .02 to NYSE Amex Options Rule 960NY in Order To Extend the Penny Pilot in Options Classes in Certain Issues Through March 31, 2013

December 13, 2012.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on November 29, 2012, NYSE MKT LLC (the ''Exchange'' or ''NYSE MKT'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Commentary .02 to NYSE Amex Options Rule 960NY in order to extend the Penny Pilot in options classes in certain issues (''Pilot Program'') previously approved by the Securities and Exchange Commission (''Commission'') through March 31, 2013. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the Exchange's principal office and at the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

*A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange hereby proposes to amend Commentary .02 to Exchange Rule 960NY to extend the time period of the Pilot Program,[4] which is currently scheduled to expire on December 31, 2012 through March 31, 2013. The Exchange also proposes that the date to replace issues in the Pilot Program that have been delisted be revised to the second trading day following January 1, 2013.[5]

This filing does not propose any substantive changes to the Pilot Program: All classes currently participating will remain the same and all minimum increments will remain unchanged. The Exchange believes the benefits to public customers and other market participants who will be able to express their true prices to buy and sell options have been demonstrated to outweigh the increase in quote traffic.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) [6] of the Securities Exchange Act of 1934 (the ''Act''), in general, and furthers the objectives of Section 6(b)(5),[7] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system. The Exchange believes that the Pilot Program promotes just and equitable principles of trade by enabling public customers and other market participants to express their true prices to buy and sell options.

*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.

[4] *See* Securities Exchange Act Release No. 67321 (June 29, 2012), 77 FR 39761 (July 5, 2012) (SR–NYSEMKT–2012–16). [sic]

[5] The Exchange will announce the replacement issues to the Exchange's membership through a Trader Update.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

No written comments were solicited or received with respect to the proposed rule change.

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [8] and Rule 19b–4(f)(6) thereunder.[9] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [10] and Rule 19b–4(f)(6)(iii) thereunder.[11]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative prior to 30 days after the date of the filing.[12] However, pursuant to Rule 19b–4(f)(6)(iii),[13] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because doing so will allow the Pilot Program to continue without interruption in a manner that is consistent with the Commission's prior approval of the extension and expansion of the Pilot Program and will allow the Exchange and the Commission additional time to analyze the impact of

[8] 15 U.S.C. 78s(b)(3)(A)(iii).

[9] 17 CFR 240.19b–4(f)(6).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6)(iii).

[12] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change along with a brief description and 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. The Exchange has satisfied this pre-filing requirement.

[13] 17 CFR 240.19b–4(f)(6)(iii).

the Pilot Program.[14] Accordingly, the Commission designates the proposed rule change as operative upon filing with the Commission.[15]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEMKT–2012–75 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–2012–75. 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–NYSEMKT–2012–75 and should be submitted on or before January 9, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2012–30500 Filed 12–18–12; 8:45 am]

**BILLING CODE 8011–01–P**

[14] *See* Securities Exchange Act Release No. 61061 (November 24, 2009), 74 FR 62857 (December 1, 2009) (SR–NYSEArca–2009–44).

[15] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[16] 17 CFR 200.30–3(a)(12).

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–68423; File No. SR–C2–2012–041]**

## Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fees Schedule

December 13, 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 December 6, 2012, C2 Options Exchange, Incorporated (''Exchange'' or ''C2'') 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 Schedule. The text of the proposed rule change is available on the Exchange's Web site (*http://www.c2exchange.com/Legal/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

[1] 15 U.S.C.78s(b)(1).

[2] 17 CFR 240.19b–4.

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

On September 2, 2011, the Commission approved a proposed rule change filed by the Exchange to permit on a pilot basis the listing and trading on C2 of Standard & Poor's 500 Index (''S&P 500'') options with third-Friday-of-the-month (''Expiration Friday'') expiration dates for which the exercise settlement value will be based on the index value derived from the closing prices of component securities (''SPXPM'').[3] On September 28, 2011, the Exchange filed an immediately-effective rule change to adopt fees associated with the anticipated trading of SPXPM (the ''Initial SPXPM Fees Filing'').[4] In the Initial SPXPM Fees Filing, the Exchange adopted an SPXPM Tier Appointment Fee of $4,000 which would be charged to any Market-Maker Permit holder that has an appointment (registration) in SPXPM at any time during a calendar month, but the Exchange also waived that fee through November 30, 2011. On November 23, the Exchange extended that waiver through December 31, 2011.[5] The Exchange then extended that waiver again through February 29, 2012,[6] May 31, 2012,[7] August 31, 2012,[8] and

[3] *See* Securities Exchange Act Release No. 34–65256 (September 2, 2011), 76 FR 55969 (September 9, 2011) (SR–C2–2011–008).

[4] *See* Securities Exchange Act Release No. 34–65471 (October 3, 2011), 76 FR 62491 (October 7, 2011) (SR–C2–2011–026).

[5] *See* Securities Exchange Act Release No. 34–65874 (December 2, 2011), 76 FR 76785 (December 8, 2011) (SR–C2–2011–037).

[6] *See* Securities Exchange Act Release No. 34–66140 (January 12, 2012), 77 FR 2772 (January 19, 2012) (SR–C2–2012–002).

[7] *See* Securities Exchange Act Release No. 34–66472 (February 27, 2012), 77 FR 12898 (March 2, 2012) (SR–C2–2012–008).

[8] *See* Securities Exchange Act Release No. 34–67023 (May 18, 2012), 77 FR 31418 (May 25, 2012) (SR–C2–2012–013).

December 31, 2012.[9] The Exchange hereby proposes continuing that waiver through March 31, 2013. The purpose of this waiver extension is to allow more time for the SPXPM market to develop and allow and encourage Market-Makers to join in and elect for an SPXPM Tier Appointment.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Section 6(b)(4)[11] of the Act in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among C2 Trading Permit Holders and other persons using Exchange facilities. Continuing the waiver of the SPXPM Tier Appointment Fee is reasonable because it will allow Market-Makers with an SPXPM Tier Appointment to avoid paying the Tier Appointment Fee for a further 3-month period, and is equitable and not unfairly discriminatory because all Market-Makers with an SPXPM Tier Appointment will be able to avoid paying the SPXPM Tier Appointment Fee through March 31, 2013.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

C2 does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

The Exchange neither solicited nor received comments on the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)[12] of the Act and paragraph (f) of Rule 19b–4[13] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–C2–2012–041 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–C2–2012–041. 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–C2–2012–041and should be submitted on or before January 9, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2012–30496 Filed 12–18–12; 8:45 am]

**BILLING CODE 8011–01–P**

[9] *See* Securities Exchange Act Release No. 34–67723 (August 23, 2012), 77 FR 52377 (August 29, 2012) (SR–C2–2012–029).

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(4).

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f).

[14] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–68416; File No. SR–NASDAQ–2012–119]**

## Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Designation of a Longer Period for Commission Action on Proposed Rule Change To Establish Fees for New Optional Wireless Connectivity for Co-Located Clients

December 12, 2012.

On October 10, 2012, The NASDAQ Stock Market LLC (''Exchange'' or ''NASDAQ'') 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 establish fees for new optional wireless connectivity for co-located clients. The proposed rule change was published for comment in the **Federal Register** on October 29, 2012.[3] The Commission received no comment letters regarding the proposed rule change.

Section 19(b)(2) of the Act[4] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day for this filing is December 13, 2012. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider issues raised by the proposed rule change, which would establish fees for new optional wireless connectivity for co-located clients.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 68085 (October 23, 2012), 77 FR 65596.

[4] 15 U.S.C. 78s(b)(2).

Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[5] designates January 25, 2013 as the date by which the Commission should either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–NASDAQ–2012–119).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2012–30545 Filed 12–18–12; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–68428; File No. SR–CBOE–2012–116]**

## Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Proposed Rule Change Related to Bylaw and Other Changes

December 13, 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 November 30, 2012, the Chicago Board Options Exchange, Incorporated (''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CBOE proposes to: (i) Amend its Bylaws to expressly provide that the Representative Director Nominating Body and any petition candidate must satisfy the compositional requirements determined by the Board from time to time pursuant to a resolution adopted by the Board; (ii) amend its Bylaws relating to the Board size range such that the Board shall consist of not less than 12 and not more than 16 directors; and (iii) make conforming changes to the CBOE Certificate of Incorporation. The text of the proposed amendments to CBOE's Bylaws and CBOE's Certificate of Incorporation are available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's Office of the Secretary and at the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change*

1. Purpose

The purpose of this proposed rule change is to (i) Amend CBOE's Bylaws to expressly state that the Representative Director Nominating Body and any petition candidate must satisfy the compositional requirements determined by the Board from time to time pursuant to a resolution adopted by the Board; (ii) amend its Bylaws relating to the Board size range such that the Board shall consist of not less than 12 and not more than 16 directors; and (iii) make conforming changes to the CBOE Certificate of Incorporation.

(1) Compositional Requirements Determined by the Board

Last year, CBOE amended its Bylaws and Certificate of Incorporation to, among other things: (i) Eliminate the requirement that its Board of Directors be composed of at least 30% Industry Directors, and (ii) eliminate the requirement in Section 3.2 of the Bylaws that the Representative Directors must be Industry Directors.[3] In its rule filing, CBOE noted that the changes would provide it with appropriate flexibility as it evaluates the structure and composition of its Board in the future.[4] Additionally, CBOE stated that no matter what the composition of its Board is, the Exchange intends to maintain the fair representation of its Trading Permit Holders in the selection of its directors and administration of its affairs consistent with Section 6(b)(3) of the Securities Exchange Act of 1934, as amended (''Act''). In approving CBOE's rule filing, the SEC noted that it has previously approved proposals in which an exchange's board of directors was composed of all or nearly all non-industry directors where the process was nevertheless designed to comply with the ''fair representation'' requirement in the selection and election of directors.[5]

In connection with these changes, CBOE also amended Section 3.1 of the Bylaws to provide that: ''[T]he Board shall determine from time to time pursuant to resolution adopted by the Board the total number of directors, the number of Non-Industry Directors and Industry Directors (if any), and the number of Representative Directors that are Non-Industry Directors and Industry Directors (if any).'' CBOE now proposes to amend the Bylaws to expressly provide that any person nominated by the Representative Director Nominating Body and any petition candidate nominated pursuant to the Section 3.2 of the Bylaws shall satisfy the compositional requirements determined by the Board pursuant to a resolution adopted by the Board in accordance with Section 3.1 designating the number of Representative Directors that are Non-Industry Directors and Industry Directors (if any). CBOE also proposes to amend Section 3.5 of the Bylaws relating to the filling of vacancies on the Board to provide that the Representative Director Nominating Body shall only recommend individuals to fill a vacancy in a Representative Director position who satisfy the compositional requirements designated by the Board pursuant to resolution adopted by the Board in accordance with Section 3.1, designating the number of Representative Directors that are Non-Industry Directors and Industry Directors (if any). CBOE believes that these changes are consistent with the changes to the Bylaws that were made last year and simply makes those changes more explicit.

[5] 15 U.S.C. 78s(b)(2).

[6] 17 CFR 200.30–3(a)(31).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange notes that at all times at least 20% of the directors serving on the Board shall be Representative Directors nominated by the Representative Director Nominating Body as provided in Section 3.2 of the Bylaws (or otherwise selected through the petition process). Under Section 3.2, the Representative Director Nominating Body provides a mechanism for Trading Permit Holders to provide input with respect to the nominees for Representative Directors and Trading Permit Holders are also allowed to nominate alternative candidates by petition.

[4] *See* Securities Exchange Act Release No. 65682 (November 3, 2011), 76 FR 69780 (November 9, 2011) (noticing for comment SR–CBOE–2011–099); Securities Exchange Act Release No. 65980 (December 15, 2011), 76 FR 79252 (December 21, 2011) (approving SR–CBOE–2011–099).

[5] *See, e.g.,* Securities Exchange Act Release No. 48946 (December 17, 2003), 68 FR 74678 (December 24, 2003) (approving SR–NYSE–2003–34).

(2) Board Size Range

CBOE proposes to amend its Bylaws relating to the Board size range. Currently, the Bylaws provide that the Board shall consist of not less than 11 and not more than 23 directors. CBOE proposes to change the Board size range such that the Board shall consist of not less than 12 and not more than 16 directors. CBOE believes that this new Board size range is consistent with the current size of CBOE's Board and the Board size range that it expects to maintain in the future.

(3) Amendment to Certificate of Incorporation

CBOE proposes to make conforming changes to its Certificate of Incorporation. Specifically, CBOE proposes to amend its Certificate of Incorporation to expressly provide that any individual(s) recommended by the Representative Director Nominating Body and any individual(s) who are petition candidates shall satisfy the compositional requirements determined by the Board of Directors from time to time pursuant to a resolution adopted by the Board in accordance with Section 3.1 of CBOE's Bylaws, designating the number of Representative Directors that are Non-Industry Directors and Industry Directors (if any). CBOE also proposes to include in its Certificate of Incorporation that the Board of Directors and/or Nominating and Governance Committee, as applicable, shall make such determinations as to whether a director candidate satisfies applicable qualifications for election as a director pursuant to and in accordance with Section 3.1 of the Corporation's Bylaws, which is consistent with the current provisions in the Bylaws.

2. Statutory Basis

For the reasons set forth above, CBOE believes that this filing is consistent with Section 6(b) of the Act,[6] in general, and furthers the objectives of Section 6(b)(1) of the Act[7] and Section 6(b)(5) of the Act[8] in particular, in that (i) it enables CBOE to be so organized as to have the capacity to be able to carry out the purposes of the Act and to comply, and to enforce compliance by its Trading Permit Holders and persons associated with its Trading Permit Holders, with the provisions of the Act, the rules and regulations thereunder, and the rules of CBOE and (ii) 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, in general, to protect investors and the public interest. Specifically, CBOE believes that the proposed changes will enhance CBOE's governance structure by (i) by expressly providing that any person nominated by the Representative Director Nominating Body and any petition candidate nominated pursuant to the Section 3.2 of the Bylaws shall satisfy the compositional requirements determined by the Board pursuant to a resolution adopted by the Board in accordance with Section 3.1 designating the number of Representative Directors that are Non-Industry Directors and Industry Directors (if any); and (ii) by changing the Board size range from 11 to 23 directors to 12 to 16 directors. Additionally, CBOE believes that this filing is consistent with Section 6(b)(3) of the Act in that CBOE's Bylaws will continue to provide for the fair representation of CBOE Trading Permit Holders in the selection of directors and the administration of the Exchange.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

CBOE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

The Exchange neither solicited nor received comments on the proposal.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2012–116 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–CBOE–2012–116. This file number should be included on the subject line if email is used.

To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site *http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2012–116, and should be submitted on or before January 9, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2012–30501 Filed 12–18–12; 8:45 am]

**BILLING CODE 8011–01–P**

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(1).

[8] 15 U.S.C. 78f(b)(5).

[9] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–68421; File No. SR–NASDAQ–2012–135]**

## Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend NASDAQ's Fees for Order Execution

December 13, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1], and Rule 19b–4 [2] thereunder, notice is hereby given that on November 30, 2012, The NASDAQ Stock Market LLC (''NASDAQ'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by NASDAQ. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The NASDAQ Stock Market LLC proposes changes to NASDAQ's fees for order execution. While changes pursuant to this proposal are effective upon filing, the Exchange will implement the proposed rule on December 3, 2012.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nasdaq.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[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

NASDAQ currently charges $0.0030 per share executed with respect to all orders for securities priced at $1 or more per share that execute in the NASDAQ Market Center. In this proposed rule change, NASDAQ is proposing two specific discounts from this fee.[3] First, if a member enters Market-on-Close (''MOC'') and/or Limit-on-Close (''LOC'') orders that execute in the NASDAQ Closing Cross, and such orders represent more than 0.06% of the total consolidated volume reported to all consolidated transaction reporting plans by all exchanges and trade reporting facilities (''Consolidated Volume'') during the month, the member would pay a fee of $0.0029 per share executed with respect to its orders that execute in the NASDAQ Market Center during the month.[4] NASDAQ is introducing the discount because it believes that members that participate in the NASDAQ Closing Cross to a significant extent through the use of MOC and/or LOC orders are frequently acting on behalf of institutional investor customers. At present, such members may be giving NASDAQ lower relative priority in their order routing decisions due to its relatively high fees for accessing liquidity, as compared with lower-cost exchanges. As a result, liquidity providers on NASDAQ may receive larger orders that have already attempted to access liquidity elsewhere, such that the order is more likely to have an impact on the price of the stock. By lowering fees for these members, NASDAQ hopes to encourage them to give greater priority to NASDAQ in their routing decisions, thereby lowering their cost and improving the execution experience of liquidity providers. NASDAQ also hopes to encourage greater use of its Closing Cross through this pricing incentive. NASDAQ further notes that the New York Stock Exchange (''NYSE'') currently offers general pricing incentives to members that make use of its closing process to a specified extent.[5]

[3] NASDAQ is also making conforming changes to relocate the placement of the definitions of ''MPID'' and ''Consolidated Volume'' in Rule 7018.

[4] Unless a lower rate applies. For example, an order subject to the discount for Designated Securities described below would pay the lower rate.

[5] Securities Exchange Act Release No. 68150 (November 5, 2012), 77 FR 67431 (November 9, 2012) (SR–NYSE–2012–56); Securities Exchange Act Release No. 68021 (October 9, 2012), 77 FR 63406 (October 16, 2012) (SR–NYSE–2012–50).

Second, NASDAQ is proposing a discounted execution fee of $0.0028 per share executed for the following securities (''Designated Securities''):

BAC Bank of America Corporation
DIA SPDR Dow Jones Industrial Average ETF
EEM iShares MSCI Emerging Markets Index ETF
F Ford Motor Co.
GE General Electric Company
GEN GenOn Energy, Inc.
HPQ Hewlett-Packard Company
INTC Intel Corporation
IWM iShares Russell 2000 Index ETF
MSFT Microsoft Corporation
NOK Nokia Corporation
QQQ Powershares QQQ ETF
S Sprint Nextel Corp.
SPY SPDR S&P 500 ETF
TZA Direxion Daily Small Cap Bear 3X Shares ETF
VXX iPath S&P 500 VIX ST Futures ETN
XLF Financial Select Sector SPDR ETF
YHOO Yahoo! Inc.

The discounted fee would apply to all orders in Designated Securities entered through a market participant identifier (''MPID'') through which a member accesses, provides, or routes shares of liquidity that represent more than 0.25% of Consolidated Volume during the month, including a daily average volume of at least 2 million shares of liquidity provided. The Designated Securities were selected based on analysis of the extent to which (i) NASDAQ generally has a strong quote in the security, in terms of size and time at the national best bid or offer (''NBBO''), but (ii) NASDAQ's share of executions in the security has declined. By lowering the fee for accessing liquidity in these securities, NASDAQ hopes to encourage members to give greater priority to NASDAQ in their routing decisions, thereby lowering their cost and improving the execution experience of liquidity providers in Designated Securities. In order to qualify for the discount, members must demonstrate a commitment to regular participation in the NASDAQ Market Center by reaching relatively modest usage levels (shares accessed, provided or routed representing 0.25% of Consolidated Volume), including an average daily volume of 2 million or more shares of liquidity provided. Through this requirement, NASDAQ will minimize the likelihood of offering the discount to members that engage solely in opportunistic trading without providing liquidity. NASDAQ believes that this will, in turn, increase the likelihood that offering the pricing incentive will increase NASDAQ's market quality in Designated Securities. NASDAQ further notes that NYSE and NYSEArca currently offer pricing

incentives that are limited to certain designated securities.[6]

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[7] in general, and with Sections 6(b)(4) and 6(b)(5) of the Act,[8] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which NASDAQ operates or controls, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Specifically, NASDAQ believes that the proposal to introduce a pricing incentive for members that achieve certain participation levels in the NASDAQ Closing Cross is reasonable because it will result in a reduction of fees below the levels currently in effect, which in turn are consistent with the requirements of Rule 610 under Regulation NMS [9] applicable to access fees. The proposal is consistent with an equitable allocation of fees and not unfairly discriminatory because it will reduce fees to members that NASDAQ believes are generally acting on behalf of institutional investors, and NASDAQ believes that drawing the orders of such members to NASDAQ will be beneficial to other market participants. Specifically, by encouraging such members to route orders to NASDAQ sooner, the pricing change is intended to benefit liquidity providers by allowing them to achieve more frequent executions under conditions where the execution of their posted liquidity is less likely to have a negative impact on the price of the security being traded. In addition, the change is intended to increase the proportion of orders in NASDAQ that reflect long-term trading interest, rather than opportunistic trading strategies. Accordingly, although the fee reduction applies only to members with certain characteristics, it is equitable and not unfairly discriminatory because it is intended to encourage trading behavior that is beneficial to the market as a whole. The discount is also not unfairly discriminatory because an appreciable number of members are expected to qualify for it based on current trading volumes, and more may qualify by increasing their participation in NASDAQ.

Similarly, NASDAQ believes that the proposal to introduce a pricing incentive for Designated Securities is reasonable because it will result in a reduction of fees below the levels currently in effect, which in turn are consistent with the requirements of Rule 610 under Regulation NMS [10] applicable to access fees. The proposal is consistent with an equitable allocation of fees and not unfairly discriminatory because it will reduce fees for members that have demonstrated a commitment to regular participation in the NASDAQ Market Center through reaching specified levels of overall usage and liquidity provision. Incentives focused on the members that provide liquidity are prevalent in securities markets because higher levels of liquidity provision aid price discovery and dampen volatility. In addition, the focus of the incentive on Designated Securities is equitable and not unreasonably discriminatory because, despite strong quotes in terms of size and time at the inside, NASDAQ's share of executions in these securities has declined, thereby risking the willingness of members to continue to offer liquidity at current levels. By providing an incentive for members to access NASDAQ's quote in these securities, the price change will benefit liquidity providers as well as liquidity accessors. The discount is also not unfairly discriminatory because an appreciable number of members are expected to qualify for it based on current trading volumes, and more may qualify by increasing their participation in NASDAQ.

Finally, NASDAQ notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, NASDAQ must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. NASDAQ believes that the proposed rule change reflects this competitive environment because it lowers fees for members whose trading activity is likely to reinforce incentives for other members to provide liquidity at NASDAQ.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Because the market for order execution is extremely competitive, members may readily opt to disfavor NASDAQ's execution services if they believe that alternatives offer them better value. By reducing fees, the proposal is a manifestation of the continued intense level of competition in the market for order execution.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were either solicited or received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[11] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2012–135 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2012–135. This file number should be included on the

[6] Securities Exchange Act Release No. 68021 (October 9, 2012), 77 FR 63406 (October 16, 2012) (SR–NYSE–2012–50); Securities Exchange Act Release No. 67986 (October 4, 2012), 77 FR 61803 (October 11, 2012) (SR–NYSEArca–2012–104).

[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78f(b)(4) and (5).

[9] 17 CFR 242.610.

[10] *Id.*

[11] 15 U.S.C. 78s(b)(3)(A)(ii).

subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2012–135, and should be submitted on or before January 9, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2012–30546 Filed 12–18–12; 8:45 am]

**BILLING CODE 8011–01–P**

[12] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–68425; File No. SR–BOX–2012–021]**

## Self-Regulatory Organizations; BOX Options Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Penny Pilot Program

December 13, 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 November 30, 2012, BOX Options Exchange LLC (the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as constituting a ''non-controversial'' rule change pursuant to Section 19(b)(3)(A) of the Act [3] and Rule 19b–4(f)(6)(iii) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

BOX Options Exchange LLC (the ''Exchange'') proposes to amend Rule 7260 (Penny Pilot Program) to extend, through June 30, 2013, the pilot program that permits certain classes to be quoted in penny increments (''Penny Pilot Program''). The text of the proposed rule change is available from the principal office of the Exchange, on the Exchange's Internet Web site at *http://boxexchange.com,* and at the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange proposes to extend the effective time period of the Penny Pilot Program that is currently scheduled to expire on December 31, 2012, for an additional six months, through June 30, 2013.[5] The Penny Pilot Program permits certain classes to be quoted in penny increments. The minimum price variation for all classes included in the Penny Pilot Program, except for the QQQQs, SPY and IWM, will continue to be $0.01 for all quotations in option series that are quoted at less than $3 per contract and $0.05 for all quotations in option series that are quoted at $3 per contract or greater. The QQQQs, SPY and IWM, will continue to be quoted in $0.01 increments for all options series.

The Exchange may replace any Pilot Program classes that have been delisted on the second trading day following January 1, 2013. The replacement classes will be selected based on trading activity for the six month period beginning June 1, 2012, and ending November 30, 2012. The Exchange will employ the same parameters to prospective replacement classes as approved and applicable under the Pilot Program, including the exclusion of high-priced underlying securities. The Exchange will distribute a Regulatory Circular notifying Participants which replacement classes shall be included in the Penny Pilot Program.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act,[6] in general, and Section 6(b)(5) of the Act,[7] in particular, in that it is designed to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism for a free and open market and a national market system and, in general, to protect investors and the public interest. In particular, the proposed extension will allow the Penny Pilot Program to remain in effect without interruption.

*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 either solicited or received.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6)(iii).

[5] The Penny Pilot Program has been in effect on the Exchange since its inception in May 2012. *See* Securities Exchange Act Release No. 66871 (April 27, 2012) 77 FR 26323 (May 3, 2012) (File No. 10–206, In the Matter of the Application of BOX Options Exchange LLC for Registration as a National Securities Exchange Findings, Opinion, and Order of the Commission) and 67328 (June 29, 2012) 77 FR 40123 (July 6, 2012) (SR–BOX–2012–007). The extension of the effective date is the only change to the Penny Pilot Program being proposed at this time.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [8] and Rule 19b–4(f)(6) thereunder.[9] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [10] and Rule 19b–4(f)(6)(iii) thereunder.[11]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative prior to 30 days after the date of the filing.[12] However, pursuant to Rule 19b–4(f)(6)(iii),[13] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because doing so will allow the Pilot Program to continue without interruption in a manner that is consistent with the Commission's prior approval of the extension and expansion of the Pilot Program and will allow the Exchange and the Commission additional time to analyze the impact of the Pilot Program.[14] Accordingly, the Commission designates the proposed rule change as operative upon filing with the Commission.[15]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–BOX–2012–021 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–BOX–2012–021. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BOX–2012–021 and should be submitted on or before January 9, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2012–30498 Filed 12–18–12; 8:45 am]

BILLING CODE 8011–01–P

[8] 15 U.S.C. 78s(b)(3)(A)(iii).

[9] 17 CFR 240.19b–4(f)(6).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6)(iii).

[12] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change along with a brief description and 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. The Exchange has satisfied this pre-filing requirement.

[13] 17 CFR 240.19b–4(f)(6)(iii).

[14] *See* Securities Exchange Act Release No. 61061 (November 24, 2009), 74 FR 62857 (December 1, 2009) (SR–NYSEArca–2009–44). *See also supra* note 6.

[15] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[16] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–68422; File No. SR–C2–2012–042]**

## Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fees Schedule

December 13, 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 December 6, 2012, C2 Options Exchange, Incorporated (''Exchange'' or ''C2'') 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 Schedule. The text of the proposed rule change is available on the Exchange's Web site (*http://www.c2exchange.com/Legal/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange proposes to amend the WebCRD[SM] fees listed on its Fees Schedule. Such fees are collected and retained by the Financial Industry Regulatory Authority, Inc. (''FINRA'') via the WebCRD[SM] registration system for the registration of associated persons of Exchange Trading Permit Holder (''TPH'') and TPH organizations that are not also FINRA members. The Exchange merely lists such fees on its Fees Schedule. FINRA recently filed a proposed rule change to increase a number of these fees (the ''FINRA Fee Change'').[3] The FINRA Fee Change increases the FINRA Non-Member Processing Fee from $85 to $100, the FINRA Annual System Processing Fee Assessed only during Renewals from $30 to $45, and the FINRA Disclosure Processing Fee from $95 to $110. The FINRA Fee Change also applies the FINRA Disclosure Processing Fee (which already applied to Form U–4 and U–5 filings and their amendments) to Form BD filings and corresponding amendments.

The FINRA Fee Change also amended FINRA's Fingerprint Processing Fees. In 2012, FINRA only offered one set of fees ($27.50 for the initial submission, $13.00 for the second submission, and $27.50 for the third submission). For 2013, FINRA is offering two sets of fees. For fingerprints submitted on paper card, the fees will be $44.50 per initial submission, $30.00 per second submission, and $44.50 per third submission. For fingerprints submitted electronically, the fees will be $29.50 per initial submission, $15.00 per second submission, and $29.50 per third submission. The FINRA Fee Change also increases from $13.00 to $30.00 the fingerprint processing fee for those submitted by TPHs or TPH organizations on behalf of their associated persons who had had their prints processed through a self-regulatory organization other than FINRA.

The proposed fee changes are to be added to the Fees Schedule for January 1, 2013 (while they are not to be implemented until January 2, 2013 (according to the FINRA Fee Change), the Exchange prefers to update its Fees Schedule as of the first day of a given month; moreover, January 1, 2013 is a national holiday and the Exchange is closed, so January 2, 2013 is the first business day on which the proposed fee changes would be effective regardless).

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[4] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(4) of the Act,[5] which provides that Exchange rules may provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities. The proposed fee changes are reasonable from the Exchange's position because the amounts are those provided by FINRA, and the Exchange does not collect or retain these fees. The proposed fee changes are equitable and not unfairly discriminatory from the Exchange's position because the Exchange will not be collecting or retaining these fees, and therefore will not be in a position to apply them in an inequitable or unfairly discriminatory manner.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

C2 does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

The Exchange neither solicited nor received comments on the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)[6] of the Act and paragraph (f) of Rule 19b–4[7] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–C2–2012–042 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–C2–2012–042. 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

[3] *See* Securities Exchange Act Release No. 67247 (June 25, 2012) 77 FR 38866 (June 29, 2012) (SR–FINRA–2012–030). These new fees and fee amounts are discussed in FINRA Regulatory Notice 12–32, available at *http://www.finra.org/Industry/Regulation/Notices/2012/P127240,* and are listed in the listing of FINRA's 2013 Regulatory Fees, available on the FINRA Web site at *http://www.finra.org/Industry/Compliance/Registration/CRD/FilingGuidance/P197266.*

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(4).

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f).

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–C2–2012–042 and should be submitted on or before January 9, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2012–30495 Filed 12–18–12; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–68429; File No. C2–2012–039]**

## Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Notice of Proposed Rule Change Related to Bylaw and Other Changes

December 13, 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 November 30, 2012, the Chicago Board Options Exchange, Incorporated (''Exchange'' or ''C2'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

C2 proposes to: (i) Amend its Bylaws to expressly provide that the Representative Director Nominating Body and any petition candidate must satisfy the compositional requirements determined by the Board from time to time pursuant to a resolution adopted by the Board; (ii) amend its Bylaws relating to the Board size range such that the Board shall consist of not less than 12 and not more than 16 directors; and (iii) make conforming changes to the C2 Certificate of Incorporation. The text of the proposed amendments to C2's Bylaws and C2's Certificate of Incorporation are available on the Exchange's Web site (*http://www.c2exchange.com/Legal/*), at the Exchange's Office of the Secretary and at the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change*

1. Purpose

The purpose of this proposed rule change is to (i) amend C2's Bylaws to expressly state that the Representative Director Nominating Body and any petition candidate must satisfy the compositional requirements determined by the Board from time to time pursuant to a resolution adopted by the Board; (ii) amend its Bylaws relating to the Board size range such that the Board shall consist of not less than 12 and not more than 16 directors; and (iii) make conforming changes to the C2 Certificate of Incorporation.

(1) Compositional Requirements Determined by the Board

Last year, C2 amended its Bylaws and Certificate of Incorporation to, among other things: (i) eliminate the requirement that its Board of Directors be composed of at least 30% Industry Directors, and (ii) eliminate the requirement in Section 3.2 of the Bylaws that the Representative Directors must be Industry Directors.[3] In its rule filing, C2 noted that the changes would provide it with appropriate flexibility as it evaluates the structure and composition of its Board in the future.[4] Additionally, C2 stated that no matter what the composition of its Board is, the Exchange intends to maintain the fair representation of its Trading Permit Holders in the selection of its directors and administration of its affairs consistent with Section 6(b)(3) of the Securities Exchange Act of 1934, as amended (''Act''). In approving C2's rule filing, the SEC noted that it has previously approved proposals in which an exchange's board of directors was composed of all or nearly all non-industry directors where the process was nevertheless designed to comply with the ''fair representation'' requirement in the selection and election of directors.[5]

In connection with these changes, C2 also amended Section 3.1 of the Bylaws to provide that: ''[T]he Board shall determine from time to time pursuant to resolution adopted by the Board the total number of directors, the number of Non-Industry Directors and Industry Directors (if any), and the number of Representative Directors that are Non-Industry Directors and Industry Directors (if any).'' C2 now proposes to amend the Bylaws to expressly provide that any person nominated by the Representative Director Nominating Body and any petition candidate nominated pursuant to the Section 3.2 of the Bylaws shall satisfy the compositional requirements determined by the Board pursuant to a resolution adopted by the Board in accordance with Section 3.1 designating the number of Representative Directors that are Non-Industry Directors and Industry Directors (if any). C2 also proposes to amend Section 3.5 of the Bylaws relating to the filling of vacancies on the Board to provide that the Representative Director Nominating Body shall only recommend individuals to fill a vacancy in a Representative Director position who satisfy the compositional requirements designated by the Board pursuant to resolution adopted by the Board in accordance with Section 3.1, designating the number of Representative Directors that are Non-Industry Directors and Industry Directors (if any). C2 believes that these changes are consistent with the changes to the Bylaws that were made last year

[8] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange notes that at all times at least 20% of the directors serving on the Board shall be Representative Directors nominated by the Representative Director Nominating Body as provided in Section 3.2 of the Bylaws (or otherwise selected through the petition process). Under Section 3.2, the Representative Director Nominating Body provides a mechanism for Trading Permit Holders to provide input with respect to the nominees for Representative Directors and Trading Permit Holders are also allowed to nominate alternative candidates by petition.

[4] *See* Securities Exchange Act Release No. 65681 (November 3, 2011), 76 FR 69783 (November 9, 2011) (noticing for comment SR–C2–2011–031); Securities Exchange Act Release No. 65979 (December 15, 2011), 76 FR 79239 (December 21, 2011) (approving SR–C2–2011–031).

[5] *See, e.g.,* Securities Exchange Act Release No. 48946 (December 17, 2003), 68 FR 74678 (December 24, 2003) (approving SR–NYSE–2003–34).

and simply makes those changes more explicit.

(2) Board Size Range

C2 proposes to amend its Bylaws relating to the Board size range. Currently, the Bylaws provide that the Board shall consist of not less than 11 and not more than 23 directors. C2 proposes to change the Board size range such that the Board shall consist of not less than 12 and not more than 16 directors. C2 believes that this new Board size range is consistent with the current size of C2's Board and the Board size range that it expects to maintain in the future.

(3) Amendment to Certificate of Incorporation

C2 proposes to make conforming changes to its Certificate of Incorporation. Specifically, C2 proposes to amend its Certificate of Incorporation to expressly provide that any individual(s) recommended by the Representative Director Nominating Body and any individual(s) who are petition candidates shall satisfy the compositional requirements determined by the Board of Directors from time to time pursuant to a resolution adopted by the Board in accordance with Section 3.1 of C2's Bylaws, designating the number of Representative Directors that are Non-Industry Directors and Industry Directors (if any). C2 also proposes to include in its Certificate of Incorporation that the Board of Directors and/or Nominating and Governance Committee, as applicable, shall make such determinations as to whether a director candidate satisfies applicable qualifications for election as a director pursuant to and in accordance with Section 3.1 of the Corporation's Bylaws, which is consistent with the current provisions in the Bylaws.

2. Statutory Basis

For the reasons set forth above, C2 believes that this filing is consistent with Section 6(b) of the Act,[6] in general, and furthers the objectives of Section 6(b)(1) of the Act[7] and Section 6(b)(5) of the Act[8] in particular, in that (i) it enables C2 to be so organized as to have the capacity to be able to carry out the purposes of the Act and to comply, and to enforce compliance by its Trading Permit Holders and persons associated with its Trading Permit Holders, with the provisions of the Act, the rules and regulations thereunder, and the rules of C2 and (ii) 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, in general, to protect investors and the public interest. Specifically, C2 believes that the proposed changes will enhance C2's governance structure by (i) by expressly providing that any person nominated by the Representative Director Nominating Body and any petition candidate nominated pursuant to the Section 3.2 of the Bylaws shall satisfy the compositional requirements determined by the Board pursuant to a resolution adopted by the Board in accordance with Section 3.1 designating the number of Representative Directors that are Non-Industry Directors and Industry Directors (if any); and (ii) by changing the Board size range from 11 to 23 directors to 12 to 16 directors. Additionally, C2 believes that this filing is consistent with Section 6(b)(3) of the Act in that C2's Bylaws will continue to provide for the fair representation of C2 Trading Permit Holders in the selection of directors and the administration of the Exchange.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

C2 does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

The Exchange neither solicited nor received comments on the proposal.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–C2–2012–039 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–C2–2012–039. This file number should be included on the subject line if email is used.

To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–C2–2012–039, and should be submitted on or before January 9, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2012–30502 Filed 12–18–12; 8:45 am]

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[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(1).

[8] 15 U.S.C. 78f(b)(5).

[9] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–68430; File No. SR–NYSEArca–2012–111]**

## Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, To List and Trade Units of the Sprott Physical Platinum and Palladium Trust Pursuant to NYSE Arca Equities Rule 8.201

December 13, 2012.

### I. Introduction

On October 9, 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 units (''Units'') of the Sprott Physical Platinum and Palladium Trust (''Trust'') pursuant to NYSE Arca Equities Rule 8.201. On October 24, 2012, the Exchange submitted Amendment No. 1 to the proposed rule change. The proposed rule change was published for comment in the **Federal Register** on October 30, 2012.[3] The Commission received no comment letters regarding the proposed rule change. This order approves the proposed rule change.

### II. Description of the Proposal

The Exchange proposes to list and trade the Units [4] under NYSE Arca Equities Rule 8.201. NYSE Arca represents that the Units satisfy the requirements of NYSE Arca Equities Rule 8.201 and thereby qualify for listing and trading on the Exchange.[5]

Sprott Asset Management LP is the sponsor and manager of the Trust (''Sponsor'' or ''Manager'').[6] RBC Investor Services (''RBC'') is the trustee and valuation agent of the Trust (''Valuation Agent''), as well as the custodian of the Trust's assets other than physical platinum and palladium bullion.[7] The Royal Canadian Mint is the custodian for the physical platinum and palladium bullion owned by the Trust (''Platinum and Palladium Custodian'').

The Trust will issue the Units in an initial public offering.[8] The Trust may not issue additional Units following the completion of the initial public offering except under certain conditions. NYSE Arca will require that a minimum of 1,000,000 Units be outstanding at the start of trading.

The Trust's investment objective is to invest and hold substantially all of its assets in physical platinum and palladium bullion. Except with respect to cash held by the Trust to pay expenses and anticipated cash redemptions,[9] the Trust expects to own only physical platinum and palladium bullion that is certified as conforming to the Good Delivery Standard (''Good Delivery'') of the London Platinum and Palladium Market. The Trust will purchase approximately equal dollar amounts of physical platinum and palladium. The Manager expects to invest and hold approximately 97% of the total net assets of the Trust in physical platinum and palladium bullion.

The Units will be redeemable monthly for physical platinum and palladium bullion or for cash at the option of the Unitholder, subject to certain conditions. Redemption requests for physical platinum and palladium bullion must be for a minimum of 25,000 Units. A redemption request for physical platinum and palladium bullion must be received by the Trust's transfer agent no later than 4:00 p.m. E.T. on the 15th day of the month in which such redemption notice will be processed, or if such day is not a Business Day,[10] then on the immediately following day that is a Business Day.[11] Generally, the Units redeemed for physical platinum and palladium bullion will have a redemption value equal to the aggregate value of the net asset value (''NAV'') per Unit of the redeemed Units on the last day on which the Exchange is open for trading in the month during which the redemption request is processed, less applicable expenses (''Redemption Amount''). The Manager will allocate the Redemption Amount to physical platinum and palladium bullion in direct proportion to the value of physical platinum and palladium bullion held by the Trust at the time of redemption (''Bullion Redemption Amount'').[12]

The Units redeemed for cash will receive a redemption price equal to 95% of the lesser of: (i) the volume-weighted average trading price of the Units traded on NYSE Arca or, if trading has been suspended on NYSE Arca, the volume-weighted average trading price of the Units traded on the TSX, for the last five days on which the respective exchange is open for trading during the month in which the redemption request is processed; or (ii) the NAV per Unit of the redeemed Units on the last day of such month on which NYSE Arca is open for trading.

Additional information can be found in the Notice and in the Registration Statement regarding: the Trust; the Units; the Trust's investment objectives,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 68101 (October 24, 2012), 77 FR 65732 (''Notice'') (noticing the filing of the proposed rule change as modified by Amendment No. 1).

[4] Each Unit will represent an equal, fractional, undivided interest in the net assets of the Trust attributable to the particular class of Units. *See* Notice, *supra* note 3, 77 FR at 65735.

[5] With respect to application of Rule 10A–3 under the Act, the Trust relies on the exemption contained in Rule 10A–3(c)(7). *See* Notice, *supra* note 3, 77 FR at 65733 n.17.

[6] The Manager is a limited partnership existing under the laws of Ontario, Canada, and acts as manager of the Trust pursuant to the trust agreement and the management agreement. The Manager has adopted a policy pursuant to which no entity or account that is (a) managed or (b) for whom investment decisions are made, directly or indirectly, by a person that is involved in the decision-making process of, or has nonpublic information about, follow-on offerings of the Trust (''Decision Maker'') is permitted to invest in the Trust, and no Decision Maker is permitted to invest in the Trust for the Decision Maker's account or benefit, directly or indirectly. *See* Notice, *supra* note 3, 77 FR at 65732 n.11. Additional details regarding the Trust are set forth the registration statement for the Trust, most recently amended on September 4, 2012 (No. 333–179017) (''Registration Statement'').

[7] RBC is affiliated with a broker-dealer. RBC has represented to the Exchange that it has put in place and will maintain the appropriate information barriers and controls between itself and the broker-dealer affiliate so that the broker-dealer affiliate will not have access to information concerning the composition and/or changes to the Trust's holdings that are not available on the Trust's Web site. *See* Notice, *supra* note 3, 77 FR at 65732 n.12.

[8] To purchase physical platinum and palladium bullion, the Manager will create an order internally and send it for pre-trade compliance review. Once the order has been approved, the order will be placed by one of the Manager's traders. Orders generally will be placed by phone and through electronic dealing systems. Lists of the plates and ingots available to fill the buy order will be sent to the Manager by a bullion broker with whom the Manager has an established relationship. While the Manager will work with a bullion broker with whom the Manager has an established relationship, the Manager has represented that it will make all purchases of physical platinum and palladium bullion on an arms-length basis and will not make purchases from affiliated entities. *See* Notice, *supra* note 3, 77 FR at 65735.

[9] The Trust can hold no more than ten percent of the assets in cash or other specified investments. *See* Notice, *supra* note 3, 77 FR at 65734–35 n.21.

[10] A ''Business Day'' is a day on which the Exchange or the Toronto Stock Exchange (''TSX'') is open for trading. The Exchange states that the Units will trade on both the Exchange and the TSX. *See* Notice, *supra* note 3, 77 FR at 65735.

[11] Any bullion redemption notice received after such time will be processed in the next month.

[12] Any Bullion Redemption Amount in excess of the value of the Good Delivery plates or ingots, as the case may be, of the particular metal to be delivered to the redeeming Unitholder will be paid in cash, as such excess amount will not be combined with any excess amounts in respect of the other metal for the purpose of delivering additional physical platinum and palladium bullion. *See* Notice, *supra* note 3, 77 FR at 65736.

strategies, policies, and restrictions; fees and expenses; creation and redemption of Units; the physical platinum and palladium markets; availability of information; trading rules and halts; and surveillance procedures.[13]

## III. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of Section 6 of the Act [14] and the rules and regulations thereunder applicable to a national securities exchange.[15] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[16] which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

In addition, the Commission finds that the proposal to list and trade Units on NYSE Arca is consistent with Section 11(a)(1)(C)(iii) of the Act,[17] which sets forth Congress's finding that it is in the public interest and appropriate for the protection of investors to assure the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities. Quotation and last-sale information for the Units will be available via the Consolidated Tape Association. The Trust's Web site will provide an intraday indicative value (''IIV'') per unit for the Units, as calculated by a third-party financial data provider during NYSE Arca's Core Trading Session (9:30 a.m. to 4:00 p.m. E.T.).[18] In addition, the Trust's Web site will contain the following information, on a per-Unit basis, for the Trust: (a) the midpoint of the bid-ask price at the close of trading in relation to the NAV as of the time the NAV is calculated (''Bid/Ask Price''), and a calculation of the premium or discount of such price against such NAV; and (b) data in chart format displaying the frequency distribution of discounts and premiums of the Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. The Trust's Web site will also provide the Trust's prospectus, the two most recent reports to Unitholders, the last sale price of the Units as traded in the U.S. market, and a breakdown, calculated on a daily basis, of the holdings of the Trust by metal type. In addition, NYSE Arca will make available over the Consolidated Tape quotation information, trading volume, closing prices, and NAV per Unit from the previous day.

The Commission believes that the proposal to list and trade the Units is reasonably designed to promote fair disclosure of information that may be necessary to price the Units appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. As discussed above, the Trust will publish on its Web site: a breakdown of the holdings of the Trust by metal type; the NAV of the Trust; the IIV per Unit; the Trust's prospectus; and the last sale price of the Units as traded in the U.S. market. The Commission notes that the Exchange will obtain a representation from the Trust prior to the commencement of trading of the Units that the NAV per Unit will be calculated daily and made available to all market participants at the same time.

Under NYSE Arca Equities Rule 7.34(a)(5), if the Exchange becomes aware that the NAV is not being disseminated to all market participants at the same time, it must halt trading on the NYSE Marketplace until such time as the NAV is available to all market participants. Additionally, if the IIV is not being disseminated as required, the Exchange may halt trading during the day in which the disruption occurs. If the interruption persists past the day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption. Further, the Exchange will consider suspension of trading pursuant to NYSE Arca Rule 8.201(e)(2) if, after the initial 12-month period following commencement of trading: (1) the value of platinum or palladium is no longer calculated or available on at least a 15-second delayed basis from a source unaffiliated with the Sponsor, Trust, or Platinum and Palladium Custodian, or the Exchange stops providing a hyperlink on its Web site to any such unaffiliated commodity value; or (2) if the IIV is no longer made available on at least a 15-second delayed basis.[19] NYSE Arca will halt trading in the Units on the Exchange in the event the Trust directs the Trust's Valuation Agent to suspend the calculation of the value of the net assets of the Trust and the NAV.[20] NYSE Arca Equities Rule 8.201(e)(2) also provides that NYSE Arca may seek to delist the Units in the event the value of the underlying commodity or the IIV is no longer calculated or available as required.

In support of this proposal, NYSE Arca has made representations, including:

(1) The Units will be subject to the initial and continued listing criteria under NYSE Arca Equities Rule 8.201.

(2) NYSE Arca's surveillance procedures are adequate to properly monitor Exchange trading of the Units in all trading sessions and to deter and detect violations of NYSE Arca rules and applicable federal securities laws.[21]

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[13] *See* Notice and the Registration Statement, *supra* notes 3 and 6, respectively.

[14] 15 U.S.C. 78f.

[15] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[16] 15 U.S.C. 78f(b)(5).

[17] 15 U.S.C. 78k–1(a)(1)(C)(iii).

[18] The IIV will be calculated by: (1) Multiplying the total number of ounces of physical platinum bullion held by the Trust as of the close of business on the previous day with the mid-price of spot platinum per ounce (''Platinum IIV''); (2) multiplying the total number of ounces of physical palladium bullion held by the Trust as of the close of business on the previous day with the mid-price of spot palladium per ounce (''Palladium IIV''); (3) adding the Platinum IIV to the Palladium IIV and the fair market value of the assets of the Trust that are not physical platinum or palladium bullion as of the close of business on the previous day (such sum, ''IIV Assets''); (4) subtracting the fair market value of the Trust's total liabilities (excluding all liabilities represented by the outstanding Units, if any) as of the close of business on the previous day from the IIV Assets; and (5) dividing the result by the number of Units outstanding as of the close of business on the previous day.

[19] More generally, NYSE Arca may halt trading on the Exchange in the Units because of market conditions or for reasons that, in the Exchange's view, make trading in the Units inadvisable, including: (1) the extent to which conditions in the underlying platinum or palladium market have caused disruptions and/or lack of trading; (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present; or (3) if trading in the Units is halted on TSX. *See* Notice, *supra* note 3, 77 FR at 65738. Additionally, trading in the Units will be subject to trading halts caused by extraordinary market volatility pursuant to NYSE Arca's ''circuit breaker'' rule. *See* NYSE Arca Equities Rule 7.12.

[20] *See* Notice, *supra* note 3, 77 FR at 65739.

[21] To support this, NYSE Arca states that, pursuant to NYSE Arca Equities Rule 8.201(g), it is able to obtain information regarding trading in the Units; physical platinum and palladium; platinum or palladium futures contracts; options on platinum or palladium futures; or any other platinum or palladium derivative from ETP Holders acting as registered Market Makers, in connection with their proprietary or customer trades. More generally, NYSE Arca states that it has regulatory jurisdiction over its ETP Holders and their associated persons, which includes any person or entity controlling an ETP Holder. With respect to a subsidiary or affiliate of an ETP Holder that does business only in commodities or futures contracts, the Exchange states that it could obtain information regarding the activities of such subsidiary or affiliate through surveillance sharing agreements with regulatory organizations of which such subsidiary or affiliate

(3) Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin of the special characteristics and risks associated with trading the Units. Specifically, the Information Bulletin will discuss the following: (a) The procedures for purchases and redemptions of Units; (b) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Units; (c) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Units prior to or concurrently with the confirmation of a transaction; (d) the possibility that trading spreads and the resulting premium or discount on the Units may widen as a result of reduced liquidity of platinum and palladium trading during the Core and Late Trading Sessions after the close of the major world platinum and palladium markets; and (e) trading information.

This approval order is based on the Exchange's representations.

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 6(b)(5) of the Act [22] and the rules and regulations thereunder applicable to a national securities exchange.

## IV. Conclusion

*It is therefore ordered,* pursuant to Section 19(b)(2) of the Act,[23] that the proposed rule change (SR–NYSEArca–2012–111), as modified by Amendment No. 1, is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

**Kevin M. O'Neill,**

*Deputy Secretary.*

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is a member. Further, NYSE Arca states that it may obtain trading information via the Intermarket Surveillance Group (''ISG'') from other exchanges that are members of the ISG, including the Commodity Exchange, Inc. (''COMEX''). The Exchange also states that The Investment Industry Regulatory Organization of Canada and the New York Mercantile Exchange, of which COMEX is a division, are ISG members. The Investment Industry Regulatory Organization of Canada oversees Canadian broker-dealers and trading activity on the TSX. *See* Securities Exchange Act Release No. 63043 (October 5, 2010), 75 FR 62615, 62619 n.26 (October 12, 2010).

[22] 15 U.S.C. 78f(b)(5).

[23] 15 U.S.C. 78s(b)(2).

[24] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–68424; File No. SR–ISE–2012–95]**

## Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Penny Pilot Program

December 13, 2012.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder, [3] notice is hereby given that on December 7, 2012, the International Securities Exchange, LLC (the ''Exchange'' or the ''ISE'') filed with the Securities and Exchange Commission (the ''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The ISE proposes to amend its rules relating to a pilot program to quote and to trade certain options in pennies (''Penny Pilot Program''). The text of the proposed rule change is as follows, with deletions in [brackets] and additions are *italicized:*

**Rule 710. Minimum Trading Increments**

* * * * *

*Supplementary Material to Rule 710*

.01 Notwithstanding any other provision of this Rule 710, the Exchange will operate a pilot program, scheduled to expire on [December 31, 2012] *June 30, 2013,* to permit options classes to be quoted and traded in increments as low as $.01. The Exchange will specify which options trade in such pilot, and in what increments, in Regulatory Information Circulars filed with the Commission pursuant to Rule 19b–4 under the Exchange Act and distributed to Members.

The Exchange may replace any penny pilot issues that have been delisted with the next most actively traded multiply listed options classes that are not yet included in the penny pilot, based on trading activity in the previous six months. The replacement issues may be added to the penny pilot on the second trading day following [July 1, 2012] *January 1, 2013.*

.02 No Change.

* * * * *

The text of the proposed rule change is available on the Exchange's Web site at *www.ise.com,* at the Exchange's principal office and at the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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 Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change*

1. Purpose

Under the Penny Pilot Program, the minimum price variation for all participating options classes, except for the Nasdaq-100 Index Tracking Stock (''QQQQ''), the SPDR S&P 500 Exchange Traded Fund (''SPY'') and the iShares Russell 2000 Index Fund (''IWM''), is $0.01 for all quotations in options series that are quoted at less than $3 per contract and $0.05 for all quotations in options series that are quoted at $3 per contract or greater. QQQQ, SPY and IWM are quoted in $0.01 increments for all options series. The Penny Pilot Program is currently scheduled to expire on December 31, 2012.[4] The Exchange proposes to extend the time period of the Penny Pilot Program through June 30, 2013, and to provide revised dates for adding replacement issues to the Penny Pilot program. The Exchange proposes that any Penny Pilot Program issues that have been delisted may be replaced on the second trading day following January 1, 2013. The replacement issues will be selected based on trading activity for the six month period beginning June 1, 2012, and ending November 30, 2012. This filing does not propose any substantive changes to the Penny Pilot Program: all classes currently participating will

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Exchange Act Release No. 67323 (June 29, 2012), 77 FR 40121 (July 6, 2012) (SR–ISE–2012–57).

remain the same and all minimum increments will remain unchanged. The Exchange believes the benefits to public customers and other market participants who will be able to express their true prices to buy and sell options have been demonstrated to outweigh the increase in quote traffic.

2. Statutory Basis

The basis under the Securities Exchange Act of 1934 (the ''Exchange Act'') for this proposed rule change is found in Section 6(b)(5),[5] in that the proposed rule change is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. In particular, the proposed rule change, which extends the Penny Pilot Program for an additional six months, will enable public customers and other market participants to express their true prices to buy and sell options for the benefit of all market participants.

*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 written comments from members or other interested parties.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[6] and Rule 19b–4(f)(6) thereunder.[7] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[8] and Rule 19b–4(f)(6)(iii) thereunder.[9]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative prior to 30 days after the date of the filing.[10] However, pursuant to Rule 19b–4(f)(6)(iii),[11] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because doing so will allow the Pilot Program to continue without interruption in a manner that is consistent with the Commission's prior approval of the extension and expansion of the Pilot Program and will allow the Exchange and the Commission additional time to analyze the impact of the Pilot Program.[12] Accordingly, the Commission designates the proposed rule change as operative upon filing with the Commission.[13]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–ISE–2012–95 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–2012–95. 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–2012–95 and should be submitted on or before January 9, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

**Kevin M. O'Neill,**

*Deputy Secretary.*

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[5] 15 U.S.C. 78f(b)(5).

[6] 15 U.S.C. 78s(b)(3)(A)(iii).

[7] 17 CFR 240.19b–4(f)(6).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6)(iii).

[10] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change along with a brief description and 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. The Exchange has satisfied this pre-filing requirement.

[11] 17 CFR 240.19b–4(f)(6)(iii).

[12] *See* Securities Exchange Act Release No. 61061 (November 24, 2009), 74 FR 62857 (December 1, 2009) (SR–NYSEArca–2009–44). *See also supra* note 4.

[13] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[14] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–68434; File Numbers SR–OCC–2012–14 and AN–OCC–2012–01]**

## Self-Regulatory Organizations; Options Clearing Corporation; Order Approving Proposed Rule Change, as Modified by Amendment No. 1 Thereto, and Notice of No Objection to Advance Notice, Modified by Amendment No. 1 Thereto, Relating to the Clearance and Settlement of Over-the-Counter Options

December 14, 2012.

### I. Introduction

On August 30, 2012, the Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change SR–OCC–2012–14 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder [2] (''Proposed Rule Change'') and as an Advance Notice (SR–OCC–2012–01) pursuant to Section 806(e) of Title VIII of the Dodd-Frank Act (''Title VIII'' or ''Clearing Supervision Act'') [3] (the Proposed Rule Change with the Advance Notice, the ''Proposal''). The Proposed Rule Change and Advance Notice were published for comment in the **Federal Register** on September 18, 2012 [4] and September 27, 2012,[5] respectively. On October 26, 2012, the Commission extended the time within which to act on the Proposal.[6] The Commission received no comment letters. On November 30, 2012, OCC filed Amendment No. 1 to the Proposal.[7] This Order approves the Proposed Rule Change and serves as notice of no objection to the Advance Notice.

### II. Description of the Proposal

The purpose of this Proposal is to establish a legal and operational framework for OCC to provide central clearing of certain OTC index options on the S&P 500 Index (''OTC S&P 500 Index Options'').[8] OCC will not commence clearing of OTC S&P 500 Index Options until a subsequent proposal concerning certain enhancements to OCC's risk modeling and risk management procedures (''Risk Management Proposal'') [9] is approved by the Commission and implemented by OCC.[10] OCC anticipates using the same legal and operational framework as contained in the Proposal for clearing additional OTC equity options or OTC equity index options in the future, subject to the requisite regulatory approvals.[11]

*OTC Options*

OCC has entered into a license agreement with Standard & Poor's Financial Services LLC (''S&P'') that allows OCC to clear OTC options on three equity indices published by the S&P: The S&P 500 Index, the S&P MidCap 400 Index, and the S&P SmallCap 600 Index. The Proposal would allow OCC to clear only OTC S&P 500 Index Options,[12] and only subject to the filing and approval of the Risk Management Proposal, as discussed above.[13] OTC S&P 500 Index Options are limited in tenor to between four months and five years and have minimum notional values of either 500,000 or 100,000 times the value of the S&P 500 Index.[14] OCC may propose to clear OTC options on other indices and on individual equity securities in the future, subject to Commission approval of one or more additional rule filings. In establishing a legal and operational framework for the potential future clearing of OTC options referencing other equities or equity indices, the Proposal defines ''OTC option'' and ''OTC index option'' (both of which terms include OTC S&P 500 Index Options) generically in order to simplify future amendments to provide for additional underlying interests. As noted above, however, the Proposal by its terms would permit only the clearing of OTC S&P 500 Index Options,[15] and only after the Commission's approval and OCC's implementation of a subsequent Risk Management Proposal.[16]

OTC S&P 500 Index Options will be similar to exchange-traded standardized equity index options called ''FLEX Options.'' FLEX Options are put and call options traded on various options exchanges that allow for customization of certain terms. For example, FLEX index Options traded on the Chicago Board Options Exchange have six customizable terms: (1) Underlying index, (2) put or call, (3) expiration date, (4) exercise price, (5) American or European exercise style, and (6) method of calculating settlement value.[17] OCC is the issuer and guarantor of FLEX Options and clears FLEX Options traded on multiple exchanges.

Similar to FLEX Options referencing the S&P 500 Index, OTC S&P 500 Index Options will allow for customization of a limited number of variable terms with a specified range of values that may be assigned to each as agreed between the buyer and seller. Parties submitting transactions in OTC Options for clearing by OCC will be able to customize six

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 12 U.S.C. 5465(e).

[4] Securities Exchange Act Release No. 67835 (September 12, 2012), 77 FR 57602 (September 18, 2012).

[5] Securities Exchange Act Release No. 67906 (September 21, 2012), 77 FR 59431 (September 27, 2012).

[6] Notice of Designation of a Longer Period for Commission Action on Proposed Rule Change Relating to the Clearance and Settlement of Over-the-Counter Options, Release No. 34–68112 (October 26, 2012); 77 FR 66497 (November 5, 2012); Notice of Extension of Review Period of Advance Notice to Establish the Legal and Operational Framework for Providing Central Clearing of OTC Index Options on the S&P 500 Index That Are Negotiated Bilaterally in the Over-The-Counter Market and Submitted to OCC for Clearance, Release No. 34–68111 (October 26, 2012), 77 FR 66196 (November 2, 2012).

[7] In Amendment No. 1, OCC proposed to amend Article XVII of its By-laws to clarify that Section 6 of that Article, pertaining to OTC Index Options, are inoperative until further notice by OCC, as well as to amend Item 3 of the proposed rule change to clarify that the clearing of OTC Options will not occur until certain enhancements related to longer-tenor options have been approved and implemented.

[8] The proposed rule change replaces a previously proposed rule change which was withdrawn by OCC. *See* Securities Exchange Act Release No. 34–66090 (January 3, 2012), 77 FR 1107 (January 9, 2012) (SR–OCC–2011–19).

[9] OCC is in the process of implementing risk modeling enhancements with respect to longer-tenor options, including OTC S&P 500 Index Options. The enhancements are part of OCC's ongoing efforts to test and improve its risk management operations with respect to all longer-tenor options that OCC currently clears. These procedures will be submitted for review in a separate proposed rule change and advance notice filing, and OCC represents that it will not commence clearing of OTC S&P 500 Index Options until such procedures have been approved and implemented. *See also supra* note 7.

[10] Notice of Filing of Advance Notice Relating to the Clearance and Settlement of Over-the-Counter Options, Rel. No. 34–67906 at 15 (Sept. 21, 2012), 77 FR 59431, 59434 (Sept. 27, 2012); Notice of Filing of Proposed Rule Change Relating to the Clearance and Settlement of Over-the-Counter Options, Rel. No. 34–67835 at 15 (Sept. 12, 2012), 77 FR 57602, 57606 (Sept. 18, 2012). *See also supra* note 7.

[11] *See supra* notes 9 and 10 and accompanying text.

[12] *See* Proposed By-laws, Section 6, Interpretations and Policies .01, Proposed Rule Change and Advance Notice by OCC (SR–OCC–2012–14), *available at http://www.theocc.com/components/docs/legal/rules_and_bylaws/sr_occ_12_14.pdf.*

[13] *See supra* notes 10 and 10 and accompanying text.

[14] *See* Proposed By-laws, Section 6, Interpretations and Policies .01, Proposed Rule Change and Advance Notice by OCC (SR–OCC–2012–14), *available at http://www.theocc.com/components/docs/legal/rules_and_bylaws/sr_occ_12_14.pdf.*

[15] *See id. See also supra* notes 9 and 10 and accompanying text.

[16] *See supra* notes 10 and 10 and accompanying text.

[17] *See* CBOE Rule 24A.4, Terms of FLEX Options, *available at http://www.cchwallstreet.com/CBOETools/PlatformViewer.asp?selectednode=chp%5F1%5F1%5F25%5F5&manual=%2FCBOE%2Frules%2Fcboe%2Drules%2F.*

discrete terms: (1) Underlying index;[18] (2) put or call; (3) exercise price; (4) expiration date; (5) American or European exercise style; and (6) method of calculating exercise settlement value on the expiration date.[19] The variable terms and permitted values will be specified in the proposed Section 6 of Article XVII of the By-Laws.

*Clearing of OTC Options*

OCC proposes to clear OTC S&P 500 Index Options subject to the same basic rules and procedures used for the clearance of listed index options, with such modifications to reflect the unique characteristics of OTC Options. Transactions in OTC options[20] will not be executed through the facilities of any exchange, but will instead be entered into bilaterally and submitted to OCC for clearance through one or more providers of trade affirmation services.[21] In addition, the proposed rules require that the counterparties to the OTC Options must be eligible contract participants (''ECPs''), as defined in Section 3a(65) of the Act,[22] and Section 1a(18) of the Commodity Exchange Act,[23] as amended (the ''CEA''). Because an OTC S&P 500 Index Option is a ''security'' as defined in the Act, the proposed rules also require that the transactions be cleared through a clearing member of OCC that is registered with the Commission as a broker-dealer or one of the small number of clearing members that are ''non-U.S. securities firms'' as defined in OCC's By-Laws. OCC is not requiring clearing members to meet any different financial standards for clearing OTC Index Options, as defined in OCC's By-laws and Rules, than those to which they are presently subject. However, clearing members must be specifically approved by OCC to clear OTC Index Options pursuant to proposed new Interpretation and Policy .11 to Section 1 of Article V in order to ensure the operational readiness of such clearing members to clear OTC Index Options. Clearing members seeking to clear OTC Index Options will be required to submit a business expansion request and complete an operational review. The operational review is to consist of an initial meeting with the clearing member's staff to evaluate the staff's experience, confirming the staff's familiarity with current OCC systems and procedures, completion of an operational questionnaire, performing a high level review of the clearing member's systems and processing capabilities, and reviewing other pertinent operational information. Successful testing of messaging capability between the clearing member, the OTC Trade Source,[24] and OCC is also necessary. These procedures will determine whether the firm is operationally ready to clear OTC Index Options.

Exercise of an OTC S&P 500 Index Option will be settled by payment of cash by the assigned writer and to the exercising holder through OCC's cash settlement system on the business day following exercise in exactly the same manner as is the case with exercise settlement of listed index options. As in the case of listed index options, the exercise-settlement amount will be equal to the difference between the current value of the underlying interest and the exercise price of the OTC Index Option, times the multiplier that determines the size of the OTC Index Option. In the case of OTC S&P 500 Index Options, the multiplier will be fixed at 1 (i.e., equal to the value of the S&P 500 Index).

OTC S&P 500 Index Options may be carried in a clearing member's firm account, in market-maker accounts or in its securities customers' account, as applicable. Although customer positions in OTC S&P 500 Index Options will be carried in the securities customers' account (an omnibus account), OCC will use a ''customer ID'' to identify positions of individual customers based on information provided by clearing members.[25] However, positions are not presently intended to be carried in individual customer sub-accounts, and positions in OTC S&P 500 Index Options will be margined at OCC in the omnibus customers' account on the same basis as listed options. If a clearing member takes the other side of a transaction with its customer in an OTC S&P 500 Index Option, the transaction will result in the creation of a long or short position (as applicable) in the clearing member's customers' account and the opposite short or long position in the clearing member's firm account. The positions could also be includable in the internal cross-margining account, subject to any necessary regulatory approvals.

OCC has stated that OTC S&P 500 Index Options will be fungible with each other to the extent that there are OTC S&P 500 Index Options in the system with identical terms. However, OCC has stated that it will not treat OTC S&P 500 Index Options as fungible with index options listed on any exchange, even if an OTC S&P 500 Index Option has terms identical to the terms of the exchange-listed option.

Clearing members that carry customer positions in cleared OTC S&P 500 Index Options will be subject to all OCC rules governing OCC-cleared options generally, as well as all applicable rules of the Commission and of any self-regulatory organization, including the Financial Industry Regulatory Authority (''FINRA''), of which they are a member. Section 8 of Article III of OCC's By-Laws provides that, subject to the By-Laws and Rules, ''the Board of Directors may suspend Clearing Members and may prescribe and impose penalties for the violation of the By-Laws or the Rules of the Corporation, and it may, by Rule or otherwise, establish all disciplinary procedures applicable to Clearing Members and their partners, officers, directors, and employees.'' As a condition to admission, Section 3(c) of Article V of the By-Laws provides that a clearing member must agree, among other things, to ''pay such fines as may be imposed on it in accordance with the By-Laws and Rules.'' OCC Rule 305 permits OCC to impose restrictions on the clearing activities of a clearing member if it finds that the financial or operational condition of the clearing member makes it necessary or advisable to do so for the protection of OCC, other clearing members, or the general public. OCC Rule 1201(a) provides that OCC ''may censure, suspend, expel or limit the activities, functions or operations of any Clearing Member for any violation of the By-Laws and Rules or its agreements with the Corporation.'' In addition to, or in lieu of, such actions, OCC is permitted under the same paragraph to impose fines. OCC Rule 1202(b) establishes procedures for

[18] Initially, pursuant to this Proposal, the S&P 500 Index will be the only permitted underlying index.

[19] The expiration date of an OTC option must fall on a business day. The method of determining the exercise settlement value of an OTC option on its expiration date may be either the opening settlement value or the closing settlement value of the underlying index (calculated by S&P using the opening or closing price, as applicable, in the primary market of each component security of the underlying index on the specified expiration date), in each case as reported to OCC by CBOE.

[20] As noted above, the Proposal by its terms would permit only the clearing of OTC S&P 500 Index Options, and only after the Commission's approval and OCC's implementation of a subsequent Risk Management Proposal. *See supra* notes 9, 10, and 14 and accompanying text. Also as discussed above, while OCC anticipates using the same legal and operational framework contained in the Proposal to clear additional OTC equity options or OTC equity index options in the future, OCC could only do so upon OCC's filing and the Commission's approval of one or more additional rule filings.

[21] *See infra* note 266 and accompanying text.

[22] 15 U.S.C. 78c(a)(65).

[23] 7 U.S.C. 1a(18).

[24] See *infra* note 266 and accompanying text.

[25] Such customer IDs are necessary in order to allow OCC to comply with certain terms of OCC's license agreement with S&P. As described further below, customer IDs will be used for other purposes as well.

taking any such disciplinary actions. The foregoing provisions are sufficient to permit OCC to fine or otherwise discipline a clearing member that fails to abide by OCC's By-Laws and Rules applicable to OTC options, or to prohibit such clearing member from continuing to clear such options.

*MarkitSERV Trade Submission Mechanics*

The trade data for an OTC S&P 500 Index Option trade will be entered into the system of MarkitSERV or another trade confirmation/affirmation vendor approved by OCC for this purpose (''OTC Trade Source'').[26] While MarkitSERV will be the only OTC Trade Source at launch, OCC has stated that it will permit additional OTC Trade Sources in the future in response to sufficient market demand from OCC's clearing members and subject to the ability of any such OTC Trade Source to meet OCC's requirements for operational readiness and interoperability with OCC's systems, as well as requirements with respect to relevant business experience and reputation, adequate personnel and expertise, financial qualification, and such other factors as OCC deems relevant.

MarkitSERV will provide an interface to OCC that allows OCC to receive messages containing details of transactions in OTC S&P 500 Index Options submitted for clearing by clearing members with access to MarketWire and also allows OCC to transmit messages to MarkitWire participants identifying the status of submitted transactions. MarkitSERV will use a ''confirmation/affirmation'' procedure in which one party to the trade enters the trade data to the MarkitWire platform, which issues a confirmation to the counterparty to be affirmed, rejected, or requested to be revised. If the trade details are confirmed, the trade will then be submitted to OCC for clearance and MarkitSERV will affirm such submission to both parties. OCC will then validate the trade information for compliance with applicable requirements, such as the identification of an account of an eligible clearing member in which each side of the trade will be cleared, that the variable terms are within permissible ranges, and that minimum size requirements under OCC's license agreement with S&P are met.[27] This validation will be completed by OCC immediately upon submission. OCC's clearing system will automatically accept the trade if it passes the validation process and will otherwise reject it. Once accepted, a trade is guaranteed by OCC.[28] A trade that is rejected by OCC may be corrected and submitted as a new transaction. Parties may submit trades for clearance that were entered into bilaterally at any time in the past, provided that the eligibility for clearance will be determined as of the date the trade is submitted to OCC for clearance.[29] Clearing members and customers with access to MarkitSERV will be able to determine whether a trade has been accepted or rejected both through MarkitSERV and, in the case of clearing members, through their interface with OCC's clearing system.

*Proposed By-Law and Rule Changes*[30]

Article I of the By-Laws contains defined terms used throughout the By-Laws and Rules. OCC proposes to modify certain existing definitions and include certain new definitions in order to incorporate OTC options into existing rules and facilitate the creation of new provisions unique to OTC options. Throughout the By-Laws and Rules, OCC proposes to replace the term ''Exchange transaction,'' which is currently defined in Article I, in relevant part, as ''a transaction on or through the facilities of an Exchange for the purchase, writing or sale of a cleared contract'' with the term ''confirmed trade'' so as to make the relevant portions of the By-Laws and Rules applicable to transactions in OTC options as well as listed options. ''Confirmed trade'' is proposed to be defined in Article I to include transactions ''effected on or through the facilities of an exchange'' or ''affirmed through the facilities of an OTC Trade Source'' in order to include transactions in both listed options and OTC options. The current definition of ''confirmed trade'' in OCC Rule 101 is proposed to be deleted as unnecessary given the new definition. OCC is also proposing to add an Interpretation and Policy to the new definition of ''confirmed trade'' in order to avoid any ambiguity concerning how such terms should be interpreted in any such agreement.

OCC proposes to add a new Interpretation and Policy .11 to Section 1 of Article V of the By-Laws, providing the additional criteria that must be met by a clearing member in order to clear OTC index options. Among these new criteria are that clearing members seeking to clear OTC index options on underlying indices published by S&P must execute and maintain in effect a short-form license agreement in such form as specified from time to time by S&P.

The Interpretations and Policies under Section 1, Article VI allow clearing members to adjust their positions with OCC for certain enumerated reasons. OCC proposes to amend the Interpretations and Policies to clarify that adjustment of positions in OTC options will be effected through a manual process (as opposed to the electronic process available to post-trade adjustments in listed options), to the extent permitted by OCC. For the same reason, OCC is proposing to amend OCC Rule 403 to prohibit clearing member trade assignment (''CMTA'') transactions in OTC options. Trade ''give-ups'' that are effected through the CMTA process in the case of listed options will, in the case of OTC options, be effected through MarkitSERV before the trades are submitted to OCC for clearing.

Article XVII of the By-Laws governs index options in general and OCC is proposing amendments to Article XVII in order to set forth the terms applicable to the initial OTC options proposed to be cleared by OCC—options on the S&P

[26] MarkitSERV, LLC is owned by Markit Group Limited, Markit Group Holdings Limited and The Depository Trust & Clearing Corporation. MarkitSERV Limited is a wholly-owned U.K. subsidiary of MarkitSERV, LLC. MarkitSERV, LLC and MarkitSERV Limited (collectively, ''MarkitSERV'') provide derivatives transaction processing, electronic confirmation, portfolio reconciliation services, and other related services for firms that conduct business in the over-the-counter derivatives markets through a variety of electronic systems, including the MarkitWire system. MarkitWire, owned by MarkitSERV Limited, is an OTC derivatives electronic confirmation/affirmation service offered by MarkitSERV as part of its post-trade processing suite of products. The role of MarkitSERV and MarkitWire in OCC's clearing of OTC options is described in further detail below.

[27] MarkitWire applications use product-specific templates to simplify deal entry and negotiations. The templates specify the data required for a given product and also the business validation rules for each field. MarkitSERV has included OCC's validation requirements for OTC options in its trade templates.

[28] Note, however, that OTC options for which the premium payment date communicated by MarkitSERV to OCC is prior to the business day on which the OTC option is submitted to OCC for clearing (''Backloaded OTC Option'') will not be accepted and guaranteed until the selling clearing member has met its initial morning cash settlement obligations to OCC on the following business day.

[29] OCC's license agreement with S&P imposes certain requirements relating to minimum time remaining to expiration of an OTC option.

[30] As noted above, the Proposal by its terms would permit only the clearing of OTC S&P 500 Index Options, and only after the Commission's approval and OCC's implementation of a subsequent Risk Management Proposal. *See supra* notes 9, 10, and 12 and accompanying text. Also as discussed above, while OCC anticipates using the same legal and operational framework contained in the Proposal to clear additional OTC equity options or OTC equity index options in the future, OCC could only do so upon OCC's filing and the Commission's approval of one or more additional rule filings.

500 Index—and to differentiate OTC index options from other index options cleared by OCC. For example, certain amendments to the definitions are necessary because OTC options will be permitted to have a much wider range of expiration dates than exchange-traded options (other than FLEX Options). Additional definitional amendments ensure that OTC index options will constitute a separate class of options from other cash-settled index options even if both index options have the same terms and cover the same underlying interest.

Section 3 of Article XVII provides for adjustment of the terms of outstanding index options as necessary to reflect possible changes in the underlying index—such as those creating a discontinuity in the level of the index—that could theoretically make an adjustment necessary to protect the legitimate expectations of holders and writers of options on the index. Pursuant to paragraph (g) of Section 3, most but not all such adjustments would be made, in the case of listed index options, by an adjustment panel consisting of representatives of the exchanges on which the options are traded. In the case of OTC options, any such adjustments will be made by OCC in its sole discretion. However, in exercising that discretion, OCC may take into consideration any adjustment made by the adjustment panel with respect to exchange-traded options covering the same underlying index.

OCC proposes to add a new Section 6 to Article XVII to set forth certain provisions unique to OTC index options, including the variable terms allowed for OTC index options and the general limitations on such variable terms. In general, all OTC index options must conform to the terms and limitations set forth in Section 6, and additional specific requirements applicable to specific OTC index options will either be set forth in the Interpretations and Policies under Section 6 or published separately on OCC's Web site. Section 6 also makes clear that although OTC index options are not fungible with exchange-traded index options, OTC index options of the same series (*i.e.,* options having identical terms) will be fungible with each other. Interpretations and Policies .01 to Section 6 would provide that only the S&P 500 Index will have been approved by OCC as an underlying index for OTC Index Options and would specify the additional terms for an OTC S&P 500 Index Option.[31]

Unless another exemption from the registration requirements of the Securities Act of 1933 (''Securities Act'')[32] is available, OCC intends to rely upon Rule 506 of Regulation D[33] under the Securities Act, which is a safe harbor under the Securities Act exemption in Section 4(a)(2)[34] for offerings by an issuer not involving a public offering.[35] OCC represents that it intends to satisfy the conditions of Rule 506 of Regulation D as in effect at the time OCC relies upon the safe harbor. OTC Index Options will be available for purchase only by highly sophisticated investors that are both ''eligible contract participants,'' as defined in Section 3a(65) of the Act,[36] and ''accredited investors,'' as defined in Rule 501(a) under Regulation D.[37] Accordingly, Section 6(f) of Article XVII will establish that clearing members will be deemed to have made a number of representations and warranties to OCC in connection with their activities in OTC options each time they affirm a confirmed trade entered into an OTC Trade Source. These representations and warranties include, among others, that (i) the offer and sale of the OTC Index Option are exempt from the registration requirements of the Securities Act; (ii) in the case where the transaction is effected for the account of a customer, the customer is an ECP, as defined in Section 3a(65) of the Act; (iii) unless OCC notifies clearing members that the OTC Index Options will no longer be offered and sold pursuant to Rule 506 of Regulation D under the Securities Act, the clearing member has not offered or sold the OTC Index Options to any person that is not an ''accredited investor'', as defined in Rule 501(a) under Regulation D and has otherwise complied with applicable conditions to the exemption set forth in Rule 506; and (vi) unless OCC notifies clearing members that such restriction no longer applies, the clearing member has not offered or sold the OTC Index Options by any form of general solicitation or general advertising that, at the time of such activities, is or may be deemed to constitute general solicitation or general advertising, as described in Rule 502(c) of Regulation D.

In addition, each clearing member would represent and warrant to OCC that the transaction has been effected by the clearing member in accordance with, the clearing member's participation in such transaction is in compliance with, and the clearing member will continue with respect to such transaction to comply with, all applicable laws and regulations including, without limitation, all applicable rules and regulations of the Commission, of FINRA, and any other regulatory or self-regulatory organization to which the clearing member is subject.

Chapter IV of the OCC's Rules sets forth the requirements for reporting of confirmed trades to OCC, and OCC Rule 401 thereunder governs reporting of transactions in listed options by participant Exchanges. OCC is proposing to add new Rule 404 to govern the details of reporting of confirmed trades in OTC options by an OTC Trade Source.

OCC has stated that positions in OTC options will generally be margined in the same manner as positions in listed options using STANS and pursuant to Chapter VI of the OCC's Rules. However, OCC proposes to amend its Rule 611 to establish different procedures for the segregation of long positions in OTC options for margining purposes.[38] Long positions in listed options are held in a clearing member's customers' account or firm non-lien account and by default are deemed to be ''segregated,'' meaning that they are not subject to OCC's lien and are given no collateral value when determining the margin requirement in the account. Such positions may be unsegregated only when a clearing member instructs OCC to unsegregate a long position and represents to OCC that the long position is part of a spread transaction carried for

[31] *See supra* note 12.

[32] 15 U.S.C. 77a *et seq.*

[33] 17 CFR 230.506.

[34] 15 U.S.C. 77d(a)(2).

[35] The OCC submitted a rulemaking petition requesting exemptions under the Securities Act, the Exchange Act, and the Trust Indenture Act. *See SEC File No. 4–644 (submitted January 13, 2012), available at http://www.sec.gov/rules/petitions/2012/petn4-644.pdf.* This Order does not address the relief requested under the rulemaking petition, nor does it represent a position on the availability of any exemption under the Securities Act.

[36] 15 U.S.C. 77c(a)(65).

[37] 17 CFR 230.501.

[38] Specifically, Proposed OCC Rule 611(d) provides:

(d) In the case of a long position in OTC options carried in the securities customers' account of a Clearing Member and for which the Corporation has received a customer ID, to the extent permitted under all applicable laws and regulations (including the rules of the Financial Industry Regulatory Authority, Inc. and any other regulatory or self-regulatory organization to which the Clearing Member is subject), the Corporation shall automatically unsegregate such long position to the extent that the Corporation identifies a qualifying spread position where the short leg of the spread is carried under the same customer ID. The Clearing Member shall not carry a qualifying spread position for a customer unless the customer's margin requirement has been reduced in recognition of the spread, and the carrying of a qualifying spread position for the account of a customer shall constitute a representation to the Corporation that the customer's margin has been so reduced.

a single customer whose margin requirement on the corresponding short position has been reduced in recognition of the spread. OCC will then unsegregate the long position and so reduce OCC's margin requirement. However, in case of long positions in OTC options that are carried in a clearing member's customers' account and for which OCC has received a customer ID, OCC proposes that it will automatically unsegregate such long positions if OCC identifies a qualifying short position in OTC options carried under the same customer ID. Clearing members will not be required to give an affirmative instruction to OCC to unsegregate a long position in OTC options or make a separate representation regarding the spread transaction. Instead, by carrying a qualifying spread position in a customer account, clearing members are deemed to have represented to OCC that the customer's margin has been reduced in recognition of the spread. Based on discussion with its clearing members, OCC's understanding is that, in practice, broker-dealers reduce customers' margin requirements to reflect spread positions. Therefore, OCC has stated that it believes automatic recognition of such spreads by OCC together with the deemed representation will greatly increase operational efficiency while providing equal assurance that long positions in OTC options will be unsegregated only if an identified customer will receive the benefit of the reduced margin required for spread transactions.

OCC Rule 1001 sets forth the amount of the contribution that each clearing member is required to make to the clearing fund. OCC proposes to amend OCC Rule 1001(c) so that, for purposes of calculating the daily average number of cleared contracts held by a clearing member in open positions with OCC during a calendar month (which number is used in turn to determine the clearing member's contribution to the clearing fund), open positions in OTC options will be adjusted as needed to account for any differences between the multiplier or unit of trading with respect to OTC options relative to non-OTC options covering the same underlying index or interest so that OTC options and non-OTC options are given comparable weight in the computation.[39]

In general, the rules in Chapter XI governing the suspension of a clearing member will apply equally to clearing members that transact in OTC options. OCC Rule 1104 provides broad authority for OCC to liquidate a suspended clearing member's margin and clearing fund deposits ''in the most orderly manner practicable.'' OCC Rule 1106 provides similarly worded authority to close out open positions in options and certain other cleared contacts carried by a suspended clearing member. In 2011, the Commission approved an OCC rule change providing OCC the express authority to use a private auction as one of the means by which OCC may close out open positions and liquidate margin and clearing fund deposits of a suspended clearing member.[40] OCC has stated that it anticipates it will use this auction process for OTC options as well.

As an additional tool to ensure its ability to close out positions in OTC options promptly, OCC is proposing to amend OCC Rule 1106 to provide for an alternative auction procedure specifically applicable only to OTC index options and related positions hedging, or hedged by, OTC index options (''OTC Options Auction''). An OTC Options Auction would be used only in unusual circumstances where OCC determines it is not feasible to close out open positions in OTC index options through the other means provided in OCC's Rules and By-Laws.[41] The amendments to OCC Rule 1106 summarize the OTC Options Auction procedures and incorporate by reference the detailed procedures contained in a document entitled ''OTC Options Auction Procedures,'' which will be posted on the OCC's Web site and otherwise made available to clearing members upon request of OCC.

OCC Rule 1106(e)(2)(C) clarifies that, in the event that the liquidation of a clearing member results in a deficiency that would otherwise result in a proportionate charge against the clearing fund contributions of other clearing members, each OTC Index Option Member (as defined below) that failed to purchase or assume its share of an auction portfolio will be the first to absorb the deficiency, through a ''Priority Charge'' against such clearing members' clearing fund contributions. The Priority Charge is a ''first loss'' mechanism, and is not intended to increase a clearing member's total maximum exposure to OCC.

Under the OTC Options Auction procedures, all clearing members authorized to clear transactions in OTC index options (''OTC Index Option Members''), other than the defaulting clearing member, will be required to participate in the OTC Options Auction by submitting competitive bids for all or a portion of the defaulting clearing member's OTC index option portfolio. Each such participant will be subject to a minimum participation level based on the participant's proportionate share of the total ''risk margin'' requirement posted by all OTC Index Options Members in the previous month for all positions (not limited to OTC option positions) held in accounts eligible to hold OTC options positions (''OTC Eligible Accounts''), after removing the defaulting clearing member.[42] This method of calculating the minimum participation level in the OTC Options Auction results in all OTC Index Option Members being required to participate in the OTC Options Auction based on their clearing activity related to all positions in OTC Eligible Accounts. Required participation ensures that the OTC Options Auction will have sufficient participants authorized to clear transactions in OTC index options and that the most active clearing members in OTC index options will submit bids for the largest percentage of the auction portfolio, increasing the likelihood of the acquisition of OTC index options positions by clearing members with appropriate financial strength, risk management capabilities, and trading expertise.

Each participant may submit bids at varying quantities and varying prices, so long as the participant's bids equal or exceed its minimum participation level. A participant may use bids from non-OTC Index Options Members and non-clearing members in order to meet its minimum participation level, subject to certain OCC requirements including that it guarantee the performance of such third parties. Each bid will indicate what percentage of the auction portfolio the participant is bidding on and the amount of the bid. Bids will be stated in terms of a price for the entire auction portfolio, and may be either positive or

[39] For example, the index multiplier applicable to OTC index options on the S&P 500 Index will be fixed at 1. In comparison, the index multiplier applicable to listed index options is 100.

[40] *See* Securities Exchange Act Release No. 34–65654 (October 28, 2011), 76 FR 68238 (November 3, 2011) (SR–OCC–2011–08). OCC subsequently filed and obtained approval for a rule change to provide for detailed procedures for the conduct of such an auction. *See* Securities Exchange Act Release No. 34–67443 (July 16, 2012), 77 FR 42784 (July 20, 2012) (SR–OCC–2012–11); Securities Exchange Act Release No. 34–67733 (August 27, 2012), 77 FR 53241 (August 31, 2012) (approving SR–OCC–2012–11).

[41] OCC anticipates that it would propose to apply these procedures to other OTC derivatives that may be cleared by OCC in the future.

[42] This minimum participation level will be multiplied by 1.15 to calculate each participant's minimum bid size, such that the sum of all participants' bids will equal 115% of the auction portfolio, in order to increase the likelihood that the entire auction portfolio will be allocated to participants.

negative. (Negative bids imply an auction portfolio that has a negative net asset value and indicate how much OCC would be required to pay the participant to assume the relevant percentage of the auction portfolio.) OCC will rank the submitted bids from best to worst and the auction portfolio will be allocated among the bidding participants accordingly until the auction portfolio is exhausted. The bid price that is sufficient to clear the entire auction portfolio will become the single price to be used for all winning bids, even if a participant's stated bid was better.

In order to provide a strong incentive to ensure competitive bidding by the OTC Index Option Members required to participate in an OTC Options Auction, OTC Index Options Members who fail to win their minimum participation in the auction will be subject to a potential priority charge against its clearing fund contribution. If all OTC Options Auction participants submit bids such that each receives an allocation of OTC index options positions equal to its minimum participation level, no priority charge will be made regardless of whether or not there is a liquidation shortfall. If a liquidation shortfall remains after any priority charges, or if no priority charges were required, OCC will then make a proportionate charge against the clearing fund contributions of all clearing members, including those that participated in the OTC Options Auction, in the usual manner pursuant to Section 5 of Article VIII of OCC's By-Laws.

In order to protect the estate of the suspended clearing member, OCC reserves some discretion in supervising the auction. In the event that the bid price that clears the entire auction portfolio is determined by OCC to be an outlier bid, OCC may choose as the winning bid a price that clears at least 80% of the auction portfolio. The remaining auction portfolio will then be re-auctioned as described above.

*Impact of Clearing OTC Options on Other OCC-Cleared Products*

An OTC option may have economic characteristics that are substantially similar or identical to the characteristics of options in series of listed options that OCC clears. While it is possible that in any given instance a market participant may elect to enter into an OTC S&P 500 Index Option in lieu of an economically similar listed product, OCC has stated that it does not believe that its clearing of OTC options will adversely affect the efficiency or liquidity of the listed markets. According to OCC, the OTC options markets accommodate a variety of commercial and other needs of market participants, including the ability to customize the terms of transactions. While the availability of an OCC guarantee for OTC transactions in which the parties would otherwise be exposed to each other's creditworthiness may cause transactions that currently occur in the non-cleared OTC markets to migrate to the cleared-OTC markets, OCC does not believe it will cause significant migration from the listed markets to the cleared-OTC options markets. OCC has stated that the limitation of the OTC options markets to ECPs as well as the significant minimum transaction size and tenor requirements that are applicable to OTC options under the S&P License Agreement will limit their use appropriately and should help to ensure that there is no substantial migration from the listed markets to the OTC markets for this product. OCC has stated that the existing bilateral OTC options markets have existed for years alongside the listed options markets, and OCC believes that dealers in such bilateral options often use the listed markets to hedge positions taken in such bilateral options and other OTC derivatives.

**III. Analysis of the Proposed Rule Change**

Section 19(b)(2)(B) of the Act [43] directs the Commission to approve a proposed rule change of a SRO if the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization. Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of the clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions, to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible, to remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions and, in general, to protect investors and the public interest.[44]

The Proposal contains provisions requiring clearing members to make representations necessary to ensure that OTC S&P 500 Index Options trades submitted to OCC for clearing involve only parties that are ECPs, were transacted in accordance with the conditions of Regulation D under the Securities Act, and are in compliance with other regulatory requirements. Consistent with the objective of OCC's safeguarding securities and funds within its control, such provisions help to ensure that OCC avoids clearing trades that are not in compliance with regulatory requirements.

The Proposal, as an initial step toward enabling OCC to provide central clearing for OTC S&P 500 Index Options, is consistent with the objective under Section 17A(b)(3)(A) of the Exchange Act of removing impediments to and perfecting the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions. Clearing OTC options using the existing market infrastructure at OCC will allow market participants to retain the benefits of the features of OTC options on the S&P 500 Index, such as expiration dates and strike prices that can be customized to match market participants' unique needs, while reducing less favorable aspects such as counterparty risk. Clearing OTC S&P 500 Index Options may also allow for capital and market efficiencies because it extends the use of existing market infrastructure at OCC into a related new product category, and eliminates the need for individual counterparties to bilaterally exchange option premiums and collect and maintain margin on a daily basis. As such, cleared OTC S&P 500 Index Options should represent a safer and more efficient use of capital than their uncleared counterpart.

Additionally, clearing OTC S&P 500 Index Options should benefit the markets and regulators by centralizing and allowing for access to information about the OTC markets that has otherwise been unavailable.

The Proposal is consistent with the protection of customers and the public interest. Only OTC S&P 500 Index Options between counterparties that are ECPs and that meet the notional minimums and other OCC requirements, as well as the conditions of Rule 506 of Regulation D under the Securities Act and other regulatory requirements, will be eligible for clearing by OCC. In addition, customers are expected benefit from substituting their credit exposure to a clearing member with exposure to OCC itself.

Although customer positions in OTC S&P 500 Index Options will be carried in an omnibus account, OCC will use a ''customer ID'' to identify OTC S&P 500 Index Options positions of individual customers based on information provided by the clearing member. This should allow customers holding OTC

[43] 15 U.S.C. 78s(b)(2)(B).

[44] In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

S&P 500 Index Options to benefit from additional capital efficiencies resulting from OCC's ability to unsegregate and offset long positions in OTC S&P 500 Index Options with qualifying short spread positions belonging to the same customer without compromising customer protections.[45]

Finally, the Proposal is in the public interest in that it represents an initial step in enabling OCC to provide central clearing for OTC S&P 500 Index Options, which ultimately should help to reduce systemic risk. Allowing for the substitution of OCC as the buyer for every seller and the seller for every buyer should reduce bilateral credit risk, replacing it with the credit risk of the more robustly risk-managed central counterparty. Thus, clearing OTC S&P 500 Index Options could potentially decrease risk to end-users of such products and, as a result, decrease systemic risk overall.

The Proposal is designed to bring about the clearing of options in sizes that are not already traded in the listed (cleared) markets. While the availability of an OCC guarantee for OTC transactions in which the parties would otherwise be exposed to each other's credit risk could cause transactions that currently occur in the listed markets to migrate to less transparent cleared-OTC markets, OCC has indicated that it does not believe this will be the case for OTC S&P 500 Index Options. The limitation to ECPs, as well as the significant minimum transaction size and tenor requirements established as part of OCC's license with S&P, are intended to minimize and should limit migration of index options referencing the S&P 500 Index from the listed to the OTC markets. OTC S&P 500 Index Options will have a minimum notional value of $500,000 times the value of the S&P 500 Index for initial maturities greater than four months but less than or equal to nine months, and a minimum notional value of at least $100,000 times the value of the S&P 500 Index for initial maturities greater than nine months but less than three years after the date the trade was originally executed.[46] The Commission expects to monitor the clearing of OTC S&P 500 Index Options and the trading of equivalent options on listed markets to consider the possible impact the clearing of OTC S&P 500 Index Options may have on the listed markets.

OCC has stated, and the Commission notes, that the existing bilateral OTC options markets have existed for years alongside the listed options markets and believes that dealers in bilateral options often use the listed markets to hedge positions taken in bilateral options and other OTC derivatives.

The Commission believes OCC's clearing of OTC S&P 500 Index Options can lead to greater efficiency. Increases in efficiency may be achieved through lower transaction costs and appropriately risk-based margin reductions for clearing members and customers. Clearing of OTC S&P 500 Index Options will increase the volume of transactions cleared at OCC and should thereby reduce transaction costs.

Another improvement in efficiency will come from margin offsets, which will free up costly capital for other uses. In particular, in clearing OTC S&P 500 Index Options, clearing members would be expected to gain margin efficiencies by (i) clearing in the same account both OTC contracts and the hedges to those positions that are traded on the listed markets; and (ii) netting positions and/or obtaining margin offsets among OTC positions in the same account that would otherwise be spread across multiple accounts and OTC counterparties. Customers may gain margin efficiencies from OCC's ability to identify unsegregated long and short positions associated with the same customer ID. By moving OTC S&P 500 Index Options to OCC for clearing, OCC clearing members and their customers trading these products may be expected to benefit from reduced counterparty credit risk by introducing OCC as central counterparty.

Finally, central clearing of OTC derivatives will bring more transparency for regulators concerning a market that is presently more asymmetric in terms of information available to regulators than the exchange-traded derivatives market. The Commission believes that the introduction of OTC S&P 500 Index Options for clearing by OCC should result in OCC and the Commission having more complete information regarding options market activity and clearing member positions overall. This should assist OCC in its risk management practices and the Commission in its supervisory and other regulatory efforts.

The impact of OCC's clearing of OTC S&P 500 Index Options on capital formation is not as direct as it is on efficiency and competition. Derivative contracts are risk management products used to hedge different risks, a practice that supports the investments that lead to capital formation. However, it is unclear whether the effects of the Proposal would be large enough to affect capital formation.

## IV. Analysis of the Advance Notice

*Standard of Review*

A registered clearing agency that has been designated as a systemically important financial market utility (''FMU'') by the Financial Stability Oversight Council (''FSOC'')[47] must provide advance notice of all changes to its rules, procedures or operations that could, as defined in the rules of the supervisory agency, materially affect the nature or level of risk presented by the clearing agency.[48] Absent an extension or request for additional information, as discussed in greater detail below, the Commission is required to notify the clearing agency of any objection regarding the proposed change within the 60 day time frame established by Title VIII.[49] A designated clearing agency may not implement a change to which its supervisory agency has objected;[50] however, the clearing agency is explicitly permitted to implement a change if it has not received an objection from its supervisory agency within the same 60 day time period.[51]

Although Title VIII does not specify a standard that the Commission must apply to determine whether to object to an advance notice, the Commission believes that the purpose of Title VIII, stated under Section 802(b),[52] is relevant to the review of advance notices.

The stated purpose of Title VIII is to mitigate systemic risk in the financial system and promote financial stability, by (among other things) authorizing the Federal Reserve Board to promote uniform risk management standards for systemically important FMUs, and providing an enhanced role for the Federal Reserve Board in the supervising of risk management standards for systemically important

[45] *See supra* 38 and accompanying text.

[46] The value of the S&P 500 Index has hovered around 1,400 points in recent months; therefore, the current notional values of such minimum transaction amounts are approximately $700,000,000 and $140,000,000, respectively.

[47] On July 18, 2012, the FSOC designated OCC as a systemically important FMU. See Financial Stability Oversight Council, 2012 Annual Report 145 (2012).

[48] 12 U.S.C. 5465(e). *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-Regulatory Organizations, Rel. No. 34–63557 (December 15, 2010), 75 FR 82490 (December 30, 2010) (Proposing Release); Rel. No. 34–67286 (June 28, 2012), 77 FR 41602 (July 13, 2012) (Adopting Release).

[49] 12 U.S.C. 5465(e)(1)(E).

[50] 12 U.S.C. 5465(e)(1)(F).

[51] 12 U.S.C. 5465(e)(1)(G).

[52] 12 U.S.C. 5461(b).

FMUs.[53] Therefore, the Commission believes that when reviewing advance notices related for FMUs, the consistency of an advance notice with Title VIII may be judged principally by reference to the consistency of the advance notice with applicable rules of the Federal Reserve Board governing payment, clearing, and settlement activity of the designated FMU.[54]

Section 805(a) requires the Federal Reserve Board and authorizes the Commission to prescribe standards for the payment, clearing, and settlement activities of FMUs designated as systemically important, in consultation with the supervisory agencies. Section 805(b) of the Clearing Supervision Act[55] requires that the objectives and principles for the risk management standards prescribed under Section 805(a) shall be to:

- Promote robust risk management and safety and soundness;
- Reduce systemic risks; and
- Support the stability of the broader financial system.

The relevant rules of the Federal Reserve Board prescribing risk management standards for designated FMUs by their terms do not apply to designated FMUs that are clearing agencies registered with the Commission.[56] Therefore, the Commission believes that the objectives and principles by which the Federal Reserve Board is authorized to promulgate such rules, as expressed in Section 805(b) of Title VIII,[57] are the appropriate standards at this time by which to evaluate advance notices.[58] Accordingly, the analysis set forth below is organized by reference to the stated objectives and principles in Section 805(b).

*Promote Robust Risk Management and Safety and Soundness*

By establishing the legal and operational framework for central clearing of OTC S&P 500 Index Options, the Proposal paves the way for shifting counterparty credit risk stemming from the over-the-counter trading of these products between bilateral counterparties to OCC. As a central counterparty that collects margin and mutualizes the risk of loss among its members in the event of a member default, OCC is generally expected to be better situated to manage the risks associated with OTC S&P 500 Index Options than the original bilateral counterparties. By laying the groundwork for OCC's clearing of OTC S&P 500 Index Options, the Proposal is consistent with the objective of promoting safety and soundness.

With regard to the credit risk that OCC would face once it begins to clear OTC S&P 500 Index Options, changes in membership or additional trading in OTC S&P 500 Index Options that results from the OTC S&P 500 Index Options being available for clearing (i.e., is not listed traffic that is migrating to OCC) could increase OCC's total exposure to its members and hence credit risk to OCC. On the other hand, credit risk to OCC could decrease because, by clearing OTC S&P 500 Index Options, OCC would have better visibility into the OTC S&P 500 Index Options positions of its members and thereby be better able to monitor its members' financial conditions, thus improving its own credit risk management. OCC's financial risks are managed through a set of financial safeguards, including strict membership rules, the collection of high-quality collateral, and additional assessment powers that protect OCC in the event of a default by a member.

*Reduce Systemic Risks*

As discussed above, the Proposal would allow OCC to lay the groundwork for clearing OTC S&P 500 Index Options. Substitution of a central counterparty as a buyer to each seller and seller to each buyer is expected to reduce counterparty risk inherent in the markets for OTC derivatives, including OTC options. To the extent the Proposal eventually leads to eliminating bilateral credit risk in OTC S&P 500 Index Options and replacing it with the credit risk of OCC, the more robustly risk-managed central counterparty, the Proposal should decrease risk to end-users of such products and, as a result, should reduce systemic risk overall.

*Support the Stability of the Broader Financial System*

OCC is the only central counterparty currently clearing exchange-listed options; any prolonged interruption to these services likely would prevent the exchanges from trading until they were restored. As such, OCC plays a primary role in the trading and clearing of options in the United States. OCC also maintains relationships with financial market utilities, settlement banks, clearing members, credit facility lenders, custodians, exchanges, cross-margining entities, and pricing vendors.

OTC options directly indexed to the S&P 500 amounted to more than $1.1 trillion as of 2010,[59] representing a market with a significant trading volume that currently does not reap any of the risk mitigation benefits of central clearing. The Commission believes that, by establishing the legal and operational framework for clearing OTC S&P 500 Index Options, the Proposal will pave the way for systemic risk reducing benefits and thus support the stability of the broader financial system.

## V. Conclusion

*It is therefore ordered,* pursuant to Section 19(b)(2) of the Act,[60] that the Proposed Rule Change (File No. SR–OCC–2012–14), as Modified by Amendment No. 1 Thereto, be and hereby is *approved* as of the date of this order, provided that OCC will not commence clearing of OTC S&P 500 Index Options until the Risk Management Proposal referenced above is filed by OCC, approved by the Commission, and implemented by OCC.

*It is therefore noticed,* pursuant to Section 806(e)(1)(I) of the Clearing Supervision Act,[61] that the Commission *does not object* to proposed rule change (File No. AN–OCC–2012–01), as Modified by Amendment No. 1 Thereto, provided that OCC will not commence clearing of OTC S&P 500 Index Options until the Risk Management Proposal referenced above is filed by OCC, approved by the Commission, and implemented by OCC.

By the Commission.

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2012–30547 Filed 12–18–12; 8:45 am]

**BILLING CODE 8011–01–P**

[53] 12 U.S.C. 5461(b).

[54] *See* Financial Market Utilities, 77 FR 45907 (Aug. 2, 2012).

[55] 12 U.S.C. 5464(b).

[56] 12 CFR 234.1(b).

[57] 12 U.S.C. 5464(b).

[58] The risk management standards that have been adopted by the Commission in Rule 17Ad–22 are substantially similar to those of the Federal Reserve Board applicable to designated FMUs other than those designated clearing organizations registered with the CFTC or clearing agencies registered with the Commission. *See* Clearing Agency Standards, Exchange Act Release No. 68080 (Oct. 22, 2012), 77 FR 66220 (November 2, 2012). To the extent such Commission standards are in effect at the time advance notices are reviewed in the future, the analysis of clearing agency rule filings under the Exchange Act would incorporate such standards directly.

[59] *See Nina Mehta, Nandini Sukumar, and Jeff Kearns, Over-The-Counter S&P 500 Index Options Will Shift to Clearinghouse in 2011, Sept. 20, 2010, http://www.bloomberg.com/news/2010–09–20/over-the-counter-s-p-500-index-options-will-shift-to-clearinghouse-in-2011.html.*

[60] 15 U.S.C. 78s(b)(2).

[61] 12 U.S.C. 5465(e)(1)(I).

## DEPARTMENT OF STATE

**[Public Notice 8124]**

### 60-Day Notice of Proposed Information Collection: Gilman Evaluation Survey

**ACTION:** Notice of request for public comment.

**SUMMARY:** The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. In accordance with the Paperwork Reduction Act of 1995, we are requesting comments on this collection from all interested individuals and organizations. The purpose of this notice is to allow 60 days for public comment preceding submission of the collection to OMB.

**DATES:** The Department will accept comments from the public up to February 19, 2013.

**ADDRESSES:** You may submit comments by any of the following methods:

- *Web:* Persons with access to the Internet may use the Federal Docket Management System (FDMS) to comment on this notice by going to *www.Regulations.gov*. You can search for the document by entering ''Public Notice ####'' in the Search bar. If necessary, use the Narrow by Agency filter option on the Results page.
- *Email: halemj2@state.gov*.
- *Mail:* ECA/P/V, Department of State (SA–44), 301 4th St. SW., Washington, DC 20547.
- *Fax:* 202–203–7742.
- *Hand Delivery or Courier:* 301 4th St. SW., Washington, DC 20024.

You must include the DS form number (if applicable), information collection title, and the OMB control number in any correspondence.

**FOR FURTHER INFORMATION CONTACT:** Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents, to Michelle Hale, ECA/P/V, Department of State (SA–44), 301 4th St. SW., Washington, DC 20547, who may be reached on 202–203–7205 or at *halemj2@state.gov*.

**SUPPLEMENTARY INFORMATION:**

- *Title of Information Collection:* Gilman Evaluation Survey.
- *OMB Control Number:* None.
- *Type of Request:* New Collection.
- *Originating Office:* Bureau of Educational and Cultural Affairs, ECA/P/V.
- *Form Number:* SV2012–0008.
- *Respondents:* All grant recipients of the Benjamin A. Gilman International Scholarship who studied abroad during the nine-year period spanning the 2002/2003 and 2010/2011 academic years.
- *Estimated Number of Respondents:* 6,184.
- *Estimated Number of Responses:* 2,474.
- *Average Time per Response:* 35 minutes.
- *Total Estimated Burden Time:* 1,443 hours.
- *Frequency:* One time.
- *Obligation to Respond:* Voluntary.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

**Abstract of Proposed Collection**

This request for a new information collection will allow ECA/P/V to conduct a survey to provide data not currently available in order to review the experiences of recipients of the Benjamin A. Gilman International Scholarship grant while they were abroad; study the ways in which they shared what they learned with family, peers, and other community members upon returning to the United States; and investigate whether the international experience factored into their subsequent educational and professional choices. This study is authorized by the Mutual Educational and Cultural Exchange Act of 1961, as amended (also known as the Fulbright-Hays Act) (22 U.S.C. 2451 *et seq.*). The survey will be sent electronically to all grant recipients who studied abroad during the nine-year period spanning the 2002/2003 and 2010/2011 academic years. Data gathered will enable analysis that can potentially be used to design new programs, improve existing programs, and to inform ongoing and future activities.

**Methodology**

The survey will be entirely web-based to ease any burden on the participant. The survey will be distributed and responses received electronically using the survey application SurveyGizmo.

Dated: December 11, 2012.

**Matt Lussenhop,**

*Director of the Office of Policy and Evaluation, Bureau of Educational and Cultural Affairs, Department of State.*

[FR Doc. 2012–30539 Filed 12–18–12; 8:45 am]

BILLING CODE 4710–05–P

## DEPARTMENT OF STATE

**[Public Notice 8125]**

### 60-Day Notice of Proposed Information Collection: ECA Exchange Student Surveys

**ACTION:** Notice of request for public comment.

**SUMMARY:** The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. In accordance with the Paperwork Reduction Act of 1995, we are requesting comments on this collection from all interested individuals and organizations. The purpose of this notice is to allow 60 days for public comment preceding submission of the collection to OMB.

**DATES:** The Department will accept comments from the public up to *February 19, 2013.*

**ADDRESSES:** You may submit comments by any of the following methods:

- *Web:* Persons with access to the Internet may use the Federal Docket Management System (FDMS) to comment on this notice by going to *www.Regulations.gov.* You can search for the document by entering ''Public Notice ####'' in the Search bar. If necessary, use the Narrow by Agency filter option on the Results page.
- *Email: kolajaag@state.gov.*
- *Mail:* 2200 C Street NW., Washington, DC 20037.

You must include the DS form number (if applicable), information collection title, and the OMB control number (if any) in any correspondence.

**FOR FURTHER INFORMATION CONTACT:** Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents, to Andrej Kolaja who may be reached on (202) 632–9362 or at *kolajaag@state.gov.*

**SUPPLEMENTARY INFORMATION:**

• *Title of Information Collection:* ECA Exchange Student Surveys.
• *OMB Control Number:* None.
• *Type of Request:* New Collection.
• *Originating Office:* Educational and Cultural Affairs (ECA/PE/C/PY).
• *Form Number:* SV2012–0007 (Foreign Exchange students) and SV2012–0010 (U.S. Exchange students).
• *Respondents:* Exchange students from foreign countries and the United States participating in Department of State sponsored programs from 2012–2016.
• *Estimated Number of Respondents:* 1800 annually—(1500 exchange students from foreign countries and 300 US students studying in foreign countries).
• *Estimated Number of Responses:* 1800 annually—(1500 exchange students from foreign countries and 300 US students studying in foreign countries).
• *Average Time per Response:* 15 minutes.
• *Total Estimated Burden Time:* 450 hours.
• *Frequency:* On occasion.
• *Obligation to Respond:* Voluntary.

We are soliciting public comments to permit the Department to:
• Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
• Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.
• Enhance the quality, utility, and clarity of the information to be collected.
• Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

*Abstract of proposed collection:* This collection of information is under the provisions of the Mutual Educational and Cultural Exchange Act, as amended, and the Exchange Visitor Program regulations (22 CFR Part 62), as applicable. The information collected will be used by the Department to ascertain whether there are any issues that would affect the safety and well-being of exchange program participants.

*Methodology:* The survey will be sent electronically via the Survey Monkey tool and responses collected electronically. If a respondent requests a paper version of the survey it will be provided.

Dated: December 7, 2012.

**Mary Deane Conners,**

*Director, Office of Citizen Exchanges, Bureau of Educational and Cultural Affairs, Department of State.*

[FR Doc. 2012–30538 Filed 12–18–12; 8:45 am]

**BILLING CODE 4710–05–P**

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## DEPARTMENT OF STATE

**[Public Notice 8126]**

## 30-Day Notice of Proposed Information Collection: Application for Employment as a Locally Employed Staff or Family Member

**ACTION:** Notice of request for public comment and submission to OMB of proposed collection of information.

**SUMMARY:** The Department of State has submitted the information collection described below to the Office of Management and Budget (OMB) for approval. In accordance with the Paperwork Reduction Act of 1995 we are requesting comments on this collection from all interested individuals and organizations. The purpose of this Notice is to allow 30 days for public comment.

**DATES:** Submit comments directly to the Office of Management and Budget (OMB) up to January 18, 2013.

**ADDRESSES:** Direct comments to the Department of State Desk Officer in the Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB). You may submit comments by the following methods:
• *Email:* *oira_submission@omb.eop.gov.* You must include the DS form number, information collection title, and the OMB control number in the subject line of your message.
• *Fax:* 202–395–5806. Attention: Desk Officer for Department of State.

**FOR FURTHER INFORMATION CONTACT:** Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents, to Caroline Cole, Bureau of Human Resources, Office of Overseas Employment, U.S. Department of State, Washington, DC 20547, who may be reached on 202–203–7390 or at *ColeCM@state.gov.*

**SUPPLEMENTARY INFORMATION:**
• *Title of Information Collection:* Application for Employment as a Locally Employed Staff or Family Member.
• *OMB Control Number:* 1405–0189.
• *Type of Request:* Revision of a Currently Approved Collection.
• *Originating Office:* Bureau of Human Resources, Office of Overseas Employment.
• *Form Number:* DS–0174.
• *Respondents:* Candidates seeking employment at U.S. Missions abroad, including family members of Foreign Service, Civil Service, and uniformed service members officially assigned to the Mission and under Chief of Mission authority.
• *Estimated Number of Respondents:* 40,000.
• *Estimated Number of Responses:* 40,000.
• *Average Time per Response:* 1 hour.
• *Total Estimated Burden Time:* 40,000.
• *Frequency:* On Occasion.
• *Obligation to Respond:* Required to Obtain a Benefit.

We are soliciting public comments to permit the Department to:
• Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
• Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.
• Enhance the quality, utility, and clarity of the information to be collected.
• Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

### Abstract of Proposed Collection

The DS–0174, Application for Employment as a Locally Employed Staff or Family Member, is needed to meet information collection requirements for recruitments conducted at approximately 170 U.S. embassies and consulates throughout the world.

Foreign Service Act of 1980, Sections 103, 105, 206, 301, 303, 311, 408, 501.

### Methodology

Candidates for employment use the DS–0174 to apply for Mission-advertised positions throughout the world. Mission recruitments generate

approximately 40,000 applications per year. Data that HR and hiring officials extract from the DS–0174 determines eligibility for employment, qualifications for the position, and selections according to Federal policies.

Dated: December 14, 2012.

**William E. Schaal, Jr.,**

*Executive Director, HR/EX, Department of State.*

[FR Doc. 2012–30540 Filed 12–18–12; 8:45 am]

**BILLING CODE 4710–15–P**

## DEPARTMENT OF STATE

**[Public Notice: 8128]**

### Notice of Receipt of Kinder Morgan Cochin, LLC, Application for a Presidential Permit To Operate and Maintain Pipeline Facilities on the Border of the United States and Canada

**AGENCY:** Department of State.

**ACTION:** Notice of Receipt of Kinder Morgan Cochin, LLC, Application for a Presidential Permit To Operate and Maintain Pipeline Facilities on the Border of the United States and Canada.

**SUMMARY:** Notice is hereby given that the Department of State (DOS) has received from Kinder Morgan Cochin, LLC (''KM Cochin'') notice that by way of corporate succession, KM Cochin now owns, operates, and maintains pipeline facilities (''Cochin Pipeline'') previously owned by Dome Pipeline Corporation (''Dome Pipeline'') and permitted under a 1974 Presidential Permit issued to Dome Pipeline. KM Cochin requests a new Presidential Permit be issued under its name with respect to the Cochin Pipeline.

KM Cochin is a Delaware limited liability company with its principal office at 500 Dallas Street Suite 1000, Houston, TX 77002. It is engaged in the interstate, intrastate and international transportation by pipeline of light liquid hydrocarbons, including transportation of light liquid hydrocarbons between the United States and Canada on the Cochin Pipeline crossing the border of North Dakota and Saskatchewan. KM Cochin is an indirectly wholly owned subsidiary of KMP, a Delaware master limited partnership listed on the NYSE as ''KMP'', with its principal office at 500 Dallas Street, Suite 1000, Houston, TX 77002. The general partner of KMP is Kinder Morgan G.P., Inc., (''KMGP'') a Delaware corporation, which is owned by Kinder Morgan, Inc., (''KMI'', as listed on the NYSE), a Delaware corporation. KMP is owned by KMI through common and class B limited partner units, by KMG though its 1% general partner interest, and by public investors as limited partners holding common units purchased on the NYSE.

Dome Pipeline built, operated and maintained the pipeline pursuant to the 1974 Permit from the date the Permit was issued until March 15, 2007, when Dome Petroleum Corp., a North Dakota corporation with principal offices in Bismarck, North Dakota, sold Dome Pipeline, its former subsidiary, to Kinder Morgan Operating L.P. ''A'' (''KMOLPA''), a Delaware limited partnership and affiliate of Kinder Morgan Energy Partners LP, (''KMP''), a Delaware limited partnership, both with principal offices in Houston, Texas. Following the sale, Dome Pipeline was converted from a Delaware corporation to a Delaware limited liability company and merged into KM Cochin, which is now the legal name of the former Dome Pipeline Corporation. Since March 15, 2007, KM Cochin has owned, operated and maintained the Cochin Pipeline in compliance with all the terms and conditions of the previously issued Permit.

The Cochin Pipeline is a 1,819 mile, 12-inch diameter pipeline that originates in Fort Saskatchewan, Alberta, and terminates at Windsor, Ontario. Cochin is presently approved by the Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) to operate at a pressure of 1,000 psi, and is able to transport up to 95,000 barrels per day of light liquid hydrocarbons. Currently, the pipeline is used to move propane from Alberta to distribution terminals in the United States and Windsor, Ontario. A planned Cochin reversal project will involve reversing the flow of petroleum liquids so that shippers will be able to ship condensate from the United States westward for delivery into Canada.

Under E.O. 13337 the Secretary of State is designated and empowered to receive all applications for Presidential Permits for the construction, connection, operation, or maintenance at the borders of the United States, of facilities for the exportation or importation of liquid petroleum, petroleum products, or other non-gaseous fuels to or from a foreign country. The Department of State is circulating this application to concerned federal agencies for comment. The Department of State has the responsibility to determine whether issuance of a new Presidential Permit reflecting the change in ownership or control of the Cochin Pipeline would be in the U.S. national interest.

**DATES:** Interested parties are invited to submit comments within 30 days of the publication date of this notice by email to *KinderMorganCochinpermit@state.gov* with regard to whether issuing a new Presidential Permit reflecting the corporate succession and authorizing KM Cochin to operate and maintain the Cochin Pipeline would be in the national interest. The application is available at *http://www.state.gov/e/enr.*

**FOR FURTHER INFORMATION CONTACT:** Office of Energy Diplomacy, Energy Resources Bureau (ENR/EDP/EWA) Department of State 2201 C St. NW., Ste. 4843, Washington, DC 20520, Attn: Michael Brennan, Tel: 202–647–7553.

Dated: December 13, 2012.

**Michael Brennan,**

*Acting Director, Office of Europe, Western Hemisphere and Africa, Bureau of Energy Resources, U.S. Department of State.*

[FR Doc. 2012–30542 Filed 12–18–12; 8:45 am]

**BILLING CODE 4710–09–P**

## DEPARTMENT OF STATE

**[Public Notice 8027]**

### Culturally Significant Objects Imported for Exhibition Determinations: ''Wait, Later This Will Be Nothing: Editions by Dieter Roth''

**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 ''Wait, Later This Will Be Nothing: Editions by Dieter Roth,'' 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 Museum of Modern Art, New York, New York, from on or about February 13, 2013, until on or about June 24, 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: *December 10, 2012.*

**J. Adam Ereli,**

*Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.*

[FR Doc. 2012–30541 Filed 12–18–12; 8:45 am]

**BILLING CODE 4710–05–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

## DEPARTMENT OF THE INTERIOR

### National Park Service

### List of Units of the National Park System Exempt From the Provisions of the National Parks Air Tour Management Act

**AGENCIES:** Federal Aviation Administration, Transportation; National Park Service, Interior.

**ACTION:** List of Exempt Parks.

**SUMMARY:** The National Parks Air Tour Management Act (NPATMA) requires the Federal Aviation Administration (FAA) and National Park Service (NPS) to develop an air tour management plan for units of the national park system where an operator has requested authority to provide commercial air tours. The FAA Modernization and Reform Act of 2012 amended various provisions of NPATMA. One provision exempted national park units with 50 or fewer annual flights from the provisions of NPATMA and requires FAA and NPS to jointly publish a list of exempt parks. This notice includes an initial list of parks that are exempt from the provisions of the NPATMA.

**FOR FURTHER INFORMATION CONTACT:** Barry Brayer—Mailing address: Federal Aviation Administration, P.O. Box 92007, Los Angeles, California 90009–2007. Telephone: (310) 725–3800. Email address: *Barry.Brayer@faa.gov*. Vicki McCusker—Mailing address: Natural Sounds and Night Skies Division, National Park Service, 1201 Oakridge Drive, Suite 100–31, Fort Collins, CO 80525. Telephone: (970) 267–2117. Email address: *Vicki_McCusker@nps.gov*.

**SUPPLEMENTARY INFORMATION:**

**I. Authority for New Requirements**

1. NPATMA (Pub. L. 106–181, codified at 49 U.S.C. 40128) requires the FAA and NPS to develop an air tour management plan for units of the national park system where an operator has requested authority to provide commercial air tours. The FAA Modernization and Reform Act of 2012 (2012 Act) amended various provisions of NPATMA.

2. This Federal Register Notice addresses the following 2012 Act amendment provisions:

a. Exempt national park units that have 50 or fewer commercial air tour operations each year from the requirements of NPATMA.

b. Authorize NPS to withdraw the exemption if necessary to protect resources and values or visitor use and enjoyment.

c. Require FAA and NPS to publish a list each year of national parks covered by the exemption.

**II. Initial List of Exempt Parks**

1. This list is based on interim operating authority (IOA) data available to FAA and NPS. At these parks, the current combined IOA of all air tour operators is 50 operations or less annually. Exempt parks are as follows:

Big Bend National Park, TX
Black Canyon of the Gunnison National Park, CO
Capulin Volcano National Monument, NM
Carlsbad Caverns National Park, NM
Casa Grande Ruins National Monument, AZ
Coronado National Memorial, AZ
Devils Tower National Monument, WY
Dinosaur National Monument, UT/CO
El Malpais National Monument, NM
El Morro National Monument, NM
Fort Bowie National Historic Site, AZ
Fort Davis National Historic Site, TX
Fort Union National Monument, NM
Gila Cliff Dwellings National Monument, NM
Great Sand Dunes National Park and Preserve, CO
Guadalupe Mountains National Park, NM
Hohokam Pima National Monument, AZ
Hubbell Trading Post National Historic Site, AZ
Kings Canyon National Park, CA
Mojave National Preserve, CA
Organ Pipe Cactus National Monument, AZ
Pecos National Historical Park, NM
Petrified Forest National Park, AZ
Petroglyph National Monument, NM
Pipe Spring National Monument, AZ
Rio Grande Wild and Scenic River, TX
Saguaro National Park, AZ
Salinas Pueblo Missions National Monument, NM
San Juan Island National Historical Park, WA
Sequoia National Park, CA
Tumacacori National Historic Park, AZ
Walnut Canyon National Monument, AZ
Wupatki National Monument, AZ

2. The list of exempt parks published in this notice is based on IOA operational numbers only, since this is the only data currently available to FAA and NPS on the number of air tour operations at parks. NPS is authorized to withdraw a park from the exempt list if NPS determines that an air tour management plan or a voluntary agreement is necessary to protect park resources and values or park visitor use and enjoyment. Pursuant to the 2012 Act, the NPS shall inform the FAA in writing of each determination to withdraw an exemption.

**III. List of Exempt Parks for Future Years**

The FAA and NPS will publish a list of exempt parks annually. The list could change from year to year since parks may be added to or removed from the exempt list based on the previous year's number of annual operations or if NPS withdraws an exempted park. In order to continue to be exempt, a park must have 50 or fewer annual commercial air tour operations in any given calendar year. At parks that lose exempt status, operators will return to IOA requirements until an air tour management plan or a voluntary agreement has been established.

Issued in Hawthorne, CA, on November 1, 2012.

**William C. Withycombe,**

*Regional Administrator, Western-Pacific Region, Federal Aviation Administration.*

Issued in Washington, DC, on November 8, 2012.

**Herbert C. Frost,**

*Associate Director, Natural Resource Stewardship and Science, National Park Service.*

[FR Doc. 2012–30561 Filed 12–18–12; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

### Notice of Final Federal Agency Action on Proposed Transportation Project in Illinois

**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(l)(1). The actions relate to a proposed highway and transit project within the Tier 2 Elgin O'Hare—West Bypass project corridor, which is located along the Elgin-O'Hare Expressway/Thorndale

Avenue between Chicago O'Hare International Airport (O'Hare) and Lake Street/US Route 20, and on a proposed alignment connecting I–90 and I–294 along the west side of O'Hare. 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(l)(1). A claim seeking judicial review of the Tier 2 Federal agency actions of the proposed highway and transit project will be barred unless the claim is filed on or before May 18, 2013. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such claim, then that shorter time period still applies.

**FOR FURTHER INFORMATION CONTACT:** Mr. Norman R. Stoner, P.E., Division Administrator, Federal Highway Administration, 3250 Executive Park Drive, Springfield, Illinois 62703, Phone: (217) 492–4600, Email address: *Norman.Stoner@dot.gov.* The FHWA Illinois Division Office's normal business hours are 7:30 a.m. to 4:15 p.m. You may also contact Mr. John Fortmann, P.E., Illinois Department of Transportation, Acting Deputy Director of Highways, Region One Engineer, 201 West Center Court, Schaumburg, Illinois 60196, Phone: (847) 705–4000. The Illinois Department of Transportation Region One's normal business hours are 8:00 a.m. to 4:30 p.m.

**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 and transit project in the State of Illinois: improving the Elgin-O'Hare Expressway/Thorndale Avenue corridor to a toll road with three basic lanes in each direction and space reserved in the median for transit accommodations; construction of a new toll road between I–90 and I–294 (known as the West Bypass) with two basic lanes in each direction and space reserved on the east side of the north leg of the West Bypass for transit accommodations; and lane additions on I–90, I–290, and I–294. The actions by the Federal agencies, and the laws under which such actions were taken, are described in the Tier 2 Final Environmental Impact Statement (FEIS) for the project approved on October 30, 2012; and Record of Decision (ROD) issued on December 12, 2012; and other documents in the FHWA administrative record. The FEIS, ROD and other documents in the FHWA administrative record are available by contacting FHWA or the Illinois Department of Transportation at the addresses above. Project information can be viewed and downloaded from the project Web site *http://www.elginohare-westbypass.org.* The FEIS can also be downloaded from *http://www.dot.il.gov/desenv/env.html,* or hard copies of the FEIS and the ROD are available upon request.

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 U.S.C. 4321–4351] Federal-Aid Highway Act [23 U.S.C. 109 and 23 U.S.C. 128].
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 and 23 U.S.C. 138].
4. *Wildlife:* Endangered Species Act [16 U.S.C. 1531–1544 and Section 1536]; Migratory Bird Treaty Act [16 U.S.C. 703–712].
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*].
6. *Water Resources:* Safe Drinking Water Act [42 U.S.C. 300(f)–300(j)(6)]; Wild and Scenic Rivers Act [16 U.S.C. 1271–1287].
7. *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.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research, 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(l)(1).

Issued on: December 12, 2012.

**Norman R. Stoner,**

*Division Administrator, Springfield, Illinois.*

[FR Doc. 2012–30472 Filed 12–18–12; 8:45 am]

BILLING CODE 4910–22–P

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

**[U.S. DOT Docket Number NHTSA–2011–0126]**

### Reports, Forms, and Record Keeping Requirements

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

**ACTION:** Request for public comment on proposed collection of information.

**SUMMARY:** Before a Federal agency can collect certain information from the public, it must receive approval from the Office of Management and Budget (OMB). Under procedures established by the Paperwork Reduction Act of 1995, before seeking OMB approval, Federal agencies must solicit public comment on proposed collections of information, including extensions and reinstatement of previously approved collections.

This document describes one collection of information for which NHTSA intends to seek OMB approval.

**DATES:** Comments must be received on or before February 19, 2013.

**ADDRESSES:** You may submit comments, identified by the docket number in the heading of this document, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments on the electronic docket site by clicking on ''Help'' or ''FAQ.''
- *Hand Delivery:* 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, between 9 a.m. and 5 p.m. Eastern Time, Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251.

Regardless of how you submit comments, you should mention the docket number of this document.

You may call the Docket Management Facility at 202–366–9826.

*Instructions:* For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the **SUPPLEMENTARY INFORMATION** section of this document. Note that all comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.

*Privacy Act:* Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *http://www.dot.gov/privacy.html.*

*Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov*, or the street address listed above. Follow the online instructions for accessing the dockets.

**FOR FURTHER INFORMATION CONTACT:** Kil-Jae Hong, NHTSA, 1200 New Jersey Avenue SE., W52–232, NPO–520, Washington, DC 20590. Ms. Hong's telephone number is (202) 493–0524 and email address is *kil-jae.hong@dot.gov*.

**SUPPLEMENTARY INFORMATION:** Under the Paperwork Reduction Act of 1995, before an agency submits a proposed collection of information to OMB for approval, it must first publish a document in the **Federal Register** providing a 60-day comment period and otherwise consult with members of the public and affected agencies concerning each proposed collection of information. The OMB has promulgated regulations describing what must be included in such a document. Under OMB's regulation (at 5 CFR 1320.8(d)),[1] an agency must ask for public comment on the following:

(i) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(ii) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) how to enhance the quality, utility, and clarity of the information to be collected;

(iv) how to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.* permitting electronic submission of responses.

In compliance with these requirements, NHTSA asks for public comments on the following proposed collection of information for which the agency is seeking approval from OMB:

Title: 49 CFR 575—Consumer Information Regulations Consumer Education Program Qualitative Research.

*OMB Control Number:* Not Assigned.

*Form Number:* None.

*Affected Public:* Passenger vehicle consumers and users.

*Requested Expiration Date of Approval:* Three years from approval date.

## Abstract

The Energy Independence and Security Act of 2007 (EISA), enacted in December 2007, included a requirement that the National Highway Traffic Safety Administration (NHTSA) develop a consumer information and education campaign to improve consumer understanding of automobile performance with regard to fuel economy, Greenhouse Gas (GHG) emissions and other pollutant emissions; of automobile use of alternative fuels; and of thermal management technologies used on automobiles to save fuel. In order to achieve the objectives of the consumer education program and fulfill its statutory obligations, NHTSA proposes a multi-phased research project to gather the data and apply analyses and results from the project to develop the consumer information program and education campaign.

As NHTSA develops content and materials related to the consumer information program, it is important to test these materials to ensure they are effective at providing important information about fuel economy, GHGs and other emissions and alternative fuels. Although previous research provided the data necessary to inform draft development of these materials, including relevant knowledge gaps among consumers and topics that are most interesting and compelling, this new research will be to identify any refinements needed prior to finalizing the NPRM content and proposed campaign direction. The purpose of this research is to ensure that NHTSA's communication efforts utilize materials that are interesting, appealing and easy to comprehend. Asking consumers to share their opinions about the concepts, design and content will help NHTSA refine materials so that the campaign effectively engages and educates consumers, thus fulfilling NHTSA's statutory requirements.

NHTSA is seeking to conduct qualitative focus group research to guide the development and refinement of materials that will be used in this consumer information program. Specifically, the objectives guiding this research include the following:

1. Understand consumer perceptions of existing information on fuel economy, GHGs and other emissions, thermal management technologies and alternative fuels.

2. Determine the most effective and compelling messages that will improve understanding about fuel economy, GHGs and other emissions, thermal management technologies and alternative fuels.

3. Test materials and content developed to assess consumer comprehension and likelihood to encourage behavior change.

The materials that NHTSA expects to test in this research include the following:

- Key messages
- Interactive infographic blueprint
- YouTube driving video game user experience brief
- Fuel economy video storyboard and script
- Online banner advertisements (as animated GIFs)
  - 5 previously tested that have been adjusted to meet current messaging
  - 5 new ads

Specifically, NHTSA seeks to conduct two (2) focus groups each, homogeneous by gender, in three (3) cities (six groups in total). In order to obtain consumer feedback in different regions of the country, we recommend conducting these groups in one city in each of the following regions: Northeast, South or Midwest, and West. With consideration to the cities previously used for this research we plan to conduct these groups in the following metro areas:

- Philadelphia, PA (high-congestion Northeast market)
- Portland, OR (''green'' West Coast market)
- St. Louis, MO (general consumer Midwest market)

For the purposes of this study, the recommended screening criteria are broad enough to include a cross-section of all vehicle drivers and purchasers throughout the U.S. Potential subjects will be asked several questions to determine their eligibility to participate in the focus groups. Respondents will be screened based on the following criteria:

- Participants must be 18 years or older.
- Participants must currently possess a valid driver's license.
- Participants must currently own or lease a vehicle.
- Participants must be the primary or a shared decision maker for vehicle purchases in their household.

Respondents in each city will be split into one of two groups: (1) Females; and (2) Males. It is our experience that in mixed-gender focus groups that cover technical or vehicle information, males will dominate the conversation and the females in the room will defer to their opinions. Splitting the groups in each city based on gender will allow us to collect information and feedback from both genders to inform the communications campaign.

Each focus group will last approximately two hours, and will include eight participants. Trends heard throughout various conversations will inform the consumer education plan and will be tested quantitatively

[1] *Available at http://www.gpo.gov/fdsys/pkg/CFR-2012-title5-vol3/pdf/CFR-2012-title5-vol3-sec1320-5.pdf* (last accessed Dec. 11, 2012).

through additional research. Throughout these groups, there will be opportunities to include quantitative aspects; however, strategic recommendations will be based on an analysis of conversations that explore whether or not consumers understand the fuel economy-related content being communicated and whether or not the messages provide consumers with the information they require and encourage them to seek out additional relevant information.

*Estimated Annual Burden:* 96 hours.

*Number of Respondents:* 48.

*Comments are invited on:* whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents.

**Public Participation**

*How do I prepare and submit comments?*

Your comments must be written and in English. To ensure that your comments are filed correctly in the Docket, please include the docket number of this document in your comments. Your comments must not be more than 15 pages long (*see* 49 CFR 553.21). We established this limit to encourage you to write your primary comments in a concise fashion. However, you may attach necessary additional documents to your comments. There is no limit on the length of the attachments.

If you are submitting comments in hard copy, please submit two copies of your comments, including the attachments, to DOT's Docket Management at the address given under **ADDRESSES**.

You may also submit your comments to the docket electronically by logging onto *http://www.regulations.gov*. Click on ''Help'' at the top of the screen to obtain instructions for filing the document electronically.

*How can I be sure that my comments were received?*

If you wish DOT's Docket Management to notify you upon its receipt of your comments, enclose a self-addressed, stamped postcard in the envelope containing your comments. Upon receiving your comments, Docket Management will return the postcard by mail.

*How do I submit confidential business information?*

If you wish to submit any information under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Chief Counsel, NHTSA, at the address given above under **FOR FURTHER INFORMATION CONTACT**. In addition, you should submit two copies, from which you have deleted the claimed confidential business information, to Docket Management at the address given above under **ADDRESSES**. When you send a comment containing information claimed to be confidential business information, you should include a cover letter setting forth the information specified in our confidential business information regulation (49 CFR part 512).

*Will the agency consider late comments?*

We will consider all comments that Docket Management receives before the close of business on the comment closing date indicated above under **DATES**. To the extent possible, we also will consider comments that Docket Management receives after that date. If Docket Management receives a comment too late for us to consider it, we will consider that comment as an informal suggestion for future rulemaking action.

*How can I read the comments submitted by other people?*

You may read the comments received by Docket Management at the address given under **ADDRESSES**. The hours of the Docket are indicated above in the same location. You also may see the comments on the Internet. To read the comments on the Internet, go to *http://www.regulations.gov*, and follow the instructions for accessing the Docket.

Please note that even after the comment closing date, we will continue to file relevant information in the Docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that you periodically check the Docket for new material.

**Gregory A. Walter,**

*Senior Associate Administrator, Policy and Operations.*

[FR Doc. 2012–30621 Filed 12–18–12; 8:45 am]

BILLING CODE 4910–59–P

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

**[Docket No. NHTSA–2012–0170]**

### Proposed Collection of Information: Medium- and Heavy-Duty Truck Fleet Survey

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

**ACTION:** Request for public comment on proposed collection of information.

**SUMMARY:** The National Highway Traffic Safety Administration (NHTSA), on behalf of the Department of Transportation (DOT), invites public comment on our intent to request Office of Management and Budget (OMB) approval to conduct an information collection. This collection of information will be in the form of a one-time survey of medium- and heavy-duty truck fleet managers.

**DATES:** Comments must be received within 60 days of publication of this notice.

**ADDRESSES:** You may submit comments [identified by Docket No. NHTSA–2012–0170] through one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 1 (202) 493–2251.
- *Mail or Hand Delivery:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

*Instructions:* Each submission must include the Agency name and the Docket number for this Notice. Note that all comments received will be posted without changes to *http://www.regulations.gov* including any personal information provided.

**FOR FURTHER INFORMATION CONTACT:** James D. MacIsaac Jr., Fuel Economy Division, Office of International Policy, Fuel Economy and Consumer Programs, NVS–132, National Highway Traffic Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590. Phone: (202) 366–9108.

**SUPPLEMENTARY INFORMATION:** Under the Paperwork Reduction Act of 1995, before an agency submits a proposed collection of information to the Office of Management and Budget (OMB) for approval, it must publish a document in the **Federal Register** providing a 60-day

comment period and otherwise consult with members of the public and affected agencies. OMB has promulgated regulations describing what must be included in such a document. Under OMB's regulations (at 5 CFR 1320.8(d)), an agency must ask for public comment on the following:

(i) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(ii) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) How to enhance the quality, utility, and clarity of the information to be collected; and

(iv) How to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

In compliance with these requirements, NHTSA seeks public comment on the following proposed collection of information:

*Type of Information Collection:* New collection.

*OMB Control Number:* To be issued at time of approval.

*Title:* Medium- and Heavy-Duty Truck Fleet Survey.

*Background:* The Energy Independence and Security Act (EISA), enacted on December 19, 2007, mandated that NHTSA set maximum feasible fuel efficiency standards for medium- and heavy-duty (MD/HD) on-highway vehicles and work trucks for each model year (MY), with four full model years of lead time. (49 U.S.C. 32902(k)(2)). On September 15, 2011, NHTSA issued the first fuel efficiency standards for these vehicles, consisting of voluntary standards for MYs 2014–2015 and mandatory standards for MYs 2016–2018 and beyond.

*Description of the Need for the Information and Proposed Use of the Information:* As the agency develops the next phase of MD/HD standards, it will require a current model year baseline of the Class 2b-8 vehicle fleet, including model configurations, levels of fuel consumption and emissions equipment, current performance, vocations, typical mileage and cargo levels, fuels, and certification choices. This information is critical to efforts to model the fleet and conduct research in support of the next phase of standards. Data with this level of detail, especially the combined vehicle build and usage statistics, are not available from commercial database services. Therefore, it is necessary to survey truck fleet managers to not only baseline the vehicle configurations within the fleet, but also to baseline each vehicle category and subcategory's relative fuel consumption performance.

The results of the survey will serve to inform the public on current model year trucking fleet characteristics, fuel efficiency and emissions technologies, and usage. The survey is part of a larger coordinated research program aimed at informing both the next phase of the fuel efficiency standards, and an upcoming National Academy of Sciences (NAS) study on MD/HD vehicle fuel economy and emissions (per Section 107 of EISA, the NAS MD/HD study is funded by the Department of Transportation and the Academy updates the report at 5 year intervals through 2025).

*Description of the Survey:* A firm under contract to conduct the proposed survey will identify that it is a USDOT–NHTSA-funded survey and that participation is voluntary. Respondents will be informed that any information they provide will be used only for research and will not be used for sales calls or other commercial purposes. The final report generated from this survey will consist of aggregated results and will not attribute responses to individuals nor divulge any identifying information of the respondents.

The proposed survey will consist of an initial introduction and screening interview by phone, with qualified respondents referred to a web link to complete the main survey online. The proposed online survey will tailor itself to the fleet size and weight class information of each respondent to minimized extraneous questions and length. The proposed survey questions can be found in the docket for this collection, at NHTSA–2012–0170.

*Respondents:* Fleet managers from the trucking industry.

*Estimated Number of Screening Interview Respondents:* 2000.

*Estimated Number of Survey Respondents:* 175.

*Estimated Number of Fully Completed Survey Responses:* 100.

*Estimated Total Annual Burden:* 235 hours. NHTSA estimates that 2000 respondents will spend an average of 5 minutes each on the screening interview. Of these 2000 respondents, the agency estimates 175 will be both qualified and willing to complete the online survey. Within the 175 willing respondents, the agency estimates 75 will suspend participation in the survey in the first 15 minutes, and the remaining 100 will spend 30 minutes to fully complete the online survey.

*Estimated Frequency:* One-time survey.

*Public Comments Invited:* You are asked to comment on any aspect of this information collection, including (a) whether the proposed collection of information is necessary for the Department's performance, (b) the accuracy of the estimated burden, (c) ways for the Department to enhance the quality, utility and clarity of the information collection and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

**Authority:** 44 U.S.C. Section 3506(c)(2)(A).

Issued: December 7, 2012.

**Christopher J. Bonanti,**

*Associate Administrator for Rulemaking.*

[FR Doc. 2012–30520 Filed 12–18–12; 8:45 am]

BILLING CODE 4910–59–P

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## DEPARTMENT OF TRANSPORTATION

### Saint Lawrence Seaway Development Corporation

### Advisory Board; Notice of Meeting

Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463; 5 U.S.C. App. I), notice is hereby given of a meeting of the Advisory Board of the Saint Lawrence Seaway Development Corporation (SLSDC), to be held from 2:00 p.m. to 4:00 p.m. (EDT) on Wednesday, January 23, 2013 at the SLSDC's Policy Headquarters, 55 M Street SE., Suite 930, Washington, DC 20003. The agenda for this meeting will be as follows: Opening Remarks; Consideration of Minutes of Past Meeting; Quarterly Report; Old and New Business; Closing Discussion; Adjournment.

Attendance at the meeting is open to the interested public but limited to the space available. With the approval of the Acting Administrator, members of the public may present oral statements at the meeting. Persons wishing further information should contact, not later than Friday, January 18, 2013, Anita K. Blackman, Senior Advisor to the Administrator, Saint Lawrence Seaway Development Corporation, Suite W32–300, 1200 New Jersey Avenue SE., Washington, DC 20590; 202–366–0091.

Any member of the public may present a written statement to the Advisory Board at any time.

Issued at Washington, DC, on December 14, 2012.

**Craig H. Middlebrook,**

*Acting Administrator.*

[FR Doc. 2012–30580 Filed 12–18–12; 8:45 am]

**BILLING CODE 4910–61–P**

## DEPARTMENT OF THE TREASURY

## Office of the Comptroller of the Currency

**[Docket ID OCC–2012–0003]**

## FEDERAL RESERVE SYSTEM

## FEDERAL DEPOSIT INSURANCE CORPORATION

## Joint Report: Differences in Accounting and Capital Standards Among the Federal Banking Agencies; Report to Congressional Committees

**AGENCY:** Office of the Comptroller of the Currency (OCC), Treasury; Board of Governors of the Federal Reserve System (Board); and Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Report to the Congressional Committees.

**SUMMARY:** The OCC, the Board, and the FDIC (collectively, the agencies) have prepared this report pursuant to section 37(c) of the Federal Deposit Insurance Act. Section 37(c) requires the agencies to jointly submit an annual report to the Committee on Financial Services of the U.S. House of Representatives and to the Committee on Banking, Housing, and Urban Affairs of the U.S. Senate describing differences between the capital and accounting standards used by the agencies. The report must be published in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:**

*OCC:* David Elkes, Risk Expert, Capital Policy, (202) 649–6984, Office of the Comptroller of the Currency, 250 E Street SW., Washington, DC 20219.

*Board:* Sviatlana Phelan, Senior Financial Analyst, Capital and Regulatory Policy, (202) 912–4306, Division of Banking Supervision and Regulation, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW., Washington, DC 20551.

*FDIC:* David W. Riley, Senior Analyst (Capital Markets), (202) 898–3728, Division of Risk Management Supervision, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.

**SUPPLEMENTARY INFORMATION:** The text of the report follows:

**Report to the Committee on Financial Services of the U.S. House of Representatives and to the Committee on Banking, Housing, and Urban Affairs of the U.S. Senate Regarding Differences in Accounting and Capital Standards Among the Federal Banking Agencies**

### Introduction

The Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (Board), and the Federal Deposit Insurance Corporation (FDIC) (collectively, the agencies) must jointly submit an annual report to the Committee on Financial Services of the U.S. House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the U.S. Senate describing differences between the accounting and capital standards used by the agencies. The report must be published in the **Federal Register**.

Prior to 2011, the Office of Thrift Supervision (OTS) joined the agencies in submitting an annual report to Congress. Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010) (Dodd-Frank Act), transferred the powers, authorities, rights and duties of the OTS to other federal banking agencies on July 21, 2011 (the transfer date), and the OTS was abolished 90 days later. Under Title III, the OCC assumed all functions of the OTS and the Director of the OTS relating to federal savings associations, and thus the OCC has responsibility for the ongoing supervision, examination, and regulation of federal savings associations as of the transfer date. Title III transferred all supervision, examination, and certain regulatory functions of the OTS relating to state savings associations to the FDIC and all functions relating to the supervision of any savings and loan holding company and non-depository institution subsidiaries of such holding companies to the Board. Accordingly, this report is being submitted by the OCC, Board, and FDIC.

The agencies are submitting this joint report, which covers differences between their uses of accounting or capital standards existing as of December 31, 2011, pursuant to section 37(c) of the Federal Deposit Insurance Act (12 U.S.C. 1831n(c)), as amended. This report covers 2010 and 2011 and describes capital differences similar to those presented in previous reports.[1]

Since the agencies filed their first reports on accounting and capital differences in 1990, the agencies have acted in concert to harmonize their accounting and capital standards and eliminate as many differences as possible. Section 303 of the Riegle Community Development and Regulatory Improvement Act of 1994 (12 U.S.C. 4803) also directs the agencies to work jointly to make uniform all regulations and guidelines implementing common statutory or supervisory policies. The results of these efforts must be ''consistent with the principles of safety and soundness, statutory law and policy, and the public interest.'' [2] In recent years, the agencies have revised their capital standards to address changes in credit and certain other risk exposures within the banking system and align the amount of capital institutions are required to hold more closely with the credit risks and certain other risks to which they are exposed. These revisions have been made in a uniform manner whenever possible and practicable to minimize interagency differences. Although the differences in capital standards have diminished over time, a few differences remain, some of which are statutorily mandated.

In addition to the specific differences in capital standards noted below, the agencies may have differences in how they apply certain aspects of their rules. These differences usually arise as a result of case-specific inquiries that have been presented to only one agency. Agency staffs generally seek to minimize these occurrences by coordinating responses to the fullest extent reasonably practicable. Furthermore, while the agencies work together to adopt and apply generally uniform capital standards, there are wording differences in various provisions of the agencies' standards that largely date back to each agency's separate initial adoption of these standards before 1990.

The federal banking agencies have substantially similar capital adequacy standards.[3] These standards are based on a common regulatory framework that establishes minimum leverage and risk-based capital ratios for depository institutions [4] (banks and savings associations). The agencies view the leverage and risk-based capital requirements as minimum standards, and most institutions generally are expected to operate with capital levels

[1] *See, e.g.,* 75 FR 47900 (August 9, 2010).

[2] 12 U.S.C. 4803(a).

[3] The agencies' general risk-based capital rules are at 12 CFR part 3 (for national banks) and 12 CFR part 167.6 (for federal savings associations); 12 CFR parts 208 and 225, appendix A (Board); 12 CFR part 325, appendix A (FDIC); and 12 CFR part 390, subpart Z (state savings associations).

[4] 12 U.S.C. 1813(c).

well above the minimums, particularly those institutions that are expanding or experiencing unusual or high levels of risk.

The agencies note that, with respect to the agencies' advanced approaches capital adequacy framework based on Basel II,[5] there are no significant differences across the agencies' rules because the agencies adopted a joint rule establishing a common advanced approaches framework in December 2007,[6] with subsequent joint revisions.[7] Therefore, the risk-based capital differences described below pertain to the agencies' Basel I-based risk-based capital standards.[8]

With respect to reporting standards, the OCC, the Board, and the FDIC, under the auspices of the Federal Financial Institutions Examination Council (FFIEC), have developed the uniform Consolidated Reports of Condition and Income (Call Report) for all insured commercial banks and certain state-chartered savings banks. The OTS required OTS-supervised savings associations and certain state-chartered savings banks to file the Thrift Financial Report (TFR). The reporting standards for recognition and measurement of regulatory capital in the Call Report and the TFR were consistent with U.S. generally accepted accounting principles. There were no significant differences in regulatory accounting standards for regulatory reports filed with the federal banking agencies. In 2011, the agencies required changes to the reporting requirements for savings associations.[9] The changes (which are described in greater detail below) include a transition from the quarterly TFR to the quarterly Call Report.

## Differences in Capital Standards Among the Federal Banking Agencies

### *Financial Subsidiaries*

The Gramm-Leach-Bliley Act (GLBA), also known as the Financial Services Modernization Act of 1999, established the framework for financial subsidiaries of banks.[10] GLBA amended the Revised Statutes to permit national banks to conduct certain expanded financial activities through financial subsidiaries. Section 5136A of the Revised Statutes (12 U.S.C. 24a) imposes a number of conditions and requirements upon national banks that have financial subsidiaries, including the regulatory capital treatment applicable to equity investments in such subsidiaries. The statute requires that a national bank deduct from assets and tangible equity the aggregate amount of its equity investments in financial subsidiaries. The statute further requires that the financial subsidiary's assets and liabilities not be consolidated with those of the parent national bank for applicable capital purposes.

State member banks may have financial subsidiaries subject to the same restrictions that apply to national banks.[11] State nonmember banks may also have financial subsidiaries, but they are subject only to a subset of the statutory requirements that apply to national banks and state member banks.[12]

The OCC, the FDIC, and the Board adopted final rules implementing their respective provisions arising from section 121 of the GLBA for national banks in March 2000, for state nonmember banks in January 2001, and for state member banks in August 2001. The GLBA did not provide new authority to savings associations to own, hold, or operate financial subsidiaries, as defined, and thus the capital rules for savings associations do not contain parallel provisions.

### *Non-Financial Subsidiaries and Subordinate Organizations of Savings Associations*

Banks supervised by the OCC, the Board, and the FDIC generally consolidate all significant majority-owned subsidiaries other than financial subsidiaries for regulatory capital purposes. For subsidiaries other than financial subsidiaries that are not consolidated on a line-by-line basis for financial reporting purposes, joint ventures, and associated companies, the parent banking organization's investment in each such subordinate organization is, for risk-based capital purposes, deducted from capital or assigned to the 100 percent risk-weight category, depending upon the circumstances. The Board's and the FDIC's rules also permit banks to consolidate the investment on a pro rata basis under appropriate circumstances.

The capital regulations for savings associations are different in some respects because of statutory requirements. A statutorily-mandated distinction is drawn between subsidiaries, which generally are majority-owned, that are engaged in activities that are permissible for national banks and those that are engaged in activities impermissible for national banks.[13] When subsidiaries engage in activities that are impermissible for national banks, the regulations governing savings associations require deduction of the parent's investment in these subsidiaries from the capital of the parent organization. If a subsidiary's activities are permissible for a national bank, that subsidiary's assets are generally consolidated with those of the parent organization on a line-by-line basis. If a subordinate organization, other than a subsidiary, engages in impermissible activities, investments in and loans to that organization generally are deducted from the savings association's capital.[14] If a subordinate organization engages solely in permissible activities, depending on the

[5] The agencies' advanced approaches rules are at 12 CFR part 3, appendix C (national banks) and 12 CFR part 167, appendix C (federal savings associations);12 CFR part 208, appendix F, and 12 CFR part 225, appendix G (Board); 12 CFR part 325, appendix D (FDIC); and 12 CFR part 390, subpart Z, appendix A (state savings associations).

[6] *See* 72 FR 69288 (December 7, 2007).

[7] *See* 76 FR 37620 (June 28, 2011). Some minor differences remain in the application of the advanced approaches rule to savings associations, as statutorily mandated.

[8] On August 30, 2012, the agencies issued three proposed rules that would revise and replace the agencies' current capital rules. *See* 77 FR 52792, 77 FR 52888, 77 FR52978. If the proposed rules were adopted as final rules, a majority of the non-statutory differences described in this report would be eliminated.

[9] *See* 76 FR 39981 (July 7, 2011).

[10] A national bank that has a financial subsidiary must satisfy a number of statutory requirements in addition to the capital deduction and deconsolidation requirements described in the text. The bank (and each of its depository institution affiliates) must be well capitalized and well managed. Asset size restrictions apply to the aggregate amount of the assets of the bank's financial subsidiaries. Certain debt rating requirements apply, depending on the size of the national bank. The national bank is required to maintain policies and procedures to protect the bank from financial and operational risks presented by the financial subsidiary. It is also required to have policies and procedures to preserve the corporate separateness of the financial subsidiary and the bank's limited liability. Finally, transactions between the bank and its financial subsidiary generally must comply with the Federal Reserve Act (FRA) restrictions on affiliate transactions, and the financial subsidiary is considered an affiliate of the bank for purposes of the anti-tying provisions of the Bank Holding Company Act. *See* 12 U.S.C. 5136A.

[11] *See* 12 U.S.C. 335 (state member banks are subject to the ''same conditions and limitations'' that apply to national banks that hold financial subsidiaries).

[12] The applicable statutory requirements for state nonmember banks are as follows: the bank (and each of its insured depository institution affiliates) must (1) be well capitalized, (2) comply with the capital deduction and deconsolidation requirements, and (3) satisfy the requirements for policies and procedures to protect the bank from financial and operational risks and to preserve corporate separateness and limited liability for the bank. In addition, the statute requires that any transaction between the bank and a subsidiary that would be classified as a financial subsidiary generally shall be subject to the affiliate transactions restrictions of the FRA. *See* 12 U.S.C. 1831w.

[13] *See* 12 U.S.C. 1464(t)(5).

[14] The definitions of subsidiary and subordinate organization are provided in 12 CFR 159.2 (federal savings associations) and 12 CFR 390.251 (state savings associations).

nature and risk of the activity, investments in and loans to that organization may be assigned either to the 100 percent risk-weight category or deducted from capital.

*Leverage Ratio Denominator*

Banks supervised by the Board, the OCC, and the FDIC use average total assets to calculate the denominator of the leverage ratio. In contrast, savings associations use quarter-end total assets. Under the rules governing the reservation of authority for savings associations, the OCC and the FDIC reserve the right to require federal and state savings associations, respectively, to compute capital ratios on the basis of average, rather than period-end, assets.[15]

*Collateralized Transactions*

The risk-based capital rules of the Board assign a zero percent risk weight to claims collateralized by cash on deposit in the institution or by securities issued or guaranteed by U.S. Government agencies or the central governments of countries that are members of the Organization for Economic Cooperation and Development (OECD), provided there is daily mark-to-market of collateral and maintenance of a positive margin of collateral. The OCC rules with respect to national banks incorporate similar conditions for such collateralized claims eligible for a zero percent risk weight. However, while the Board's rules require such claims to be fully collateralized, the OCC's rules governing national banks permit partial collateralization.

Under the FDIC rules for state nonmember banks and the FDIC and OCC rules for state and federal savings associations, respectively, portions of claims collateralized by cash or by securities issued or guaranteed by OECD central governments or U.S. Government agencies receive a 20 percent risk weight. However, these institutions may assign a zero percent risk weight for claims on certain qualifying securities firms that are collateralized by cash on deposit in the institution or by securities issued or guaranteed by the U.S. Government, U.S. Government agencies, or other OECD central governments.

*Noncumulative Perpetual Preferred Stock*

Under the agencies' capital standards, noncumulative perpetual preferred stock is a component of tier 1 capital. The capital standards of the Board, the FDIC with respect to state nonmember banks, and the OCC with respect to national banks, require noncumulative perpetual preferred stock to give the issuer the option to waive the payment of dividends and provide that waived dividends neither accumulate to future periods nor represent a contingent claim on the issuer.

As a result of these requirements, under the risk-based capital rules of the OCC (with respect to national banks), the Board, or the FDIC, if a bank issues perpetual preferred stock and is required to pay dividends in a form other than cash (*e.g.,* dividends in the form of stock, when cash dividends are not or cannot be paid and when the bank does not have the option to waive or eliminate dividends), the perpetual preferred stock would not qualify as noncumulative. Under the capital requirements for savings associations, a savings association may request supervisory approval to treat perpetual preferred stock as noncumulative if it requires the payment of dividends in the form of stock when cash dividends are not paid.

*Equity Securities of Government-Sponsored Enterprises*

The risk-based capital rules of the Board and the FDIC and the capital regulations governing savings associations apply a 100 percent risk weight to equity securities of government-sponsored enterprises (GSEs).[16] In contrast, the OCC's regulation governing national banks applies a 20 percent risk weight to all GSE equity securities.

*Conversion Factors for Off-Balance Sheet Contracts*

Under the agencies' general risk-based capital rules, the credit equivalent amount of a derivative contract that is not subject to a qualifying bilateral netting contract is equal to the sum of the derivative contract's current credit exposure and the potential future credit exposure. The potential future exposure is estimated by multiplying the notional principal amount of the contract by a credit conversion factor by type of derivative contract. The regulations of the Board, the FDIC with respect to state nonmember banks, and the OCC with respect to national banks provide a chart illustrating the applicable credit conversion factors, as follows:

| Remaining maturity | Interest rate (percent) | Exchange rate and gold (percent) | Equity (percent) | Precious metals, except gold (percent) | Other commodities (percent) |
|---|---|---|---|---|---|
| One year or less | 0.0 | 1.0 | 6.0 | 7.0 | 10.0 |
| More than one year to five years | 0.5 | 5.0 | 8.0 | 7.0 | 12.0 |
| More than five years | 1.5 | 7.5 | 10.0 | 8.0 | 15.0 |

In contrast, the regulations governing savings associations, as currently incorporated into the FDIC's and the OCC's regulations, provide a table of conversion factors that is less granular as to the types of contracts to which it applies as well as their remaining maturity.

| Remaining maturity | Interest rate contracts (percent) | Foreign exchange rate contracts (percent) |
|---|---|---|
| One year or less | 0.0 | 1.0 |
| Over one year | 0.5 | 5.0 |

*Limitation on Subordinated Debt and Limited-Life Preferred Stock*

The risk-based capital rules of the Board, the FDIC with respect to state nonmember banks, and the OCC with respect to national banks limit the amount of subordinated debt and intermediate-term preferred stock that may be treated as part of tier 2 capital to 50 percent of tier 1 capital. Such a restriction is not imposed on savings associations. However, the agencies

[15] *See* 12 CFR 167.11(b) (federal savings associations) and 12 CFR 390.470(b) (state savings associations).

[16] However, Federal Home Loan Bank stock held by banking organizations as a condition of membership receives a 20 percent risk weight.

limit the amount of tier 2 capital to 100 percent of tier 1 capital for all banks and savings associations.

In addition, under the risk-based capital rules of the Board, the FDIC with respect to state nonmember banks, and the OCC with respect to national banks, at the beginning of each of the last five years of the life of a subordinated debt or limited-life preferred stock instrument, the amount eligible for inclusion in tier 2 capital is reduced by 20 percent of the original amount of that instrument (net of redemptions). However, the regulations governing savings associations provide the option of using either the discounting approach described above or an approach that, during the last seven years of the instrument's life, allows for the full inclusion of all such instruments, provided that the aggregate amount of such instruments maturing in any one year does not exceed 20 percent of the savings association's total capital.

*Tangible Capital Requirement*

Unlike banks, savings associations, by statute, must satisfy a 1.5 percent minimum tangible capital requirement.[17] However, under the Prompt Corrective Action framework all insured depository institutions are considered critically undercapitalized if their tangible common equity falls below 2 percent.[18] Therefore, the 1.5 percent minimum tangible capital requirement for savings associations is no longer a meaningful limit.

*Market Risk Rule*

In 1996, the Board, the FDIC with respect to state nonmember banks, and the OCC with respect to national banks, adopted rules requiring banks and bank holding companies with significant exposure to market risk to measure and maintain capital to support that risk.[19] However, the rules governing savings associations do not include a market risk framework because no savings association engaged in the threshold level of trading activity when the market risk capital rule was adopted.[20]

*Pledged Deposits, Nonwithdrawable Accounts, and Certain Certificates*

The capital regulations governing mutual savings associations permit such institutions to include in tier 1 capital pledged deposits and nonwithdrawable accounts to the extent that such accounts or deposits have no fixed maturity date, cannot be withdrawn at the option of the accountholder, and do not earn interest that carries over to subsequent periods. The regulations also permit the inclusion of net worth certificates, mutual capital certificates, and income capital certificates complying with applicable regulations in savings associations' tier 2 capital. The risk-based capital rules of the Board, the FDIC with respect to state nonmember banks, and the OCC with respect to national banks do not expressly address these instruments.

*Assets Subject to FDIC or Federal Savings and Loan Insurance Corporation Agreements*

The risk-based capital rules of the Board, the OCC for national banks, and the FDIC for state nonmember banks generally place assets subject to guarantee arrangements by the FDIC or the former Federal Savings and Loan Insurance Corporation (FSLIC) in the 20 percent risk-weight category. The regulations governing savings associations place certain assets in the zero percent risk-weight category, provided the assets are fully covered against capital loss and/or by yield maintenance agreements initiated by the FSLIC, regardless of any later successor agency such as the FDIC.

The federal banking agencies issued a joint statement, *Clarification of the Risk Weight for Claims on or Guaranteed by the FDIC,* on February 26, 2010, that clarifies the risk weights for claims on or guaranteed by the FDIC for purposes of banking organizations' risk-based capital requirements. Recent loss-sharing agreements entered into by the FDIC with acquirers of assets from failed institutions are considered conditional guarantees for risk-based capital purposes due to contractual conditions imposed on the acquiring institution. The guaranteed portion of assets subject to an FDIC loss-sharing agreement may be assigned a 20 percent risk weight. Any such assets reported by a savings association, other than those meeting the requirements provided in 12 CFR 167.6(a)(1)(i)(F) (federal savings associations) and 12 CFR 390.466(a)(1)(i)(F) (state savings associations) may similarly receive a 20 percent risk weight.

**Differences in Accounting Standards Among the Federal Banking Agencies**

*Specific Valuation Allowances*

There was a difference in regulatory reporting of ''specific valuation allowance'' between Call Report and TFR filers.[21] Under the TFR, if a savings association determined that it was likely the amount of a loan loss classification would change due to market conditions, it could record the loss associated with the loan by either (1) creating a specific valuation allowance or (2) recognizing a charge-off.[22] In contrast, Call Report instructions require a charge-off for all confirmed losses and do not provide for this use of specific valuation allowances.

*Regulatory Reporting*

In 2011, subsequent to the Dodd-Frank Act, the agencies changed regulatory reporting requirements, including requiring savings associations to file the quarterly Call Report rather than the TFR.[23] As a result, institutions supervised by the agencies are subject to uniform regulatory reporting requirements.

Savings associations continued their existing reporting processes until the effective dates cited below, but they were permitted to convert early to the Call Report for report dates after July 21, 2011. Savings associations that elected to early adopt the Call Report were still required to submit other applicable reports (Cost of Funds, Holding Company, and Consolidated Maturity/Rate Schedule) through the December 31, 2011, reporting period.

Specific changes to reporting requirements for savings associations include:

- A requirement to file the quarterly Call Report, beginning with the March 31, 2012, report date. Effective on that date, all required schedules of the TFR (including Schedules CMR—Consolidated Maturity Rate and HC—Thrift Holding Company) were eliminated;
- A requirement to file data through the Summary of Deposits with the FDIC,

[17] *See* 12 U.S.C. 1464(t)(1)(A)(ii) and (t)(2)(B).

[18] *See* 12 U.S.C. 1831o(c)(3); *see also* 12 CFR 6.4, 12 CFR 165.4 (OCC); 12 CFR 208.45 (Board); 12 CFR 325.105, 12 CFR 390.455 (FDIC).

[19] *See* 61 FR 47358 (September 6, 1996).

[20] On August 30, 2012, the agencies published a revised market risk final rule that: (1) enhances the market risk rule's sensitivity to risks that are not adequately captured under the prior market risk rule, (2) increases transparency through enhanced disclosures, and (3) does not rely on credit ratings, consistent with section 939A of the Dodd-Frank Act. *See* 77 FR 53060. On the same day, the agencies also issued a proposed rule that would subject federal and state savings associations to the market risk rule. *See* 77 FR 52978 (August 30, 2012). Thus, if the proposed rule is adopted as a final rule, the difference described above would be eliminated.

[21] Effective March 30, 2012, this difference was eliminated when savings associations began to file the Call Report.

[22] A savings association is not permitted to use a specific valuation allowance in lieu of a charge-off when it classifies certain credits as a loss, such as unsecured loans, consumer loans, and credit cards, and in instances where the collateral underlying a secured loan would likely be acquired through foreclosure or repossession. In those cases, only a charge-off is permitted.

[23] *See* 76 FR 39981 (July 7, 2011).

beginning with the June 30, 2011, report date. Effective on that date, the OTS Branch Office Survey was eliminated; and

• Ending collection of monthly median cost-of-funds data from savings associations, effective January 31, 2012. The last cost-of-funds indices were published as of December 31, 2011.

Dated: December 13, 2012.

**Thomas J. Curry,**

*Comptroller of the Currency.*

By order of the Board of Governors of the Federal Reserve System, December 10, 2012.

**Robert deV. Frierson,**

*Secretary of the Board.*

Dated: December 11, 2012.

Federal Deposit Insurance Corporation.

**Robert E. Feldman,**

*Executive Secretary.*

[FR Doc. 2012–30608 Filed 12–18–12; 8:45 am]

**BILLING CODE 4810–33–P; 6210–01–P; 6714–01–P**

## DEPARTMENT OF THE TREASURY

### Fiscal Service

### Surety Companies Acceptable on Federal Bonds: Termination; ULLICO Casualty Company

**AGENCY:** Financial Management Service, Fiscal Service, Department of the Treasury.

**ACTION:** Notice.

**SUMMARY:** This is Supplement No. 3 to the Treasury Department Circular 570; 2012 Revision, published July 2, 2012, at 77 FR 39322.

**FOR FURTHER INFORMATION CONTACT:** Surety Bond Branch at (202) 874–6850.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that the Certificate of Authority issued by the Treasury to ULLICO Casualty Company (NAIC# 37893) under 31 U.S.C. 9305 to qualify as an acceptable surety on Federal bonds is terminated immediately. Federal bond-approving officials should annotate their reference copies of the Treasury Department Circular 570 (''Circular''), 2012 Revision, to reflect this change.

With respect to any bonds, including continuous bonds, currently in force with above listed Company, bond-approving officers should secure new bonds with acceptable sureties in those instances where a significant amount of liability remains outstanding. In addition, in no event, should bonds that are continuous in nature be renewed.

The Circular may be viewed and downloaded through the Internet at *www.fms.treas.gov/c570.*

Questions concerning this notice may be directed to the U.S. Department of the Treasury, Financial Management Service, Financial Accounting and Services Division, Surety Bond Branch, 3700 EastMest Highway, Room 6F01, Hyattsville, MD 20782.

Dated: December 11, 2012.

**Kevin McIntyre,**

*Acting Director, Financial Accounting and Services Division.*

[FR Doc. 2012–30422 Filed 12–18–12; 8:45 am]

**BILLING CODE 4810–35–M**

## DEPARTMENT OF THE TREASURY

### Fiscal Service

### Surety Companies Acceptable on Federal Bonds: Termination; Universal Insurance Company

**AGENCY:** Financial Management Service, Fiscal Service, Department of the Treasury.

**ACTION:** Notice.

**SUMMARY:** This is Supplement No. 2 to the Treasury Department Circular 570; 2012 Revision, published July 2, 2012, at 77 FR 39322.

**FOR FURTHER INFORMATION CONTACT:** Surety Bond Branch at (202) 874–6850.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that the Certificate of Authority issued by the Treasury to Universal Insurance Company (NAIC# 31704) under 31 U.S.C. 9305 to qualify as an acceptable surety on Federal bonds is terminated immediately. Federal bond-approving officials should annotate their reference copies of the Treasury Department Circular 570 (''Circular''), 2012 Revision, to reflect this change.

With respect to any bonds, including continuous bonds, currently in force with above listed Company, bond-approving officers should secure new bonds with acceptable sureties in those instances where a significant amount of liability remains outstanding. In addition, in no event, should bonds that are continuous in nature be renewed.

The Circular may be viewed and downloaded through the Internet at *www.fms.treas.gov/c570.*

Questions concerning this notice may be directed to the U.S. Department of the Treasury, Financial Management Service, Financial Accounting and Services Division, Surety Bond Branch, 3700 East-West Highway, Room 6F01, Hyattsville, MD 20782.

Dated: December 11, 2012.

**Kevin McIntyre,**

*Acting Director, Financial Accounting and Services Division.*

[FR Doc. 2012–30421 Filed 12–18–12; 8:45 am]

**BILLING CODE 4810–35–M**

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Part II

## Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Termination of the Southern Sea Otter Translocation Program; Final Rule

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

**[FWS–R8–FHC–2011–0046]; [FF09E32000–134–FXES11130900000]**

**RIN 1018–AX51**

# Endangered and Threatened Wildlife and Plants; Termination of the Southern Sea Otter Translocation Program

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Final rule and record of decision.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), are removing the regulations that govern the southern sea otter (*Enhydra lutris nereis*) translocation program, including the establishment of an experimental population of southern sea otters, and all associated management actions. Removal of the regulations terminates the program. We analyzed the environmental consequences of this action, and alternatives to it, in a final supplemental environmental impact statement (final SEIS), which we made available to the public on November 9, 2012. This **Federal Register** document records our decision to select the preferred alternative, Alternative 3C.

**DATES:** This rulemaking becomes effective January 18, 2013.

**ADDRESSES:** This final rulemaking and supporting documentation, including public comments, are available on the Internet at *http://www.regulations.gov.* In the search field, enter FWS–R8–FHC–2011–0046, which is the docket number. Then click on the Search button. On the resulting screen, you may view documents associated with the docket. Comments and materials received, as well as supporting documentation used in the preparation of this rulemaking, are also available for public inspection, by appointment, during normal business hours at the Ventura Fish and Wildlife Office, 2493 Portola Road, Suite B, Ventura, CA 93003.

**FOR FURTHER INFORMATION CONTACT:** Lilian Carswell, at the above Ventura street address, by telephone (805/644–1766), by facsimile (805/644–3958), or by electronic mail (*Lilian_Carswell@fws.gov*). Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Services (FIRS) at 800–877–8339.

**SUPPLEMENTARY INFORMATION:**

## Executive Summary

With this final rulemaking, we are removing the regulations that govern the southern sea otter translocation program, including the establishment of an experimental population of southern sea otters, and all associated management actions. We are also amending the authority citation for 50 CFR part 17 by removing the reference to Public Law (Pub. L.) 99–625, the statute that authorized the Secretary to promulgate regulations establishing the southern sea otter translocation program. Removal of the regulations terminates the program. We are taking this action because we have determined that the southern sea otter translocation program has failed to fulfill its purpose, as outlined in the southern sea otter translocation plan, and that our recovery and management goals for the species cannot be met by continuing the program. Our conclusion is based, in part, on an evaluation of the program against specific failure criteria established at the program's inception.

This action terminates the designation of the experimental population of southern sea otters, abolishes the southern sea otter translocation and management zones, eliminates the obligation to remove southern sea otters in perpetuity from an ''otter-free'' management zone, and removes the current requirement to remove southern sea otters from San Nicolas Island and the management zone upon termination of the program. As a result, it allows southern sea otters to expand their range naturally into southern California waters.

We analyzed the environmental consequences of this action, and alternatives to it, in a final SEIS that we made available to the public on November 9, 2012 (77 FR 67302; 77 FR 67362). This **Federal Register** document records our decision to select the preferred alternative, Alternative 3C. We have prepared a final regulatory flexibility analysis (FRFA) to accompany this rulemaking.

## Decision

We published a final SEIS on November 9, 2012 (77 FR 67302; 77 FR 67362), which evaluates options for continuing, revising, or terminating the southern sea otter translocation program, initiated in 1987. The final SEIS describes the proposed action and alternatives under consideration and discloses the direct, indirect, and cumulative environmental effects of each of the alternatives. We analyzed six alternatives:

- *No Action Alternative:* Maintain the status quo. This alternative serves as the baseline for comparison with all other alternatives;
- *Alternative 1:* Resume implementation of the 1987 southern sea otter translocation plan;
- *Alternative 2:* Implement a modified southern sea otter translocation program with a smaller management zone;
- *Alternative 3A:* Terminate the southern sea otter translocation program based on a failure determination pursuant to 50 CFR 17.84(d) and remove all sea otters residing within the translocation and management zones at the time the decision to terminate is made;
- *Alternative 3B:* Terminate the southern sea otter translocation program based on a failure determination pursuant to 50 CFR 17.84(d) and remove only sea otters residing within the translocation zone at the time the decision to terminate is made;
- *Alternative 3C (Preferred Alternative*): Terminate the southern sea otter translocation program based on a failure determination pursuant to 50 CFR § 17.84(d) and do not remove sea otters residing within the translocation or management zones at the time the decision to terminate is made.

*Comments:* We received 12 comments on the final SEIS. These comments did not raise any new substantive issues regarding the final SEIS or this rulemaking. The comment letters and a summary of our responses are available on the Service's Web site at the internet address identified in the **ADDRESSES** section of this document.

Based on a thorough review of the alternatives and their adverse and beneficial environmental consequences, as described in the final SEIS, the decision of the Service is to implement Alternative 3C, the preferred alternative. We are selecting Alternative 3C because we have determined that the southern sea otter translocation program has failed to fulfill its purpose, as outlined in the southern sea otter translocation plan, and that our recovery and management goals for the species cannot be met by continuing the program.

The purpose of the southern sea otter translocation program was to: (1) Implement a primary recovery action for the southern sea otter; and (2) obtain data for assessing southern sea otter translocation and containment techniques, population dynamics, ecological relationships with the nearshore community, and effects on the donor population of removing individual southern sea otters for

translocation (52 FR 29754; August 11, 1987). The translocation of southern sea otters was intended to advance southern sea otter recovery, with the ultimate goal of delisting the species under the Endangered Species Act of 1973, as amended (ESA) (16 U.S.C. 1531 *et seq.*). Through translocation, we hoped to establish a self-sustaining southern sea otter population (experimental population) that would provide a safeguard in the event that the parent southern sea otter population was adversely affected by a catastrophic event, such as an oil spill.

Our conclusion that the southern sea otter translocation program has failed is based on an in-depth evaluation of the translocation program (see Appendix C to the final SEIS). The translocation program evaluation compares results to date with the program's objectives and specific failure criteria established at the program's inception. We have determined that the translocation program meets failure criterion 2. We also note that (1) the colony of southern sea otters at San Nicolas Island remains small, and its ability to become established and persist is uncertain; (2) establishment and maintenance of an isolated southern sea otter colony at San Nicolas Island will not provide an adequate safeguard should the mainland southern sea otter population be adversely affected by a catastrophic event; (3) attempts to limit natural range expansion of southern sea otters disrupt seasonal patterns of movement and hinder recovery of the southern sea otter; (4) capturing and moving sea otters out of a ''no-otter'' management zone has proven to be ineffective as a long-term management action, largely because of the difficulties inherent in sea otter capture, the ability of sea otters to return rapidly to the management zone, and the elevated mortality associated with the holding, transport, and release of sea otters; 5) the recovery strategy for the southern sea otter has changed since the original recovery plan was released in 1982, in part because of points 1–4 above; in the revised recovery plan for the southern sea otter (USFWS 2003), the recovery team recommends that we declare the translocation program a failure and discontinue maintenance of a ''no-otter'' management zone.

Alternative 3C allows for the continued natural range expansion of sea otters into their historic range in southern California waters. This alternative reflects the recommendation made in the revised recovery plan, which advises against additional translocations and instead advocates allowing natural range expansion (USFWS 2003). In light of these and other considerations of effects on southern sea otters and on our ability to meet our mandates under the ESA and the Marine Mammal Protection Act of 1972, as amended (MMPA) (16 U.S.C. 1361 *et seq.*), discussed in sections 6.7.3.3 and 6.7.11.1 of the final SEIS, we are selecting Alternative 3C.

The No Action Alternative reflects baseline environmental conditions that have been in place since the suspension of containment in 1993. It serves as the baseline for comparison with the other alternatives, but we do not consider it to be a viable alternative because the legal regime reflected in the No Action Alternative (continuation of the translocation program without containment) is untenable. In 2001, we published a Notice of Policy (66 FR 6649; January 22, 2001) notifying the public that we would not implement the containment component of the translocation program pending completion of a supplemental environmental impact statement and a final evaluation of the program. In the notice, we acknowledged the conclusion of our 2000 biological opinion that capture and removal (containment) of southern sea otters from the management zone—a key component of the translocation program—would likely jeopardize the continued existence and impede the recovery of the species. In light of our inability to implement the translocation program as designed and intended, we committed to a full and final evaluation of the program. We have now completed that evaluation and determined that the translocation program has failed. For additional discussion of the No Action Alternative, see our responses to comments below under the heading ''Positions on Proposed Action.''

Alternatives 1 and 2 would entail resumption of implementation of the translocation program, including resumption of its containment component (though with differently configured management zones). However, we determined that resumption of containment would jeopardize the southern sea otter and violate Section 7 of the ESA (USFWS 2000). We based this conclusion, in part, on the recognition that reversal of southern sea otter population declines and expansion of the southern sea otter's range is essential to the survival and recovery of the species. In order to resume containment, we would have to reinitiate consultation under the ESA to consider any new information and conclude that continuation of the program would not jeopardize the southern sea otter. Resumption of sea otter containment could result in increased mortality of sea otters and disrupt behavior throughout the range of the species. It would also artificially restrict the southern sea otter's range, increasing its vulnerability to oil spills, disease, and stochastic events relative to the baseline. In combination, these effects would slow or prevent the recovery of the species. Additionally, it is now well established that sea otters can return rapidly to areas from which they have been removed; thus, our ability to influence sea otter movements by means of capture and removal is limited. Successful implementation of containment would likely require the repeated removals of some individuals. In light of these and other effects on southern sea otters and on our ability to meet our mandates under the ESA and the MMPA, discussed in sections 6.3.3.3, 6.3.11.1, 6.4.3.3, and 6.4.11.1 of the final SEIS, we have not selected Alternatives 1 or 2.

Alternatives 3A and 3B would recognize that the translocation program has failed, but they would be less likely to achieve our objectives than Alternative 3C. Alternatives 3A and 3B would require that we remove sea otters from the translocation zone and/or management zone at the time the decision to terminate the program was made. The attempted removal of sea otters from San Nicolas Island or the management zone, even over the short term, could result in increased mortality of the removed sea otters and temporarily disrupt behavior throughout the range of the species. Additionally, because sea otters can return rapidly to areas from which they have been removed (and can also potentially disperse to new areas), attempting these removals would be not only harmful but likely futile. In light of effects on southern sea otters and on our ability to meet our mandates under the ESA and the MMPA, discussed in sections 6.5.3.3, 6.5.11.1, 6.6.3.3, and 6.6.11.1 of the final SEIS, we have not selected Alternatives 3A or 3B.

We identified Alternative 3C as the environmentally preferable alternative. While the regulatory change in the status of sea otters in the Southern California Bight may result in indirect effects on gill and trammel net fisheries if additional depth restrictions are adopted in the future, we have determined that, on balance, Alternative 3C causes the least damage to the biological and physical environment, in that it would allow a ''keystone species'' to return to its former range off southern California and would help to restore the natural functioning of the nearshore marine ecosystem. For an in-depth

discussion of the effects of sea otters on the nearshore marine ecosystem, see section 6.2.2 of the final SEIS.

We have adopted all practicable means to avoid or minimize potential environmental harm from Alternative 3C. Natural range expansion of sea otters (which is occurring under baseline conditions and is expected to continue to occur under Alternative 3C) could affect the endangered white abalone (*Haliotis sorenseni*) and the endangered black abalone (*Haliotis cracherodii*) if sea otters encounter individuals that are not in cryptic or otherwise inaccessible habitat. We recognize our affirmative responsibilities under the ESA and fully support recovery efforts for endangered white and black abalone. To lessen the risk that natural range expansion of sea otters could interfere with recovery efforts for white and black abalone, we are committed to working closely with the National Marine Fisheries Service (NMFS) to share information that may affect recovery actions for these species. Specifically, we are working with NMFS to convene a working group composed of managers and scientists that have southern sea otter and abalone expertise to benefit the recovery of abalone and sea otters. We are also pursuing a Memorandum of Understanding with NMFS to formalize this and other cooperative efforts to facilitate the recovery of sea otters alongside the recovery of endangered abalone.

While Alternative 3C (termination of the translocation program) is not anticipated to affect defense-related agency actions that are currently carried out within the translocation zone around San Nicolas Island, we acknowledge that Alternative 3C could result in an increased regulatory burden on the Department of Defense if actions significantly different from those currently being carried out are implemented in the future. To mitigate regulatory effects that may occur, we are continuing to work with the Department of Defense to identify possible mutually agreeable solutions, including streamlining ESA and MMPA compliance. While the Service does not have management authority for marine fisheries, we will also work closely with the California Department of Fish and Game (CDFG), NMFS, and affected fishers to identify and develop fishery management strategies, as feasible, to minimize effects on individual fishers.

## Background

### *Previous Federal Actions*

On January 14, 1977, we listed the southern sea otter as a threatened species under the ESA on the basis of its small population size, its greatly reduced range, and the potential risk from oil spills (42 FR 2965). We established a recovery team for the species in 1980 and approved a recovery plan on February 3, 1982. In the recovery plan, we identified the translocation of southern sea otters as an effective and reasonable recovery action, acknowledging that a translocated southern sea otter colony could impact shellfish fisheries that had developed in areas formerly occupied by southern sea otters. The objectives of southern sea otter translocation, as stated in the 1982 recovery plan, included: (1) Establishing a second colony (or colonies) sufficiently distant from the parent population such that a smaller portion of the southern sea otter range would be affected in the event of a large-scale oil spill; and (2) establishing a database for identifying the optimal sustainable population level for the southern sea otter. We anticipated that translocation would ultimately result in a larger population size and a more continuous distribution of animals throughout the southern sea otter's historic range.

Under the ESA, the Secretary has inherent authority to establish new or translocated populations of listed species. Section 10(j) of the ESA provides the Secretary with additional flexibility to relax the protective provisions of the ESA when translocating a population of a listed species by allowing the Secretary to designate the translocated population as an experimental population. However, the southern sea otter is protected under both the ESA and the MMPA, and at the time, the MMPA did not contain similar provisions. This inconsistency was resolved in the case of the southern sea otter translocation program by the passage of Public Law 99–625 (Fish and Wildlife Programs: Improvement; Section 1. Translocation of California Sea Otters) on November 7, 1986, which specifically authorized development of a translocation plan for southern sea otters administered in cooperation with the affected State.

If the Secretary of the Interior chose to develop a translocation plan under Public Law 99–625, the plan was required to include: (1) The number, age, and sex of southern sea otters proposed to be relocated; (2) the manner in which southern sea otters were to be captured, translocated, released, monitored, and protected; (3) specification of a zone into which the experimental population would be introduced (translocation zone); (4) specification of a zone surrounding the translocation zone that did not include the range of the parent population or adjacent range necessary for the recovery of the species (management zone); (5) measures, including an adequate funding mechanism, to isolate and contain the experimental population; and (6) a description of the relationship of the implementation of the plan to the status of the species under the ESA and determinations under section 7 of the ESA. The purposes of the management zone were to: (1) Facilitate the management of southern sea otters and the containment of the experimental population within the translocation zone; and (2) prevent, to the maximum extent feasible, conflicts between the experimental population and fishery resources within the management zone. Any southern sea otter found within the management zone was to be treated as a member of the experimental population. We were required to use all feasible, nonlethal means to capture southern sea otters in the management zone and to return them to the translocation zone or to the range of the parent population.

On August 15, 1986, we published a proposed rule to establish an experimental population of southern sea otters at San Nicolas Island, Ventura County, California, in conjunction with a management zone from which sea otters would be excluded (51 FR 29362). Concurrently, we released a draft environmental impact statement (EIS) that analyzed the impacts of six alternatives, which included establishing a program to translocate southern sea otters from their then-current range along the central coast of California to areas of the northern coast of California, the southern coast of Oregon, or San Nicolas Island off the coast of southern California. We identified translocation to San Nicolas Island as our preferred alternative, with the management zone including the coastline from Point Conception to the Mexican border and all of the offshore islands except San Nicolas Island. On May 8, 1987, we made available our final EIS (52 FR 17486). A detailed translocation plan meeting the requirements of Public Law 99–625 was included as an appendix to the final EIS. On August 11, 1987, we published a final rule providing implementing regulations for the translocation program (52 FR 29754); these regulations are codified at 50 CFR 17.84(d). These regulations define the boundaries of the translocation and management zones, provide the framework for the program, and include a set of criteria for determining if the

translocation should be considered a failure.

*Implementation of the Translocation Program*

The purpose of the southern sea otter translocation program was to: (1) Implement a primary recovery action for the southern sea otter; and (2) obtain data for assessing southern sea otter translocation and containment techniques, population dynamics, ecological relationships with the nearshore community, and effects on the donor population of removing individual southern sea otters for translocation (52 FR 29754; August 11, 1987). The translocation of southern sea otters was intended to advance southern sea otter recovery, with the ultimate goal of delisting the species under the ESA. Through translocation, we hoped to establish a self-sustaining southern sea otter population (experimental population) that would provide a safeguard in the event that the parent southern sea otter population was adversely affected by a catastrophic event, such as an oil spill. We expected that, to achieve this aim, the colony at San Nicolas Island would need to grow to a size such that it could remain viable while furnishing up to 25 sea otters per year for up to 3 years to repopulate affected areas of the parent range. Based on the magnitude of oil spills that had occurred up to that time, San Nicolas Island appeared to be sufficiently distant from the parent range to provide a reasonable safeguard in the event of such a catastrophic occurrence.

On August 24, 1987, we began to implement the translocation plan by moving groups of southern sea otters from the coast of central California to San Nicolas Island. The translocation plan allowed for a maximum of 70 southern sea otters to be moved to San Nicolas Island during the first year of the program (USFWS 1987). This number could be supplemented with up to 70 animals annually (up to 250 total) in subsequent years, if necessary, to ensure the success of the translocation and to prevent the colony from declining into an irreversible downward trend. Assuming that a core population of 70 southern sea otters could be maintained through translocation, we anticipated that the experimental population could be established within as few as 5 or 6 years. In this context, the term ''established'' had a specific meaning: When at least 150 southern sea otters resided at the island, and the population had a minimum annual recruitment of 20 animals (52 FR 29754; August 11, 1987).

Between August 1987 and March 1990, we captured 252 southern sea otters along the central California coast and released 140 at San Nicolas Island. More than 100 of the captured sea otters were deemed unsuitable for translocation and released near their capture sites, and 6 of the 252 animals died of stress-related conditions before translocation to San Nicolas Island. Some sea otters died as a result of translocation, many swam back to the parent population, and some moved into the management zone. As of March 1991, approximately 14 independent (non-pup) southern sea otters (10 percent of those translocated) were thought to remain at the island.

Because of the unexpected mortalities and high emigration encountered during the first year, we amended our regulations for the translocation program in 1988 (53 FR 37577; September 27, 1988). The amendments were intended to minimize stress on captured sea otters, to improve the survival of translocated animals, and to minimize the dispersal of translocated sea otters from the translocation zone. Specifically, we provided more flexibility in selecting the ages of sea otters for translocation, eliminated the restriction to capture them only within an August to mid-October timeframe, eliminated the requirement to move a specified number of sea otters previously implanted with transmitters, provided the flexibility either to transport them immediately or to hold them on the mainland before releasing them at San Nicolas Island, and eliminated the requirement to translocate a minimum of 20 animals at a time.

The fate of approximately half the sea otters taken to San Nicolas Island was never determined, although an intense effort was made to locate translocated animals at San Nicolas Island, in the management zone, and in the parent range. In 1991, we stopped translocating sea otters to San Nicolas Island due to high rates of dispersal and poor survival. However, we continued monitoring the sea otters remaining in the translocation zone.

In December 1987, in coordination with CDFG, we began capturing and moving southern sea otters that entered the designated management zone. Containment efforts were intended to keep the management zone free of otters, in accordance with Public Law 99–625 and our implementing regulations. Containment operations consisted of three interdependent activities: (1) Surveillance of the management zone; (2) capture of southern sea otters in the management zone; and (3) relocation of captured animals to the parent range or San Nicolas Island.

Between December 1987 and February 1993, 24 southern sea otters were captured, removed from the management zone, and released in the parent range. Of these, two sea otters were captured twice in the management zone, despite being released at the northern end of the parent range after their first removal. In February 1993, two sea otters that had been recently captured in the management zone were found dead shortly after their release in the range of the parent population. In total, four sea otters were known or suspected to have died within 2 weeks of being moved from the management zone. We were concerned that sea otters were dying as a result of our containment efforts; therefore, in 1993, we suspended all sea otter capture activities in the management zone to evaluate capture and transport methods. We recognized that available capture techniques, which had proven to be less effective and more labor-intensive than originally predicted, were not an efficient means of containing sea otters. From 1993 to 1997, few sea otters were reported in the management zone, and there appeared to be no immediate need to address sea otter containment. In 1997, CDFG notified us that it intended to end its sea otter research project and would no longer be able to assist if we resumed capturing sea otters in the management zone.

In 1998, a group of approximately 100 southern sea otters moved from the parent range into the northern end of the management zone, inaugurating a pattern of seasonal movements of large numbers of sea otters into and out of the management zone. Subsequent radio-telemetry studies have determined that these animals are moving great distances throughout their range and are an important component of the population (*i.e.,* the same territorial males that hold territories and sire pups within the center of the range may be found seasonally aggregated in ''male areas,'' often at the range ends) (Tinker *et al.* 2006). At the same time, rangewide counts of the southern sea otter population indicated a decline of approximately 10 percent between 1995 and 1998. In light of the decline in the southern sea otter population, we were concerned about the potential effects on the parent population of moving the large number of southern sea otters that had moved into the management zone. We asked the Southern Sea Otter Recovery Team, a team of biologists with expertise pertinent to southern sea otter recovery, for their recommendation

regarding the capture and removal of southern sea otters in the management zone. The recovery team recommended that we not move southern sea otters from the management zone to the parent population because moving large groups of southern sea otters and releasing them within the parent range would be disruptive to the social structure of the parent population. We agreed with their recommendation.

In order to notify stakeholders of our intended course of action, we held two public meetings in August 1998. At these meetings, we provided information on the status of the translocation program, solicited general comments and recommendations, and announced that we intended to reinitiate consultation under section 7 of the ESA for the containment program and to begin the process of evaluating the failure criteria established for the translocation program. Subsequent to these meetings, the group of technical consultants (a body composed of representatives from the fishery and environmental communities, as well as State and Federal agencies) to the Southern Sea Otter Recovery Team was expanded to assist in evaluating the translocation program. We provided updates on the translocation program and the status of the southern sea otter population to the California Coastal Commission, the Marine Mammal Commission, and the California Fish and Game Commission in 1998 and 1999.

In March 1999, we distributed a draft evaluation of the translocation program to interested parties for their comment. The draft document included the recommendation that we declare the translocation program a failure because fewer than 25 sea otters remained in the translocation zone, and reasons for the translocated sea otters' emigration or mortality could not be identified or remedied. We received comments from State and Federal agencies and the public following release of the draft for review. Some comments supported declaring the translocation program a failure, while others opposed it. The majority of respondents cited new information that became available after publication of our 1987 EIS and record of decision for the program. Many respondents encouraged us to look at new alternatives that were not identified in our 1987 EIS or corresponding implementing regulations.

During the same period, we prepared a draft biological opinion, pursuant to section 7 of the ESA, evaluating the containment aspects of the southern sea otter translocation program. We distributed the draft to interested parties for comment on March 19, 1999, and issued a final biological opinion on July 19, 2000. Our reinitiation of consultation was prompted by the receipt of substantial new information on the population status, behavior, and ecology of the southern sea otter that revealed adverse effects of containment that were not previously considered. In the biological opinion, we cited the following information and circumstances as prompting reinitiation:

(1) In 1998 and 1999, southern sea otters moved into the management zone in much greater numbers than in previous years;

(2) Analysis of carcasses indicated that southern sea otters were being exposed to environmental contaminants and diseases that could be affecting the health of the population throughout California;

(3) Rangewide counts of southern sea otters indicated that numbers were declining;

(4) Recent information, in particular the observed effects of the Exxon Valdez oil spill, indicated that southern sea otters at San Nicolas Island would not be isolated from the potential effects of a single large oil spill; and

(5) The capture and release of large groups of southern sea otters could result in substantial adverse effects on the parent population.

The biological opinion concluded with our assessment that continuation of the containment program would likely jeopardize the continued existence of the species on the grounds that: (1) Reversal of the southern sea otter's population decline is essential to the survival and recovery of the species, whereas continuation of containment could cause the direct deaths of individuals and disrupt social behavior in the parent range, thereby exacerbating population declines; and (2) expansion of the southern sea otter's distribution is essential to the survival and recovery of the species, whereas continuation of the containment program would artificially restrict the range to the area north of Point Conception, thereby increasing the vulnerability of the species to oil spills, disease, and stochastic events.

On July 27, 2000, we published in the **Federal Register** a notice of intent to prepare a supplement to our 1987 EIS on the southern sea otter translocation program (65 FR 46172), and on January 22, 2001, we issued a policy statement regarding the capture and removal of southern sea otters in the designated management zone (66 FR 6649). Based on our July 2000 biological opinion, we determined that the containment of southern sea otters was not consistent with the requirement of the ESA to avoid jeopardy to the species. The notice advised the public that we would not capture and remove southern sea otters from the management zone pending completion of our reevaluation of the southern sea otter translocation program, which would include the preparation of a supplement to our 1987 EIS and release of a final evaluation of the translocation program that contains an analysis of failure criteria.

Public scoping meetings were announced in the July 27, 2000, issue of the **Federal Register** (65 FR 46172) and were held in Santa Barbara, California, on August 15, 2000, and in Monterey, California, on August 17, 2000. We also convened the technical consultants to the Southern Sea Otter Recovery Team on September 26, 2000, to discuss scoping of the supplement. In April 2001, we published a scoping report that identified alternatives we would consider in the supplement and summarized comments received during the scoping period.

On April 3, 2003, we made available our Final Revised Recovery Plan for the Southern Sea Otter (68 FR 16305; USFWS 2003, *http://www.fws.gov/ventura/*). This document updated the original recovery plan published in 1982. The revised recovery plan incorporated significant revisions, including a shift in focus from translocation as a primary recovery action to efforts to reduce the mortality of prime-aged animals. Based on the recommendations of the recovery team, the revised recovery plan concluded that additional translocations were not the best way to accomplish the objective of increasing the range and number of southern sea otters in California. According to the revised plan, range expansion of sea otters in California would occur more rapidly if the existing population were allowed to recover autonomously than it would under a recovery program that included actively translocating sea otters. The revised plan also recommended that it would be in the best interest of southern sea otter recovery to declare the translocation program a failure, to discontinue maintenance of an otter-free zone, and to allow the sea otters currently at San Nicolas Island to remain there.

On October 7, 2005, we made available a draft supplemental environmental impact statement (draft SEIS) on the translocation program (70 FR 58737). A draft evaluation of the translocation program was included as Appendix C. We solicited comments on both the draft SEIS and the draft evaluation during the public comment period, which began October 7, 2005 (70

FR 58737), and ended March 6, 2006 (70 FR 77380; December 30, 2005). Comments we received during the 5-month comment period, including those addressing the translocation program evaluation, are summarized in Appendix G to the revised draft SEIS.

On August 26, 2011, we made available a revised draft SEIS on the translocation program, a proposed rulemaking, and an accompanying initial regulatory flexibility analysis (76 FR 53381). A revised draft evaluation of the translocation program was again included as Appendix C. We solicited comments on the revised draft SEIS, revised draft evaluation of the translocation program, proposed rulemaking, and initial regulatory flexibility analysis during the 60-day public comment period, which began August 26, 2011 and ended October 24, 2011 (76 FR 53381). We reopened the comment period on November 4, 2011 for an additional 18 days, until November 21, 2011 (76 FR 68393). On November 9, 2012, we made available a final SEIS (77 FR 67302; 77 FR 67362). Comments we received during the comment period, including those addressing the revised draft evaluation of the translocation program, are summarized in Appendix G to the final SEIS.

Approximately 50 independent southern sea otters currently exist at San Nicolas Island. Dependent pups are frequently observed with these animals. Data from quarterly counts indicate that the population has fluctuated between 13 and 51 independent animals since July 1990. One sea otter pup was born at San Nicolas Island during the first year of the translocation program (1987–88), and new pups have been observed in each subsequent year. At least 174 pups are known to have been born at the island since the program's inception.

At present, all of the southern sea otters at San Nicolas Island are believed to be offspring of those originally translocated to the island. This is because the original animals were translocated 25 years ago, and the average life expectancy of southern sea otters in the wild is 10 to 15 years. Although it is possible that sea otters could disperse from the mainland range to San Nicolas Island, we have no information to indicate that any exchange of animals between these two locations has occurred subsequent to the return of many of the translocated sea otters to the mainland range in the early years of the program. To date, we have gathered a significant amount of data to assess capture, transport, reintroduction, and containment techniques. However, the goal of implementing a primary recovery action for the southern sea otter remains unfulfilled. The original intention, to create a colony that would provide a safeguard in the event that the parent southern sea otter population was adversely affected by a catastrophic event, such as an oil spill, has not been accomplished.

We have selected the preferred alternative in the final SEIS, which is to terminate the southern sea otter translocation program and, further, to allow southern sea otters in the former translocation and management zones to remain there upon termination of the program. The preferred alternative reflects the recommendations of the revised recovery plan for the southern sea otter (USFWS 2003). This final rulemaking and record of decision documents our selection of the preferred alternative, Alternative 3C, and implements it. Allowing sea otters to remain at San Nicolas Island and in the management zone upon termination of the translocation program is contrary to 50 CFR 17.84(d)(8)(vi)), which required removal of sea otters from both locations if the translocation program were to be terminated. This rulemaking terminates the southern sea otter translocation program through removal of the regulations at 50 CFR 17.84(d) that established and governed implementation of the translocation program. Among the regulatory requirements that are eliminated by the removal of 50 CFR 17.84(d), in its entirety, is the previous requirement to remove sea otters from San Nicolas Island and from the management zone if the translocation program were terminated.

Termination of the translocation program through this rulemaking is not anticipated to affect defense-related agency actions that are currently carried out within the translocation zone around San Nicolas Island. The provisions of the MMPA have remained applicable under Public Law 99–625 to defense-related activities in that zone, and despite the low threshold for MMPA authorization of military activities (*i.e.,* disturb or is likely to disturb a marine mammal or injure or has the significant potential to injure a marine mammal), the Navy has not required MMPA authorization for any of its activities there to date. Therefore, defense-related activities of the type currently carried out at San Nicolas are unlikely to need authorization under the generally higher thresholds of the Endangered Species Act.

*Summary of Comments and Recommendations*

In the August 26, 2011, proposed rulemaking and notice of availability, we requested comments concerning any aspect of the proposal and the accompanying revised draft SEIS (including the revised draft evaluation of the translocation program) and initial regulatory flexibility analysis (76 FR 53381). We provided a 60-day comment period, which closed on October 24, 2011 (76 FR 53381). In response to a request from the California Sea Urchin Commission, we reopened the comment period on November 4, 2011 for an additional 18 days, until November 21, 2011 (76 FR 68393; November 4, 2011).

We sent notifications about the proposal and supporting documents to Federal and State agencies, Congressional representatives, conservation groups, industry organizations, other entities, and numerous private citizens who may be affected or had expressed an interest in the proposal. We issued a news release on August 26, 2011, and published newspaper advertisements announcing public hearings in the Ventura County Star, Santa Barbara News Press, and Santa Cruz Sentinel. We held public informational open houses and public hearings in Ventura (September 27, 2011), Santa Barbara (October 4, 2011), and Santa Cruz, California (October 6, 2011). Approximately 190 people attended the public hearings, and 68 provided testimony. During the two comment periods, which totaled 78 days, we received 6,843 comment letters, postcards, and emails. Among the comment letters were 5 petitions with 12,514 signatories.

Most of the comments (approximately 99 percent) expressed support for termination of the translocation program generally or for the proposed action specifically. We received numerous substantive comments on the revised draft SEIS and revised draft evaluation of the translocation program that were also pertinent to the proposed rulemaking. We developed the following summary of comments to address the major issues raised during the comment period that are pertinent to the proposed rulemaking. Some of the comments are relevant to the revised draft SEIS or revised draft evaluation of the translocation program as well. We refer readers to Appendix G of the final SEIS for responses to all comments submitted during the comment period.

Positions on Proposed Action

*Comment:* Approximately 750 commenters and 12,500 signatories to

petitions expressed support for the proposed action (Alternative 3C) for one or more of the following reasons: Range expansion is important for sea otter recovery; sea otters are a native, keystone species in kelp forest habitats; the presence of sea otters would enhance biodiversity in southern California waters; the presence of sea otters would enhance the economy by producing benefits for tourism and industries that depend on ocean health; sea otters have an intrinsic right to recolonize and make use of their historic habitat, the nearshore marine environment, without human-imposed restrictions.

*Our Response:* Thank you for your comments. They have been noted and will be included in the administrative record for this action.

*Comment:* Approximately 6,000 commenters did not specifically identify an alternative but expressed support for terminating the translocation program and ending the ''no-otter'' zone for one or more of the following reasons: Range expansion is important for sea otter recovery; sea otters are a native, keystone species in kelp forest habitats; the presence of sea otters would enhance biodiversity in southern California waters; the presence of sea otters would enhance the economy by producing benefits for tourism and industries that depend on ocean health; sea otters have an intrinsic right to recolonize and make use of their historic habitat, the nearshore marine environment, without human-imposed restrictions.

*Our Response:* Thank you for your comments. They have been noted and will be included in the administrative record for this action.

*Comment:* Implementing the No Action Alternative is the best way to allow sea otters to expand their range into southern California while still maintaining the incidental take exemptions provided in Public Law 99–625 for the fisheries.

*Our Response:* The No Action Alternative is not a viable alternative. While the environmental consequences of the No Action Alternative are the same as baseline environmental conditions and as such form an integral part of our analysis, the legal regime reflected in the No Action Alternative (continuation of the translocation program without containment) is not a reasonable path forward. In the revised draft SEIS and final SEIS, we considered the following additional alternatives: resume implementation of the translocation program (Alternative 1), modify it (Alternative 2), or terminate it (Alternatives 3A–3C). In 2001, we published a Notice of Policy (66 FR 6649; January 22, 2001) notifying the public that we would not implement the containment component of the translocation program pending completion of a supplemental environmental impact statement and a final evaluation of the program. In the notice, we acknowledged the conclusion of our 2000 biological opinion that capture and removal (containment) of southern sea otters from the management zone—a key component of the translocation program—would likely jeopardize the continued existence and impede the recovery of the species. In light of our inability to implement the translocation program as designed and intended, we committed to a full and final evaluation of the program. We have also faced litigation over the translocation program twice during the past 12 years: First, for failing to implement the containment component of the translocation program, and second, for failing to complete our evaluation of whether the translocation program has failed. In resolution of the second lawsuit, we committed to evaluating whether the translocation program has failed under 50 CFR 17.84(d)(8), and if we determined the program has failed, to promulgate a final rulemaking to terminate the program. Continuing to maintain the status quo, which is reflected in the No Action Alternative, when we cannot implement the translocation program as intended by Congress in Public Law 99–625 and have concluded in our evaluation of the translocation program that the program has failed and does not further recovery of the southern sea otter, is not reasonable, and cannot be justified on the basis that it would maintain current incidental take exemptions for fisheries. We prepared a final SEIS and completed a final evaluation of the translocation program. This rulemaking reflects our decision to implement the proposed action (Alternative 3C).

Fisheries

*Comment:* Closing additional areas outside 3 miles along the coastline between Santa Barbara and Port Hueneme, Santa Barbara and Ventura Counties, to gill and trammel net fishing, will devastate the halibut and white seabass fisheries. Sea otters have not been observed in this area, and two seasons of observation by NMFS observers did not document any interactions.

*Our Response:* The Service does not have management authority for gill and trammel net fisheries, and this rulemaking does not include a proposal to close any area to fishing. We do not advocate closures in areas where sea otters do not occur. We are aware that sea otters are currently very rare in the area we have analyzed as being potentially subject to fishery closures, although individual sea otters likely occasionally transit it. As a result, it is expected that at present the potential for interactions between sea otters and gill and trammel net gear is extremely low. However, if the southern sea otter range expands as expected, the potential for interactions will likely increase in the future.

*Comment:* The Service should monitor the actual migration of sea otters and adjust regulations as needed to protect local fisheries from premature and unwarranted closure. The Service should also treat the drift-net and set-net fisheries differently because drift gear is deployed overnight, and few or no sea otters have been observed swimming or foraging 3 to 5 miles offshore at night.

*Our Response:* The Service does not have management authority for gill and trammel net fisheries, and this rulemaking does not include a proposal to close any area to fishing. We do not advocate closures in areas where sea otters do not occur. The shore-based method of radio-tracking sea otters (which generally requires both the ability to receive a radio signal and visibility) has limited both night-time and far-offshore observations of sea otters. However, time-depth recorders, which are not subject to a shore-bias and do not require visibility, indicate that sea otters frequently forage and travel at night. Therefore we do not concur that the drift-net and set-net fisheries pose widely different risks to sea otters.

*Comment:* The Service has grossly underestimated the value of the white seabass fishery by using a 10-year average ex-vessel price rather than current market values.

*Our Response:* In order to allow for the comparison of different alternatives across many different impact topics, it is necessary to maintain a consistent methodology. In our analysis of impacts, we use a 10-year average to establish the baseline for commercial fisheries landings and ex-vessel revenues. The ex-vessel value of all fisheries tends to fluctuate according to demand and available supply. For some fisheries, the ex-vessel price will be higher at the end of this period, whereas for others, the price will be highest during the middle or at the beginning of this period. We use a 10-year average to dampen these fluctuations and standardize ex-vessel values for inflation to 2009 dollars.

*Comment:* It appears that the Service has already decided what its recommendation to CDFG will be regarding potential gill and trammel net closures and that comments submitted during the comment period will not be considered.

*Our Response:* The Service does not have management authority for gill and trammel net fisheries, and this rulemaking does not include a proposal to close any area to fishing. We do not advocate closures in areas where sea otters do not occur. Our analysis of effects on these fisheries presents a low estimate (no additional closure) and a high estimate (immediate closure of the area to 104 meters (m) (341 feet (ft)). Our intention is not to advocate for such a closure but to disclose the maximum potential effect on these fisheries, while also acknowledging that this effect might not occur at all.

*Comment:* The multiplied retail value of halibut and white seabass is 100 to 200 percent higher to the consumer than the ex-vessel price. These multiplied retail values should be presented in addition to ex-vessel values.

*Our Response:* A detailed economic analysis for this rulemaking and associated alternatives is included in a final SEIS, available at *http://www.fws.gov/ventura/species_information/so_sea_otter/index.html.* We include an estimate of the regional economic impacts in the analysis of effects on commercial fisheries under each alternative in that document. Because our primary intent in this rulemaking is to characterize effects on particular industries and not on the regional economy as a whole, we do not present multiplied effects here.

*Comment:* The Service should offer mitigation for the financial hardship that will result from gill and trammel net closures associated with the proposed action.

*Our Response:* The Service does not have management authority for gill and trammel net fisheries, and this rulemaking does not include a proposal to close any area to fishing. We do not advocate closures in areas where sea otters do not occur. Nevertheless, we recognize that additional gill and trammel net closures imposed by the State or NMFS are a potential indirect consequence of the change in regulatory status of sea otters under this rulemaking. We remain committed to working cooperatively with these management agencies to ameliorate any economic effects as they deem appropriate and feasible.

*Comment:* Impacts to the shellfish industry are overstated. While we appreciate the Service's desire to err on the side of caution by overestimating, rather than underestimating, impacts on fisheries, we are concerned that the agency's approach is fueling misconceptions that the otters' return to southern California will result in the end not only of shellfish fisheries, but of fisheries in general.

*Our Response:* Our assumption that under a scenario involving natural range expansion, sea otters will eliminate fisheries for sea urchins, lobsters, crabs, and sea cucumbers is based in part on data on proportional prey consumption by sea otters in southern California and in part on past interactions between sea otters and shellfish fisheries along the central coast (Estes and VanBlaricom 1985). Based on recent observations of proportional prey consumption by sea otters at San Nicolas Island (Bentall 2005), it is probable that sea urchin fisheries will be more heavily impacted than crab or lobster fisheries. However, because we lack data on absolute abundance of the prey species in question and the level at which fisheries for lobsters, crabs, and sea cucumbers would become inviable, we conservatively assume that these fisheries cannot coexist with sea otters once an area of range has been fully reclaimed. Although effects may be overestimated, they represent a reasonable upper bound and are sufficient to inform our decisionmaking. We note that these effects occur equally under the baseline and under this rulemaking.

*Comment:* The Service misdefines the baseline in a manner that overestimates landings and does not account for reduced catches in many fisheries in recent years. The Service should revise its estimates to provide an accurate baseline that reflects the current state of fishing landings and revenue.

*Our Response:* Cyclic variations in populations, adverse weather, market demand, and other factors influence catch from one year to the next. We use a 10-year average to account for such fluctuations in estimating the baseline ex-vessel value of fisheries. While we recognize that using a 10-year average to determine a baseline for effects on landings under the various alternatives will overestimate these effects if a fishery is in decline, we consider this approach to be more reasonable than basing 10-year projections on only 1 or 2 years of data.

Incidental Take

*Comment:* If the only acceptable number of sea otter 'takes' is zero, the Service should be addressing other, non-fishery, impacts, such as propeller strikes.

*Our Response:* Termination of the southern sea otter translocation program entails the removal of all associated regulatory provisions, such as the exemption from the incidental take prohibitions of the ESA and the MMPA for activities within the management zone. Allowable incidental take of sea otters in southern California commercial fisheries will thus be zero, as it is throughout the remainder of the southern sea otter's range, because such take cannot be authorized under section 118 of the MMPA. Boat strikes remain a low but persistent source of sea otter mortality. Many such strikes appear to occur as boats exit harbors. We continue to work with enforcement authorities to ensure compliance with speed limits in and near harbors.

*Comment:* The Service should work with fishermen to provide incidental catch authorization for sea otters, as is available for other marine mammals.

*Our Response:* Section 118 of the MMPA, which governs the incidental taking of marine mammals in the course of commercial fishing operations, does not apply to southern sea otters. Section 118 of the MMPA would need to be amended before the incidental taking of southern sea otters in commercial fisheries could be authorized.

*Comment:* The Service does not adequately present the importance of the U.S. Navy (Navy) agreeing to have sea otters translocated to San Nicolas provided the Navy was given exemption from ESA and MMPA requirements.

*Our Response:* We acknowledge that the Navy agreed to allow sea otters to be translocated to San Nicolas Island provided it was given an exemption from ESA and MMPA requirements for southern sea otters. However, we note that the MMPA exemption applies only to the management zone, not the translocation zone. Our observations of the colony to date suggest that the presence of southern sea otters at San Nicolas Island is compatible with naval operations. We appreciate the Navy's cooperation in establishing and implementing the translocation program and the Navy's continuing contribution to southern sea otter recovery efforts.

Expansion and Health of the Southern Sea Otter Population

*Comment:* The proposed action does not address the real problem for southern sea otter recovery: disease resulting from degraded water quality.

*Our Response:* Addressing disease is one component of the overall recovery strategy for southern sea otters. That strategy is outlined in the Final Revised Recovery Plan for the Southern Sea Otter (USFWS 2003). The translocation

program was not intended or designed to address every action necessary to recover the southern sea otter. The objectives of southern sea otter translocation, as stated in the 1982 recovery plan, included: (1) Establishing a second colony (or colonies) sufficiently distant from the parent population such that a smaller portion of the southern sea otter range would be affected in the event of a large-scale oil spill; and (2) establishing a database for identifying the optimal sustainable population level for the southern sea otter. Our translocation program evaluation concludes that the translocation program has failed under one of the specific failure criteria set forth in 50 CFR 17.84(d)(8) and has also failed to achieve its overall recovery objectives. Maintaining an otter-free zone as provided in the translocation plan would prevent the natural range expansion of southern sea otters; that is, it would preclude the natural repopulation of southern California waters by southern sea otters and is detrimental to southern sea otter recovery. Additionally, it would make it difficult, if not impossible, to reach the Optimum Sustainable Population level for sea otters in California under the MMPA.

We recognize the importance of addressing disease in southern sea otters, but that issue is beyond the scope and specific objectives of the translocation program and is not relevant to our determination that the translocation has failed to achieve its primary recovery goal of producing a second, self-sustaining population of sea otters that could produce sufficient numbers of sea otters to repopulate the mainland range in the event of catastrophic mortality and has failed under the specific regulatory criteria established to evaluate the program. Further, the commenter is incorrect in assuming that solely addressing water quality issues is sufficient to bring about the recovery and delisting of the southern sea otter. The occurrence of infectious disease in sea otters resulting from land-borne pathogens appears to be related synergistically to exposure to harmful algal blooms and to nutritional stress (food limitation). These factors often interact in complex ways that we are just beginning to understand. For example, lower per-capita food availability leads to poorer body condition and greater reliance on suboptimal prey, which increases exposure and susceptibility to novel disease-causing pathogens, which may be further exacerbated by chronic domoic acid exposure) (Tinker, pers. comm. 2012). We are continuing to support research to understand these complex processes in order to identify management actions that target areas with the maximum growth potential for sea otters and thus the maximum effect on recovery.

While a reasonable range of alternatives associated with the translocation program was analyzed in our final SEIS, this rulemaking does not in any way preclude continued efforts to understand and address disease in sea otters. In fact, because food limitation increases exposure and susceptibility to disease, the natural movement of sea otters into areas with higher prey abundance, such as will continue to occur under the current action, will likely result in a lower incidence of disease in those sea otters.

*Comment:* The Service should address the problem of *Toxoplasma gondii* from cat feces.

*Our Response:* The pathways by which sea otters are becoming exposed to *Toxoplasma gondii* are more complex than were at first recognized. Until recently, it was believed that cats (both domesticated and wild) were the only definitive host for this protozoal parasite. However, the widespread exposure of other marine mammals to *T. gondii,* including those whose habitat is mostly pelagic and distant from human population centers, as well as recent laboratory analyses, have suggested that there may be a definitive host in the marine environment (for example, Jensen *et al.* 2010). If sea otters are being exposed by this route, then efforts to control cat feces will have no effect on *T. gondii* exposure in sea otters. The relative contribution of parasites from wild felids versus domestic or feral cats is also an outstanding question (one that is currently under investigation, for example, Miller *et al.* 2008); efforts to control domestic cat feces will have no effect on sea otter exposure to *T. gondii* parasites from wild felids. Finally, recent research indicates that *T. gondii* is only one of a number of closely related protozoan parasites that infect sea otters (*Sarcocystus neurona* is another), and genetic work has revealed that in many cases sea otters and other marine mammals actually have co-infections of multiple parasite species (for example, Gibson *et al.* 2011, Colegrove *et al.* 2011). A better understanding of the sources of the various parasite genotypes, the routes by which they are entering marine food webs, and the degree to which they have significant health impacts on sea otters is needed before specific management actions can be recommended. We are continuing to support research to understand the pathways by which sea otters are being exposed to *Toxoplasma gondii* and other parasites and the effects of these parasites on recovery.

*Comment:* The issues regarding the sea otter translocation program are not about striking a balance between economics and environmentalism, but about doing what is right. Hijacking a program intended to nurse the sea otter population back to healthy abundance in order to preserve declining industries, at the expense of those very populations, is not right.

*Our Response:* Thank you for your comment. It has been noted and will be included in the administrative record for this action.

*Comment:* The southern sea otter population needs to expand into southern California beyond Point Conception if this species is ever to recover its original range. Sea otters are also an important functional element of the coastal marine ecosystem in that region (Estes *et al.,* 2011). Preventing their recovery by any means would be contrary to the conservation and management goals of the Service under the both the ESA and the MMPA.

*Our Response:* We agree. This rulemaking allows for the continued natural range expansion of sea otters into their historic range in southern California waters. Our decision reflects the recommendation made in the revised recovery plan, which advises against additional translocations and instead advocates allowing natural range expansion (USFWS 2003).

*Comment:* A recent population viability analysis (PVA) conducted by Dr. Daniel Doak demonstrates that increases in the southern sea otter population and the probability of meeting the Service's recovery goals for the species substantially differ depending on whether zonal management is terminated and sea otters are allowed to remain at San Nicolas Island. The likelihood of recovery, resulting in the delisting of the southern sea otter, and even the likelihood of uplisting the otter to endangered status will be significantly influenced depending on whether the management zone is maintained or abandoned. Termination of zonal management and removal of the exclusion zone will result in a 14 percent increase in the probability of the southern sea otter meeting the recovery criteria at the end of the 10-year period adopted by the Service. This outcome translates into a greater than 55 percent proportional reduction in risk if zonal management is terminated. Lesser differentials in the probability of recovery have been considered

unacceptable for other listed species. These results support the conclusion that continuing the containment program would hinder recovery and violate the conservation mandate. Clearly, the Service cannot meet its affirmative duty to achieve recovery when it is carrying out an action that makes species conservation and delisting significantly less likely. The Service's conclusions, supported by this most recent analysis, make clear that continuation of the containment program would violate the Service's section 7(a)(1) obligations. The program must be declared a failure and ended.

In addition, when the PVA takes into account the well-documented but poorly understood periodic dips in the southern sea otter population, it shows that maintenance of the containment zone does result in 4.4 to 5.6 percent risk of the southern sea otter population dipping below the threshold for uplisting it to endangered status under the ESA. While these risks are not significant in and of themselves, they do highlight the nontrivial risk that uplisting could take place, despite current growth trends.

Finally, as Doak demonstrates, the number of otters that would have to be captured and moved to maintain the management zone program is very large, resulting in unacceptably high sea otter mortality and requiring the Service to spend significant funds to enforce the ''no-otter zone.'' An average of at least 45 otters would have to be pursued, captured, and translocated each year, in perpetuity. Over the next 10 years, a total of 393 otters would have to be removed from the management zone. Using the Service's expected mortality rate of 17 percent, an expected 66–67 otters would die as a direct result of the containment program.

*Our Response:* We have incorporated the results of the referenced population viability analysis (Doak 2011) into our analysis.

Retention of the Sea Otter Colony at San Nicolas Island

*Comment:* If the Service declares the translocation program a failure, it should remove sea otters from San Nicolas Island. Leaving them there is counter to all of the discussions, commitments, and intentions expressed during development of the original plan and rule.

*Our Response:* The commenter recommends that the Service remove the small but healthy population of southern sea otters from San Nicolas Island if we terminate the translocation program because that is the commitment we made when the program was initiated 25 years ago. Our decision to declare the program a failure but to retain sea otters at San Nicolas Island is based in part on the recognition, gained from our experience implementing the translocation program, that if sea otters were removed from the island, some would return, some would die, and the introduction of these sea otters into the mainland population would likely further stress that food-limited population. During public hearings, one fisherman reported that he and other fishermen had discussed the issue and recognized that if the San Nicolas Island population were removed, some sea otters would likely return immediately to San Nicolas Island (just as many returned immediately to the mainland range after being translocated to San Nicolas Island) and stated that although they believed the program should not be declared a failure, they did not want sea otters to be removed from San Nicolas Island if the program were declared a failure. We conclude that removal of southern sea otters from San Nicolas Island, if it were determined to be allowable under the ESA, would not further the species' survival or its recovery. It is for this reason that we proposed terminating the translocation program, including removing the existing regulatory requirement to remove sea otters from San Nicolas Island, and requested public review and comment on this issue.

*Comment:* The small population at San Nicolas Island should not be captured and translocated elsewhere. We are particularly concerned that the relocation of sea otters from San Nicolas Island back to the mainland could result in increased risk of mortality due in part to the stress associated with capture, handling, and time out of water, and in part to the general lack of familiarity of the animals with their new environments. Previous translocation efforts have shown that such stress and mortality are both significant and inevitable. Further, competition with the resident sea otter populations in the central part of the California coast would be detrimental to both populations competing for limited food resources.

*Our Response:* We agree. Our decision to declare the program a failure but to retain sea otters at San Nicolas Island is based in part on the recognition that if sea otters were removed from the island, some would return, some would die, and the introduction of these sea otters into the mainland population would likely further stress that food-limited population.

*Comment:* Since the zonal management system was first implemented, substantial new information on the population status, behavior, and ecology of the southern sea otter has revealed that effects of containment that were not previously considered have continued to develop and placed a renewed importance on retention of the San Nicolas Island population. Recent studies have demonstrated that moving sea otters from San Nicolas Island and the ''otter-free'' zone into the central part of the range would have potentially deleterious effects on social structure and could greatly exacerbate problems involving competition in a very food-limited area. Removal of southern sea otters from San Nicolas Island will result in the direct deaths of individuals (presumably at the same 17 percent rate specified in the 2000 biological opinion) and the disruption of social behavior in the parent population, in that those affected individuals will have reduced potential for survival and reproduction. In order to avoid these negative consequences and meet the requirements of ESA Section 7(a)(2), southern sea otters should be left at San Nicolas Island according to Alternative 3C.

*Our Response:* Relocating sea otters from the management zone and San Nicolas Island to the northern or central portion of the existing range would increase competition among sea otters, especially in areas of the central coast now thought to be food-limited (see Tinker *et al.* 2008), disrupt natural behaviors, and likely result in the deaths of otherwise healthy animals. The incidental injury or death of sea otters removed from San Nicolas Island or the management zone would likely be unavoidable. The relocation of sea otters results in increased risk of mortality due in part to the stress associated with capture, handling, and time out of water, and in part to the general lack of familiarity of the animals with their new environments (Estes *et al.,* n.d.). Sea otters that have learned to forage in prey-rich environments (such as San Nicolas Island) may experience additional stress or even starvation resulting from their inability to find adequate food in prey-limited areas of the mainland range. For males, there may be an added risk of death or injury from encountering territorial males in unfamiliar habitats (Estes *et al.,* n.d.). Some sea otters would likely attempt to return to their location of capture, depleting their energy reserves and increasing their risk of mortality. Overall, relocating sea otters from San Nicolas Island or the management zone to the mainland range would be

disruptive, harmful, or possibly lethal, both to the relocated animals and to those in the receiving population. The effects of removing the population of southern sea otters from San Nicolas Island and relocating them into the parent population would be similar to those analyzed in the 2000 biological opinion that resulted in our jeopardy determination. Prior to making a decision to remove otters from San Nicolas Island, we would have to complete a formal internal Section 7 consultation under the ESA and determine that such relocation would not result in jeopardy to southern sea otters.

Impacts on Other Species and the Ecosystem

*Comment:* The Service admits that ''sea otter range expansion along the central California coast is known to have reduced abalone population levels and size distributions'' but concludes there is no conflict between the preferred alternative and white abalone survival and recovery. Introducing an apex predator into abalone habitat will have significant, if not fatal, consequences for the future of this endangered species.

*Our Response:* Potential future effects on white abalone of this action are identical to baseline conditions. Currently, southern sea otters are present at San Nicolas Island and are naturally recolonizing their historic range in the management zone. Under this action, those conditions will continue. The National Oceanic and Atmospheric Administration (NOAA), the federal agency with ESA jurisdiction over the endangered white abalone, has stated that it ''supports USFWS' efforts to recover southern sea otters throughout their range,'' and NMFS, which NOAA oversees, has stated that it ''does not support the alternatives that involve some level of sea otter removal from the management and/or translocation zones'' (NOAA 2011).

The effect of this action is not to ''introduce'' an apex predator into abalone habitat as the commenter suggests. Rather, it would continue baseline conditions of natural sea otter range expansion. Sea otters are naturally recolonizing their historic range, which formerly encompassed the entire range of white abalone until sea otters were hunted to near extinction during the 18th and 19th centuries. Sea otters and white abalone coevolved. We note that white abalone were federally listed as endangered not because of sea otter predation but because of dramatic declines in abundance due primarily to overharvesting for human consumption (66 FR 29046; May 29, 2001). Sea otters have been absent from nearly all of the range of white abalone since approximately 1850 (Scammon 1968). Therefore, very little is known about the specific ecology of sea otter–white abalone interactions. According to one researcher with specific expertise with white abalone, ''sea otters and abalone have coexisted historically. Many abalone traits are probably the result of selection by sea otters. To that end, sea otters will probably deplete abalone abundance, but not extirpate them. [* * *] [W]hite abalone have a depth refuge from otters'' (Lafferty, pers. comm. 2012).

Nevertheless, we acknowledge that populations that have been reduced to very low densities are subject to risks that healthy populations are not and that sea otters may consume white abalone where their geographic and depth ranges overlap. We recognize our affirmative responsibilities under the ESA and fully support recovery efforts for endangered white abalone. To lessen the risk that natural range expansion of sea otters (which would occur both under baseline conditions and under alternatives that terminate the translocation program) could interfere with recovery efforts for white abalone, we are committed to working closely with NMFS, CDFG, and the White Abalone Recovery Team to share information that may affect recovery actions for this species. We are also pursuing a Memorandum of Understanding with NMFS to formalize our agencies' mutual commitment to cooperate in facilitating both southern sea otter and abalone recovery efforts.

*Comment:* The Service's preferred alternative threatens both the survival and the recovery of black abalone. Although the Service admits that black abalone ''have nearly been extirpated in southern California waters,'' the Service apparently sees no problem with introducing a voracious apex predator into an already precarious circumstance for black abalone.

*Our Response:* Potential future effects on black abalone of this action are identical to baseline conditions. We conducted an internal biological evaluation of the proposed rulemaking on the black abalone under Section 7(a)(2) of the Act and concluded that the proposed rulemaking would have no effect on the species or black abalone critical habitat. Currently, southern sea otters are present at San Nicolas Island and are naturally recolonizing their historic range in the management zone. Under this action, those conditions will continue. NOAA, the federal agency with ESA jurisdiction over the endangered black abalone, has stated that it ''supports USFWS' efforts to recover southern sea otters throughout their range,'' and NMFS has stated that it ''does not support the alternatives that involve some level of sea otter removal from the management and/or translocation zones'' (NOAA 2011).

The effect of this action is not to ''introduce'' an apex predator into abalone habitat as the commenter suggests. Rather, it would continue baseline conditions of natural sea otter range expansion. Sea otters are naturally recolonizing their historic range, which formerly overlapped with much of the range of black abalone until sea otters were hunted to near extinction during the 18th and 19th centuries. Sea otters and black abalone coevolved. The extirpation of southern sea otters from most of their former range is considered to have been responsible for the large aggregations of black abalone evident in California and Mexico during the nineteenth and twentieth centuries (Haaker *et al.* 2001). We note that black abalone were federally listed as endangered not because of sea otter predation but because of dramatic declines in abundance due to disease and overfishing (74 FR 1937; January 14, 2009, Van Blaricom *et al.* 2009).

Nevertheless, we acknowledge that the severe reduction of black abalone populations as a result of human overexploitation and disease has rendered them more vulnerable to all sources of mortality, including natural sources such as predation by marine organisms. The final status review for black abalone ranks the severity of the overall threat level posed by sea otter predation as ''medium'' (see Table 6, Van Blaricom *et al.* 2009). It notes that although sea otters are known to prey on black abalone, the quantitative ecological strength of the interaction is poorly understood (Van Blaricom *et al.* 2009). In its responses to comments in the final critical habitat designation for black abalone, NMFS states, ''the best available data do not support the idea that sea otter predation was a major factor in the decline of black abalone populations or that it will inhibit the recovery of the species'' (76 FR 66806; October 27, 2011).

We recognize our affirmative responsibilities under the ESA and fully support recovery efforts for endangered black abalone. To lessen the risk that natural range expansion of sea otters (which would occur both under baseline conditions and under this action) could interfere with recovery efforts for black abalone, we are committed to working closely with NMFS, CDFG, and the Black Abalone Recovery Team (once it

has been convened), to share information that may affect recovery actions for this species. We are also pursuing a Memorandum of Understanding with NMFS to formalize our agencies' mutual commitment to cooperate in facilitating both southern sea otter and abalone recovery efforts.

*Comment:* Section 7(a)(2) of the ESA requires that every Federal agency ''shall * * * insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined * * * to be critical.'' 16 U.S.C. 1536(a)(2). The Service simply cannot ensure that the preferred alternative will not jeopardize the continued existence of endangered abalone. Section 7(a)(1) of the ESA requires that the Secretary of the Interior review programs administered by the Interior Department and utilize such programs in furtherance of the purposes of the ESA. 16 U.S.C. 1536(a)(1). The failure to take action to protect the endangered white abalone and the endangered black abalone violates this mandatory duty. Further, allowing unlimited sea otter range expansion is an action that will result in a taking of endangered white and black abalone in violation of the prohibition set forth in § 9(a)(1)(B) of the ESA, 16 U.S.C. 1538(a)(1)(B). In sum, the Service is proposing a preferred alternative that likely violates the ESA at several levels. First, the agency action will allow unlimited sea otter range expansion, which will result in a prohibited taking of endangered abalones. Second, the Service has failed to implement its § 7(a)(1) responsibilities because it has failed to fully and adequately consider the impact of its actions on the survival and recovery of endangered abalone and to affirmatively take action to protect these abalone. Finally, the Service is proposing an action that will jeopardize the continued existence of endangered abalone in violation of § 7(a)(2).

*Our Response:* We have carefully considered the effects of this rulemaking on endangered white and black abalone and black abalone critical habitat. We note that the effects of this rulemaking are identical to baseline conditions. We conducted an internal biological evaluation of the proposed rulemaking on the endangered abalone species, designated critical habitat for black abalone, and the southern sea otter under Section 7(a)(2) of the Act and concluded that the proposed rulemaking would have no effect on the two abalone species or black abalone critical habitat and is not likely to adversely affect the southern sea otter. Thus, we have met our obligations under Section 7(a)(2). Currently, southern sea otters are present at San Nicolas Island and are naturally recolonizing their historic range in the management zone. Under the proposed action, those conditions will continue. NOAA has stated that it ''supports USFWS' efforts to recover southern sea otters throughout their range,'' and NMFS has stated that it ''does not support the alternatives that involve some level of sea otter removal from the management and/or translocation zones'' (NOAA 2011).

We recognize our affirmative responsibilities under the ESA and fully support recovery efforts for endangered white and black abalone. To lessen the risk that natural range expansion of sea otters (which would occur both under baseline conditions and under alternatives that terminate the translocation program) could interfere with recovery efforts for white or black abalone, we are committed to working closely with NMFS, CDFG, the White Abalone Recovery Team, and the Black Abalone Recovery Team (once it has been convened), to share information that may affect recovery actions for these species. We are also pursuing a Memorandum of Understanding with NMFS to formalize our agencies' mutual commitment to cooperate in facilitating both southern sea otter and abalone recovery efforts.

Resumption of the containment component of the translocation program could potentially benefit abalone by preventing the effects of sea otter predation predicted under future baseline conditions and Alternative 3C. However, we determined that resumption of containment would jeopardize the southern sea otter and violate Section 7 of the ESA (USFWS 2000). We based this conclusion, in part, on the recognition that reversal of southern sea otter population declines and expansion of the southern sea otter's range is essential to the survival and recovery of the species. In order to resume containment, we would have to reinitiate consultation under the ESA to consider any new information and conclude that continuation of the program would not jeopardize the southern sea otter. Resumption of sea otter containment could result in increased mortality of sea otters and disrupt behavior throughout the range of the species. Additionally, it would artificially restrict the southern sea otter's range, increasing its vulnerability to oil spills, disease, and stochastic events relative to the baseline. In combination, these effects would slow or prevent the recovery of the species.

We are not at liberty to jeopardize the southern sea otter in order to benefit listed abalone species. Given these circumstances and the ESA mandate that the Service and NMFS seek to recover threatened and endangered species, the best—and currently the only legal—approach available to us is to cooperate with NMFS to facilitate recovery actions that benefit both species and minimize adverse effects on both species. This approach is in furtherance of, and not violative of, our obligations under both sections 7(a)(1) and 7(a)(2) of the ESA. The commenter's assertion that the Service is ''taking'' abalone by failing to restrict sea otters from inhabiting their historic range reflects a misunderstanding of the ESA. Southern sea otters are naturally expanding into their former range. The Service could deter range expansion only by taking affirmative action to contain sea otters and return them to the parent range. The Service may not take such affirmative action because containment would jeopardize the continued existence of the southern sea otter (USFWS 2000). Thus, any effects that southern sea otter range expansion may have on abalone are a function of the natural migration and predation patterns of the sea otter and not the result of—or attributable to any—action on the part of the Service.

*Comment:* NMFS does not support the alternatives that involve some level of sea otter removal from the management and/or translocation zones, as this has proven to be biologically, economically, and/or logistically infeasible. However, NMFS is concerned about the potential conflict of the preferred alternative with the goals of recovering the federally listed abalone over the long term (beyond the 10-year timeframe). NMFS believes that the likelihood and intensity of the conflict can be mitigated by creating a working group composed of managers and scientists that have southern sea otter and abalone expertise. NMFS would like the Service to make a commitment to organizing a working group that is focused on minimizing impacts of the preferred alternative to potentially affected ESA species managed by NMFS.

*Our Response:* The Service supports recovery efforts for white and black abalone and is committed to working closely with NMFS to share information that may affect recovery actions for these species. Toward that goal, we are pursuing an MOU with NMFS. This action further meets our obligations under Section 7(a)(1) of the Act. We agree that convening a working group

composed of managers and scientists that have southern sea otter and abalone expertise would be beneficial for the recovery of white and black abalone, and we will work with NMFS to convene this group.

*Comment:* Several other species of shellfish (besides abalone) will also see their populations plummet, perhaps to endangered status, if the preferred alternative is adopted. The Service states that sea otters ''consume an amount of food equivalent to 23 to 33 percent of their body weight per day.'' Having admitted this fact, the Service never considers its implications for the future of California's shellfish. Those implications are made clear by examining what will happen to commercial fishermen if the preferred alternative is adopted. As scientists have noted, ''Unless the sea otter is eventually contained, the State's Pismo clam, sea urchin, abalone, certain crab, and possibly lobster fisheries will be precluded. Sea otters do not extirpate these shellfish stocks, they merely reduce the exposed biomass to densities well below those necessary for profitable commercial exploitation or satisfactory recreational use.''

*Our Response:* We acknowledge that sea otters are likely to decrease the densities of benthic invertebrates within the sea otters' dive depth range as they recolonize their historic habitat. However, the commenter does not offer any information to support the assertion that sea otters would cause shellfish populations to decline to ''endangered status'' and does not identify which species are the subject of this concern. The statement quoted by the commenter notes that although sea otters may reduce the noncryptic portion of certain shellfish populations to densities that cannot sustain profitable commercial fisheries, ''sea otters do not extirpate these shellfish stocks.'' We disagree with the commenter's assertion that we do not consider the implications of sea otter prey consumption on shellfish populations currently exploited by commercial fisheries in California. We considered the implications of sea otter range expansion (and the restriction of natural range expansion) on shellfish fisheries in detail in our analysis of the program.

*Comment:* NOAA's Office of National Marine Sanctuaries uses ecosystem-based management approaches to protect our Nation's most vital coastal and marine natural and cultural resources. We believe the proposed action (Alternative 3C) furthers an ecosystem-based management approach by allowing sea otters to recover naturally through expansion from central California into their historic range to the south. We support terminating the southern sea otter translocation program and are committed to research and monitoring with our Federal and State partners to assess changes to the marine ecosystem. We commend the Service in proposing to terminate the failed translocation program and in proposing a course of action that has the potential to reverse the decline in sea otter population numbers.

*Our Response:* Thank you for your comment. It has been noted and will be included in the administrative record for this action.

Failure Determination

*Comment:* The Service is basing its failure determination on Criterion 2. However, it is difficult to understand how the failure criteria have been met. There are now 50+ sea otters on the island, and the population has been growing at an average of 7 percent per year. The Service's determination that the translocation program has failed is a political construct. Given that the 1930s Big Sur population of 40–50 otters was the source of the 2,800 sea otters currently in the mainland range, it is obvious that the San Nicolas population could serve the same function if necessary after a large oil spill. As such, the translocation program is not a failure under the intent of Public Law 99–625.

*Our Response:* Public Law 99–625 did not address the prospect of the program's failure. The failure criteria were established at the inception of the translocation program based on the scientific judgment of the agency biologists who designed the program. These criteria are codified at 50 CFR 17.84(d) in the rule implementing the translocation program. The final translocation program evaluation assesses the program in relation to the objectives for which it was undertaken and the specific regulatory failure criteria at 50 CFR 17.84(d)(8). In that evaluation, we conclude that the translocation program has failed to fulfill its primary purpose as a recovery action and that, measured against the specific regulatory failure criteria governing the translocation program, the program has failed under Criterion 2.

Under Criterion 2, the count of southern sea otters at San Nicolas Island is based on the number present within 3 years from the initial transplant—not on the number present as of 2012, 25 years after the initial transplant. The initial high rate of dispersal of translocated sea otters from San Nicolas Island is the primary cause of failure under Criterion 2 not only because of its direct effect on the subsequent size of the San Nicolas Island colony, but also because of its implications for the recovery strategy at the heart of the program: The intended function of the San Nicolas Island population as a self-sustaining ''reserve colony for providing stock to restore subsequently damaged areas'' in the southern sea otter's range (52 FR 29754; August 11, 1987). The high rate of dispersal of translocated sea otters suggests it is unlikely that the colony will ever be large enough to supply the numbers of sea otters necessary to perform a successful translocation and reestablishment of the population in the mainland range if the parent population were reduced or eliminated by a catastrophic event. The translocation program has not achieved its primary recovery goal of producing a second, self-sustaining population of sea otters that could produce sufficient numbers of sea otters to repopulate the mainland range in the event of catastrophic mortality.

The fact that a remnant population of southern sea otters numbering approximately 50 animals in 1914 (Bryant 1915) grew over the course of nearly a century in essentially unrestricted habitat to the current mainland population size of 2,711 animals (in 2010) does not contradict our finding that the translocation program has failed. Rather, it emphasizes the precariousness of both the mainland population and the San Nicolas Island colony and the need for continued range expansion. It should be noted that, based in part on data gained while implementing the translocation program, the recovery strategy has fundamentally changed. The revised recovery plan recommends against additional translocations and instead advocates allowing natural range expansion (USFWS 2003).

*Comment:* Implementing regulations for the translocation program (52 FR 29754; August 11, 1987) state that the Service must conduct a full evaluation into the probable causes of failure prior to declaring the translocation a failure. If the causes can be determined and if legal, reasonable remedial measures can be identified and implemented, then consideration is to be given to continuing to maintain the translocated population. Evaluation of the program's failure has not been conducted in accordance with the regulations. There are several theories for sea otter mortality and fecundity that have not been considered in the analysis, and an investigation of alternative implementation methods that would maintain the translocated population

has not been adequately conducted. Finally, there has been no real consideration of maintaining portions of the program. If capturing and relocating otters has negative effects, consideration should be given to terminating only those portions of the program.

*Our Response:* We describe our efforts to determine and remedy the causes of failure in our translocation program evaluation. We have concluded that the translocation program has failed under Criterion 2. We conclude that emigration from San Nicolas Island is the primary reason that substantially fewer than 25 otters remained in the translocation zone within 3 years of the initial transplant. We do not agree that we have failed to give adequate consideration to remedial measures that would enable continuation of the translocation program. Although we modified the program significantly after the first year in an attempt to reduce emigration and otherwise reduce sea otter mortality associated with the program, we were unable to remedy the situation. Therefore, failure Criterion 2 has been met. The translocation program evaluation discusses the translocation and containment results, including remedial efforts undertaken to address program implementation concerns, and their relationship to the failure criteria in detail. We are unable to address the commenter's assertion that there are ''several theories for sea otter mortality and fecundity that have not been considered in the analysis'' because the commenter does not identify or describe these theories. Because translocation and containment are integral, required components of the translocation program under the authorizing legislation, the program, if it were to continue, could not continue without both components.

*Comment:* The proposed rulemaking states that the ''experimental population has fluctuated in number since 1993, and now appears to be increasing overall.'' This statement is misleading and does not adequately represent the population's present status. Three-year average counts (used statewide to estimate sea otter abundance) have increased every year on San Nicolas Island since 1997, with the exception of 1 year where the 3-year average dropped by less than 0.5 otters (2005). This is not a fluctuating population, but rather an increasing population, with the 2011 count reaching 54 otters and pups.

*Our Response:* Different methodologies are used for the counts along the mainland and at San Nicolas Island. Three-year running averages based on an annual census are not used to characterize population trends at San Nicolas Island as they are for the mainland population. Because it is a small island with a limited coastline, counts are conducted there quarterly, and the high quarterly count is adopted as the official count for the year. The high count for 2011 was 48 independent sea otters plus 5 pups. Although on average the San Nicolas Island colony has been growing at an annual rate of approximately 7 percent since its low point in 1993, this rate has been variable from year to year. Specifically, the number of independent (non-pup) sea otters at San Nicolas Island decreased (relative to the previous year's count) in 1995, 1997, 1998, 2004, 2005, and 2009. Therefore, we do not consider the statement misleading, and we have retained the original language.

*Comment:* The translocation has not failed. Instead, the Fish and Wildlife Service had unrealistic expectations for when certain milestones would be reached. Indeed, the revised draft SEIS admits the Service's expectations were unrealistic and further admits that the translocation population is a successfully reproducing population in terms of numbers and growth. Rather than recognize these data and reevaluate the Service's original expectations, the Service has chosen to declare the translocation a failure. To reach that conclusion, the Service has ignored the best scientific data available and has used evaluation standards found nowhere in the existing regulations. The Service has simply minted new standards to evaluate the translocation without complying with the Administrative Procedure Act.

*Our Response:* The translocation program evaluation assesses the program in relation to the objectives for which it was undertaken and the specific regulatory failure criteria contained in the rule at 50 CFR 17.84(d) that established the translocation program. We have concluded that the translocation program has failed to fulfill its primary purpose as a recovery action. Additionally, in our formal review of the program, we have determined that the program has failed under Criterion 2 of the specific regulatory failure criteria at 50 CFR 17.84(d)(8). Thus the commenter is incorrect in asserting that we relied on new evaluation standards not found in the regulations. It is the commenter who appears to suggest that we should disregard the regulatory failure criteria, stating that ''the Fish and Wildlife Service had unrealistic expectations for when certain milestones would be reached * * * and should reevaluate [its] expectations.''

*Comment:* The potential for a catastrophic spill of the same magnitude of the *Exxon Valdez* was present when the translocation was planned and implemented. Then, it was not perceived as a problem. Then, the establishment of the San Nicolas Island population was ''essential'' for sea otter recovery. Today, with no change in the size of a potential spill, but with the addition of new and improved navigation and safety programs, the Service claims a sudden and new awareness of the threat of an oil spill, and the San Nicolas Island translocation is somehow a failure. If the translocation is a failure because it is within the range of a catastrophic oil spill, then so too is the preferred alternative of range expansion. The Service cannot use the catastrophic oil spill scenario to declare translocation a failure without simultaneously admitting the preferred alternative cannot meet its objective. The Service is using a fatally flawed double standard to declare translocation a failure.

*Our Response:* Our conclusion that the program has failed is based on our analysis of the regulatory failure criteria in 50 CFR 17.84(d)(8). We determined that the program has failed under Criterion 2. We did not conclude—contrary to the commenter's assertion—that the translocation program failed because the population of southern sea otters at San Nicolas Island is within the range of a potential catastrophic oil spill. However, our evaluation of the translocation program does recognize that although the potential for a spill of the magnitude of the *Exxon Valdez* disaster may have existed when the translocation program was initiated, that risk was not adequately appreciated. Our experience until then had led us to expect that San Nicolas Island was sufficiently distant from the mainland population to serve as a reasonable safeguard for sea otters in the event of an oil spill. The *Exxon Valdez* spill demonstrated (and the Deepwater Horizon spill further demonstrated) that this is not the case. The evaluation of the translocation program thus acknowledges that not only is the San Nicolas Island population too small to produce sufficient numbers of sea otters to repopulate the mainland range in the event of catastrophic mortality, but that San Nicolas Island is not sufficiently distant from the mainland range to insulate the San Nicolas Island population from the effects of a catastrophic oil spill within the mainland range. The evaluation of the translocation program also recognizes that containment was far more difficult

to achieve than expected and that the recovery strategy for southern sea otters has fundamentally changed (USFWS 2003), such that we now recognize that allowing southern sea otters to naturally expand their range is key to the future recovery of the species.

In summary, we have concluded that the translocation program has met failure Criterion 2 and that the overarching recovery goal of the program—the establishment of a distant population of southern sea otters at San Nicolas Island to provide a source population of sea otters should the mainland population experience catastrophic mortality—cannot be achieved because (1) the population at San Nicolas Island is much too small to provide an adequate source population of sea otters, (2) even if the San Nicolas Island population were eventually to become ''established,'' a substantial number of sea otters translocated to the parent range would likely emigrate back to the island and thus not repopulate the parent range; and (3) the San Nicolas Island population is not sufficiently distant from the parent population to be insulated from the effects of a catastrophic oil spill. In addition, artificially restricting the natural range of southern sea otters through containment—a required component of the translocation program—is not only detrimental to the recovery of the species but, if resumed, is likely to jeopardize the continued existence of the species in violation of the ESA.

*Comment:* The second underlying basis for the Service's decision to declare translocation a failure is the assertion that the San Nicolas Island population is small and its future uncertain. That is far different than saying the San Nicolas Island population is still not critical to the recovery of southern sea otters. The fact that the Service's preferred alternative is to leave the sea otters at San Nicolas Island, even after declaring the translocated population a failure, proves that the translocation did not fail and that the San Nicolas Island population is important for sea otter recovery.

*Our Response:* The translocation program evaluation assesses the program in relation to the objectives for which it was undertaken and the specific regulatory failure criteria provided in the rule at 50 CFR 17.84(d) that established the translocation program. We have determined that program has failed under Criterion 2. We have also concluded that the translocation program has failed to fulfill its primary purpose as a recovery action and noted that the San Nicolas Island population remains small, its future is uncertain, and it is unlikely that it will ever be able to produce sufficient numbers of sea otters to repopulate the mainland range in the event of catastrophic mortality, which was the primary recovery goal of the translocation program. This conclusion does not mean that the San Nicolas Island population of southern sea otters is unimportant or that its removal from the island would not result in adverse consequences. Indeed, the Service's decision to declare the program a failure but to retain sea otters at San Nicolas Island is based in part on the recognition that if sea otters were removed from the island, some would return, some would die, and the introduction of these sea otters into the mainland population would likely further stress that food-limited population. Our recognition of the value of maintaining in place the small but stable San Nicolas population, which is reflected in this rulemaking, does not mean that the translocation has been successful as evaluated against the specific regulatory failure criteria in 50 CFR 17.84(d) or against the overarching recovery goals of the translocation program. As we explain in detail in the translocation program evaluation, the program has failed under both measurements.

*Comment:* The intent of the translocation program was to establish a breeding nucleus of 70 sea otters. That 70 would expand into an established population of 150. To achieve the breeding nucleus, the plan was to translocate 70 sea otters in the first year of the program. That number would be supplemented with up to 70 sea otters annually, to a total of 250 that could be moved. However, the Service translocated only 140 sea otters between 1987 and 1990, 56 percent of the 250 originally planned to be part of the translocation. Given that the Service stopped the actual translocation at just over 50 percent of the original objective, it is arbitrary and capricious to judge success of the current population level at San Nicolas Island based on the original assumptions about when and how population levels would be achieved if 250 sea otters were translocated. Since the Service elected to implement only half of the translocation program, transferring to San Nicolas Island only about half of the number allowed to be placed there, the actual standard should not be 25. It is only half of that, in which case Criterion 2 is not met because, within 3 years of the initial transplant, 17 sea otters were at the Island.

If the full translocation program had been implemented, it is reasonable to assume we would now have a breeding nucleus of 70 animals and would be moving toward the population level of 150. At the current reproduction rate, which is approximately 10 percent annually, the San Nicolas Island population should reach 70 within 4 years. Even the Service admits the initial objective of 70 sea otters at San Nicolas Island will occur. The fact that this event may not have occurred as rapidly as the Service hoped does not mean the translocation program failed, particularly when the Service's implementation of the program is a principal cause of the delay. In light of these facts, the Service should recognize under its existing regulatory authority that the translocation has not failed. The Service simply did not give the translocation sufficient time to achieve the population objectives given the reduction in the number of animals actually translocated.

*Our Response:* The translocation program evaluation assesses the program in relation to the objectives for which it was undertaken and the specific regulatory failure criteria contained in the rule at 50 CFR 17.84(d) that established the translocation program. We have determined that the program has failed under Criterion 2. The number of sea otters translocated to San Nicolas Island is not a factor considered in any of the failure criteria, including Criterion 2. We disagree with the commenter's assertion that it is arbitrary and capricious to determine failure by the standards specifically established in the translocation rule for that purpose.

Nevertheless, it should be noted that the translocation plan did not require that 250 sea otters be translocated but rather authorized the Service to translocate ''up to'' 250 sea otters. The Service captured the maximum number of sea otters allowed by the translocation plan. Of these, 139 (plus 1 rehabilitated pup) were deemed to be appropriate for translocation. The commenter suggests that because the Service did not move the maximum allowable numbers of sea otters to San Nicolas Island, it is unfair to conclude that the translocation has failed. Under the translocation rule, an established population at San Nicolas Island is defined as a minimum of 150 healthy sea otters, with a minimum annual recruitment of 20 sea otters. A stabilized population consists of a minimum of 70 sea otters under the rule. In fact, the Service translocated 69 sea otters, one fewer than the maximum number allowed during a 1-year period, to San Nicolas Island during the first year, and yet, at the end of that year, a total of

only 20 sea otters remained at the island. The following year, after making modifications to the program to increase the likelihood that sea otters would be successfully translocated, we translocated 57 additional sea otters to San Nicolas Island, again not far below the maximum number of otters allowed to be translocated in a given year. At the end of 2 years (and a total translocation of 126 sea otters) even fewer sea otters—only 17—remained at San Nicolas Island. The translocation rule itself states that following the initial translocation of 70 sea otters the first year, ''it is not likely that supplemental translocation after the initial 70 will involve more than small numbers of southern sea otters'' 50 CFR 17.84(d)(2). In our third and final attempt to translocate sea otters, we moved an additional 14 sea otters to San Nicolas Island. At the end of that year—the third year of the translocation—only 15 adult and subadult sea otters and 3 dependent pups remained at the island out of a total of 140 translocated sea otters.

We have concluded that the high dispersal rate of sea otters from San Nicolas Island is the primary reason that the population was so small after 3 years of translocation effort and why, 25 years after the initial translocation, the population is far from becoming ''established'' under the translocation rule, and has yet even to reach ''stabilized'' status. The commenter's hypothesis that simply translocating more sea otters to San Nicolas would have resulted in an established population or even a stabilized population today or would have avoided failure under Criterion 2 is unsupported by the facts surrounding the translocation.

That a population size of 70 animals or more may eventually be attained at San Nicolas Island is not relevant to our determination of failure. As indicated above, the translocation rule defines an established population as a minimum of 150 healthy male and female otters, originating from a breeding nucleus of 70 sea otters, not a total of 70 sea otters originating from a breeding nucleus of 12 or fewer animals. Over the 25 years it has been in existence, the translocation program has never come close to achieving its primary goal of producing a second, self-sustaining population of sea otters at San Nicolas Island that could produce sufficient numbers of sea otters to repopulate the mainland range in the event of catastrophic mortality. The initial high rate of dispersal of translocated sea otters from San Nicolas Island is the primary cause of failure under Criterion 2 not only because of its direct effect on the subsequent size of the San Nicolas Island colony, but also because of its implications for the recovery strategy at the heart of the program: the intended function of the San Nicolas Island population as a self-sustaining ''reserve colony for providing stock to restore subsequently damaged areas'' in the southern sea otter's range (52 FR 29754; August 11, 1987). The high rate of dispersal of translocated sea otters from San Nicolas Island following 3 years of translocation effort refutes the commenter's speculation that simply translocating more otters to San Nicolas Island would have resulted in a larger current population at San Nicolas Island. The high rate of dispersal of translocated sea otters also suggests it is unlikely that the colony will ever be large enough to remain viable and to supply the numbers of sea otters necessary to perform a successful translocation and reestablishment of the population in the mainland range if the parent population were reduced or eliminated by a catastrophic event. It should be noted that, based in part on data gained while implementing the translocation program, the recovery strategy has fundamentally changed. The revised recovery plan recommends against additional translocations and instead advocates allowing natural range expansion (USFWS 2003).

*Comment:* Four other factors confirm the success of the translocation: (1) Virtually all of the sea otters at San Nicolas Island are offspring of the originally translocated population, indicating there is a healthy and successfully reproducing population at San Nicolas Island; (2) at least 150 pups have been born at San Nicolas Island, further confirming the presence of a healthy reproducing population; (3) the San Nicolas Island population is reproducing at a rate of 10 percent annually, which is better than the 5–6 percent rate of the parent population; and (4) the San Nicolas Island population is healthier than the parent population, in that a comparison of the translocated population with the parent population found that the ''length and mass at age and the age-specific mass-to-length ratios were significantly greater for sea otters at San Nicolas Island than in the central population.'' This does not sound like a failed population. It sounds like a population that is healthier than the parent population.

*Our Response:* While the commenter is correct that the San Nicolas Island colony is successfully reproducing, that it has grown since its low point in the early 1990s at an average annual rate that exceeds the growth rate of the mainland population (although the overall average annual growth rate has dropped from 9 percent to 7 percent with the inclusion of the past several years of data), and that sea otters at San Nicolas Island exhibit greater mass-to-length body ratios than those in the mainland range, these facts do not alter our assessment that the translocation program has failed.

The commenter seeks to substitute new standards for those clearly outlined in the translocation plan and implementing regulations for the program. The translocation program evaluation assesses the program in relation to the objectives for which it was undertaken and the specific regulatory failure criteria contained in the rule at 50 CFR 17.84(d) that established the translocation program. We have determined that the program has failed under Criterion 2. The initial high rate of dispersal of translocated sea otters from San Nicolas Island is the primary cause of failure under Criterion 2 not only because of its direct effect on the subsequent size of the San Nicolas Island colony, but also because of its implications for the recovery strategy at the heart of the program: the intended function of the San Nicolas Island population as a self-sustaining ''reserve colony for providing stock to restore subsequently damaged areas'' in the southern sea otter's range (52 FR 29754; August 11, 1987). The high rate of dispersal of translocated sea otters suggests it is unlikely that the colony will ever be large enough to remain viable and to supply the numbers of sea otters necessary to perform a successful translocation and reestablishment of the population in the mainland range if the parent population were reduced or eliminated by a catastrophic event. The translocation program has not achieved its primary recovery goal of producing a second, self-sustaining population of sea otters that could produce sufficient numbers of sea otters to repopulate the mainland range in the event of catastrophic mortality.

*Comment:* The Service incorrectly concludes that ''the creation of an established southern sea otter population at San Nicolas Island does not appear to be achievable.'' The facts regarding the status, trend, and health of the San Nicolas Island population belie that conclusion.

*Our Response:* We make this statement because the translocation rule at 50 CFR 17.84(d)(1)(vi) defines an ''established experimental population'' of southern sea otters as ''an estimated combined minimum of 150 healthy male and female otters residing within the translocation zone, little or no

emigration into the management zone occurring, and a minimum annual recruitment to the experimental population in the translocation zone of 20 sea otters for at least 3 years of the latest 5-year period, or replacement yield sufficient to maintain the experimental population at or near carrying capacity during the postestablishment and growth phase or carrying capacity phase of the experimental population.'' The logic underlying this definition is explained in the preamble to the final rule implementing the translocation program: ''The Service does not consider the mere presence of sea otters in the translocation zone an indication that a new population is established. If a catastrophic event were to decimate a portion of the parent population, it is possible that the relocated otters could be used to restore the damaged portion of the parent population; however, it would also likely eliminate the value of the new population to serve as a reserve colony for providing stock to restore subsequently damaged areas and it could eliminate the reproductive viability of the colony such that the remaining animals could not be self-sustaining. Therefore, to be considered established it must be a reproductively viable unit, capable of maintaining itself even if 25 animals are removed each year for 1 to 3 years or replacement yield is sufficient to maintain the experimental population at or near carrying capacity during the post-establishment and growth phase or carrying capacity phase for the purposes of repairing damage to the parent population'' (52 FR 29754; August 11, 1987).

Two circumstances make achievement of this objective unlikely. First, the future of the San Nicolas Island colony is uncertain. Its small population size (hence its susceptibility to demographic as well as environmental stochasticity) makes it difficult to predict when, if ever, the population may become ''established.'' Second, if the San Nicolas Island colony were to become ''established'' at some point in the future (with a population size of 150 southern sea otters and an annual recruitment of 20 animals), our experience with the translocation of southern sea otters to San Nicolas Island indicates that if a catastrophic event were to affect the parent population, it is unlikely that we would be able to reestablish a viable southern sea otter population by moving small numbers of animals (25) from San Nicolas Island to the parent population annually over a 3-year period. The high emigration apparently inherent in sea otter translocations combined with the small number of animals available to be moved would make it unlikely that a core population could become established in the damaged area.

*Comment:* The Service's conclusion that the San Nicolas Island translocation has failed is arbitrary and capricious under the Administrative Procedure Act. The Supreme Court has held an agency action is arbitrary and capricious if the agency (1) has relied on factors Congress has not intended it to consider, (2) entirely failed to consider an important aspect of the problem, (3) offered an explanation for its decision that runs counter to the evidence before the agency, or (4) has offered an explanation for its action that is so implausible it could not be ascribed to a difference of view or the product of agency expertise. Here, at a minimum, the Service has offered an explanation for its decision that runs counter to the evidence.

*Our Response:* The translocation program evaluation assesses the program in relation to the objectives for which it was undertaken and the specific regulatory failure criteria contained in the rule at 50 CFR 17.84(d). We have determined that the translocation program has failed under Criterion 2 of the specific regulatory failure criteria at 50 CFR 17.84(d)(8). We have also concluded that the translocation program has failed to fulfill its primary purpose as a recovery action. The translocation program evaluation provides a clear and rational explanation for our failure determination based on a careful review of the facts surrounding the translocation in relation to the regulatory failure criteria and the program's recovery purpose. We reject the commenter's assertion that the evaluation of the translocation program is arbitrary or capricious or counter to the evidence before us.

*Comment:* The primary purpose of the translocation program was to increase the population toward the delisting level. That objective is met. The Service's failure finding is without merit.

*Our Response:* The primary purpose of the translocation program was not simply to increase the number of southern sea otters but to achieve a primary recovery action for the species. The translocation rule at 50 CFR 17.84(d) quotes the recovery plan (USFWS 1982) at length to elucidate the relationship of the translocation program to recovery: ''Sea otter translocation, if properly designed and implemented, should provide the necessary foundation for ultimately obtaining the Recovery Plan's objective and restoring the southern sea otter to a non-threatened status and maintaining OSP by: (i) Establishing a second colony (or colonies) sufficiently distant from the present population such that a smaller portion of southern sea otters will be jeopardized in the event of a large-scale oil spill and (ii) establishing a data base for identifying the optimal sustainable population level for the sea otter.'' The translocation program has not achieved its primary recovery goal. In fact, based in part on data gained while implementing the translocation program, the recovery strategy has fundamentally changed. The revised recovery plan recommends against additional translocations and instead advocates allowing natural range expansion (USFWS 2003).

*Comment:* The Service uses newly minted standards to reach its conclusion that the translocation program has failed. One of these newly minted standards is that the translocated population is small and its ability to become established is uncertain. However, the applicable regulations set a minimum acceptable population for translocated sea otters at 25, a number well below the current population of 46. That the population is small is not the relevant standard. The existing regulatory standards for declaring translocation a failure are not satisfied.

*Our Response:* The translocation program evaluation assesses the program in relation to the objectives for which it was undertaken and the specific regulatory failure criteria contained in the rule at 50 CFR 17.84(d). We have concluded that the translocation program has failed to fulfill its primary purpose as a recovery action. Additionally, in our formal review of the program, we have determined that the program has failed under Criterion 2 of the specific regulatory failure criteria at 50 CFR 17.84(d)(8). Thus the commenter is incorrect in asserting that we relied on new standards not found in the regulations. The commenter proposes that the Service rewrite regulatory failure Criterion 2 in the translocation rule to provide that a minimum of 25 sea otters must be present today at San Nicolas Island and not as of 1990, which was 3 years following the initial translocation, as the criterion states. The commenter's interpretation of failure Criterion 2 is at odds with its plain language and disregards the primary recovery goal underlying the translocation program. The goal of the program was not simply to create a small, distant colony of sea otters. The

goal of the program was to establish a distant population of at least 150 healthy male and female otters residing with a minimum annual recruitment of 20 sea otters (50 CFR 17.84(d)(1)(vi)).

The logic underlying this definition is explained in the preamble to the final rule implementing the translocation program: ''The Service does not consider the mere presence of sea otters in the translocation zone an indication that a new population is established. If a catastrophic event were to decimate a portion of the parent population, it is possible that the relocated otters could be used to restore the damaged portion of the parent population; however, it would also likely eliminate the value of the new population to serve as a reserve colony for providing stock to restore subsequently damaged areas and it could eliminate the reproductive viability of the colony such that the remaining animals could not be self-sustaining. Therefore, to be considered established, it must be a reproductively viable unit, capable of maintaining itself even if 25 animals are removed each year for 1 to 3 years or replacement yield is sufficient to maintain the experimental population at or near carrying capacity during the post-establishment and growth phase or carrying capacity phase for the purposes of repairing damage to the parent population'' (52 FR 29754; August 11, 1987). The population of southern sea otters at San Nicolas Island—even after 25 years—has yet to reach the status of an ''established'' or even a ''stabilized'' population as defined by the translocation rule at 50 CFR 17.84(d)(1)(vi) or (vii) and is unlikely ever to serve the recovery purpose envisioned for it under the translocation program.

*Comment:* Another newly minted standard set forth to judge the translocation is that there were issues associated with the original capture program, which ceased over 14 years ago. The applicable regulations required that captured animals be transported to the relocation area no more than 5 days after capture (50 CFR 17.84(d)(3)(ii) and (iii)). Often, however, those time requirements were not observed, and the animals were kept in temporary holding areas for much longer periods. Further, many animals were subjected to questionable and dangerous surgical procedures to implant tracking devices. Several failed to survive the surgery. Problems associated with the prior capture and transport process resulted not from weaknesses in the transport program but from the Service's actions. Such problems could have been remedied. Thus, the Service's complaints about the capture and transfer program are suspect. These problems have nothing to do with the current status of the San Nicolas Island population.

*Our Response:* It is unclear whether the commenter is referring to the containment portion of the program, which was suspended in 1993 (now 19 years ago), or the translocation portion of the program, which is described in the specific section of the rule that the commenter cites. In the translocation program evaluation, we summarize the history of the translocation program, including the difficulties we experienced capturing and moving sea otters both into the translocation zone and out of the management zone, in order to provide an honest and accurate assessment of the program. That several otters died either during or as a likely consequence of translocation or containment is a fact. However, we have concluded that the translocation program is a failure because it has failed to achieve its overarching recovery purpose and, specifically, because it has failed under Criterion 2 of the regulatory failure criteria established in the translocation rule at 50 CFR 17.84(d)(8). Thus the commenter is incorrect in asserting that our failure determination is based on new standards not found in the regulations.

With regard to the commenter's specific assertions about the transport process, we estimate that 6 sea otters out of a total of 252 sea otters captured for potential translocation died of stress-related causes prior to transport. We made changes in our translocation procedures prior to the second year of the program in an effort to decrease the time between capture and release and thereby reduce stress on captured sea otters. We also made changes to containment operations to reduce stress on captured sea otters. The initial strategy of releasing sea otters at their known original capture sites in the mainland range resulted, in most cases, in lengthy travel times and additional handling of the animals. To reduce this source of stress on captured sea otters, we revised our strategy to release recaptured animals at more easily accessible sites in the northern portion of the parent range. Despite the increased distance, the accessibility of these sites reduced transport times and resulted, we believed, in reduced stress and the improved well-being of moved sea otters. We also hoped that releasing animals at the northern end of the range would reduce the likelihood that animals would return to the management zone because of the greater distances they would have to travel. Despite these changes, in February 1993, two sea otters that had been recently captured in the management zone were found dead shortly after their release in the range of the parent population. Of the 24 sea otters captured in the management zone from 1987 to 1993, removal from the management zone was known or suspected to have killed 4 sea otters within 2 weeks. These deaths led to a determination to suspend containment of sea otters in the management zone.

The commenter is correct that none of these problems is the primary reason the San Nicolas Island population declined so precipitously after the translocation of 140 otters to the island. We consider the emigration of translocated sea otters from the island to be the primary reason for the population's initial (and hence continued) small size.

*Comment:* The Service has asserted that it is ''unable to evaluate whether the program has failed under Criterion 3 because we never reached the minimum number of sea otters at San Nicolas Island required to complete the transplant phase of the program.'' Given the significant decline in the population evident 2 years after the effective end of the transplant phase, and the lack of substantial population growth in the intervening 19 years, the Coalition (Defenders of Wildlife, Friends of the Sea Otter, The Humane Society of the United States, the Monterey Bay Aquarium, and Oceans Public Trust Initiative, a project of Earth Island Institute's International Marine Mammal Project) believes that the spirit and intent of Criterion 3 have been met and that these facts provide an additional basis for declaring the translocation a failure.

While the Service is correct that the minimum population was never reached at San Nicolas Island, that does not mean that Criterion 3 cannot be evaluated. In 1992, two years following the effective end of the transplant phase in 1990, the San Nicolas Island population was a mere 13 sea otters, down from 140 released at San Nicolas Island originally. Thus, rather than witnessing reasonable population levels and evidence of recruitment of otters born to translocated animals, project managers observed a dramatic decline in the population at San Nicolas Island during the transplant phase of the translocation. Based on the plain language of the regulation and the population numbers present at the required time of evaluation, the translocation must be declared a failure.

*Our Response:* We acknowledge in the translocation program evaluation that although we never achieved the

requisite number of 70 sea otters to consider the transplant phase completed and thus cannot evaluate the program under Criterion 3, from a practical perspective the transplant phase ended with the translocation of the last sea otter to San Nicolas Island in 1990. At that time, after the translocation of 140 sea otters to the island, 14 independent sea otters remained. Two years later, 13 independent sea otters remained, and despite evidence of pupping, there appeared to be little or no recruitment into the population. Criterion 3 clearly does not anticipate that the ''significant declines'' to which it refers would occur immediately upon the release of sea otters at the island, such that even with the transport of 140 sea otters, we were still unable to retain, at any one time, the minimum number of 70 sea otters at the island. In this sense, the program may be seen as having failed more dramatically than was anticipated under Criterion 3.

Unlike Criterion 3, Criterion 2 effectively captures the realized outcome of immediate significant declines and a resulting core population size well below the threshold of 70 animals. We note that, under 50 CFR 17.84(d)(8), a determination that any one of the failure criteria has been met is sufficient to declare that the translocation program has failed (50 CFR 17.84(d)(8)). We have determined that the program has failed under Criterion 2.

*Comment:* The Service states in the draft evaluation of the translocation program that ''[t]echnically, criterion 4 has not been met.'' We disagree. The Service has reached the conclusion that ''containment cannot be successfully accomplished,'' and thus the standard for failure has been met. Pursuant to 50 CFR 17.84(d)(8)(iv), the translocation has failed if ''FWS determines * * * that sea otters are dispersing from the translocation zone and becoming established within the management zone in sufficient numbers to demonstrate that containment cannot be successfully accomplished.'' This standard is: [M]eant to be applied when it becomes apparent that, over time, (one year or more), otters are relocating from the translocation zone to the management zone in such numbers that: (1) An independent breeding colony is likely to become established within the management zone; or (2) they could cause economic damage to fishery resources within the management zone. It is expected that [FWS] could make this determination within a year, provided that sufficient information is available. The key element of this criterion is otters ''becoming established within the management zone in sufficient numbers to demonstrate that containment cannot be successfully accomplished.''

While southern sea otters have not moved from the *translocation zone* to the management zone, since 1998, 50–150 southern sea otters have seasonally moved from the parent range to the management zone. The Service determined that containing this emigration is ineffective as a long-term management action and stated: ''The difficulties associated with sea otter capture and transport, our concern for the welfare of animals removed from the management zone, the adverse effects of sea otter containment on the parent population, and the adverse effects on fisheries are concerns regardless of whether sea otters enter the management zone from the parent range or from San Nicolas Island.'' Further, as the Service concluded in the 2000 biological opinion, continuing the containment policy will likely jeopardize the continued existence of the southern sea otter. This finding prohibits the Service from continuing the containment program under section 7(a)(2) of the ESA. Therefore, Criterion 4 has been satisfied because, as the Service has determined, containment ''cannot be accomplished.'' While the sea otters entering the management zone are not from the San Nicolas Island population, they nevertheless have led the Service to conclude that containment is not feasible and would violate the ESA, and therefore, the program should be declared a failure.

*Our Response:* We acknowledge that successful containment of sea otters, or maintenance of an ''otter-free'' management zone is likely infeasible and cannot be accomplished by simply capturing animals in the management zone and moving them to another location. Returning southern sea otters that have migrated south into the management zone from the mainland range back to the parent population would likely result in jeopardy to the species. Moving southern sea otters that entered the management zone from the mainland range to San Nicolas Island would likely result in dispersal of the sea otters from the island back into the management zone or back into the parent population, as occurred during the initial translocation phase of the translocation program. Thus, containment of southern sea otters from the management zone would likely be unsuccessful. Nevertheless, applying the literal language of failure Criterion 4, which refers to southern sea otters dispersing from the translocation zone into the management zone rather than to southern sea otters dispersing into the management zone from the mainland range, we have not changed our conclusion that the translocation program has not met this criterion.

*Comment:* The Service determined that ''[c]riterion 5 has not been met.'' We disagree, and we believe that the Service's own statements about the prospects for the San Nicolas Island population support a failure determination under Criterion 5. Pursuant to 50 CFR 17.84(d)(8)(v), the translocation has failed if the: [H]ealth and well-being of the experimental population should become threatened to the point that the colony's continued survival is unlikely, despite the protections given to it by [FWS], State, and applicable laws and regulations. An example would be if an overriding military action for national security was proposed that would threaten to devastate the colony and the removal of otters was determined to be the only viable way of preventing the loss of the colony. The health and well-being of the SNI population is seriously in question due to its small size, vulnerability to an oil spill, epizootic, or other catastrophic event, and potential lack of genetic diversity due to the small parent population. In the Service's brief explanation of its conclusion regarding Criterion 5, it states that ''[t]here are no proposed Federal, State or local actions that threaten to devastate the colony.'' While this is true, it is not the proper basis to evaluate Criterion 5. The proper consideration is the likelihood of the SNI population's survival. In this regard, the Service points out that the population has ''persisted,'' but it has also stated ''it is not certain that the San Nicolas colony will persist.'' Given the Service's own doubts about the future viability of the San Nicolas Island population, the Service should follow the plain language of Criterion 5 and declare the translocation program a failure on that basis.

*Our Response:* We agree with the commenter that the San Nicolas Island colony remains vulnerable due to its small size and the potential for an oil spill, epizootic, or other catastrophic event. Nevertheless, there are no proposed actions that would threaten to devastate the colony. We have not changed our reasoning regarding whether the translocation program has met Criterion 5.

Procedural and Legal Issues

*Comment:* The Service's ''preferred alternative'' violates the intent of Congress in passing Public Law 99–625. The law established a dual mandate to protect the sport and commercial

fisheries of Southern California from the effects of sea otters, both biologically and legally, along with establishing a viable otter population at San Nicolas Island.

*Our Response:* Public Law 99-625 authorized—but did not require—the Service to develop and implement a southern sea otter translocation plan. It set forth certain components that such a plan must contain, if developed, including provisions to minimize conflict between sea otters and shellfish fisheries. Implementing regulations for the translocation program (52 FR 29754; August 11, 1987) specifically address the possibility that the translocation program could fail. We have determined that the translocation program authorized under Public Law 99-625 has failed and should be terminated.

*Comment:* The Marine Mammal Commission supports the Service's plan to retain the existing otter population at San Nicolas Island and give it an opportunity to become fully established. The Southern Sea Otter Recovery Team advised the same, and the Service's biological opinion also recognized that capture and removal would pose an unnecessary risk to the San Nicolas Island otters and the population as a whole. However, the applicable regulations do not contain such an option. Therefore, to address this concern, the Marine Mammal Commission recommends that, as part of a proposed rulemaking to terminate the sea otter translocation, the Fish and Wildlife Service include proposed amendments to § 17.84(d)(8)(vi) to eliminate the requirement that sea otters at San Nicolas Island be returned to the parent population and complete that part of the rulemaking prior to making a final failure determination. It is our understanding that the Service intends to repeal § 17.84(d) in its entirety in the contemplated rulemaking. If this is the case, it may be necessary for the Service to include different effective dates for different provisions, so that paragraph (d)(8)(vi) is amended prior to repeal of paragraph (d) as a whole. Only in that way can the Service ensure that it will not be required to remove otters from San Nicolas Island as a consequence of making a failure determination.

*Our Response:* The Service appreciates the concern of the Marine Mammal Commission regarding elimination of the existing regulatory requirement to remove otters from San Nicolas Island and from the management zone prior to declaring the program a failure. We do not consider a two-step regulatory process to be legally required to terminate the program. We have been very clear in the draft SEIS, revised draft SEIS, final SEIS, and in our **Federal Register** notice on the proposed rulemaking (76 FR 53381; August 26, 2011) that the proposed action is to terminate the program while allowing southern sea otters to remain at San Nicolas Island and in the management zone. We have held public hearings and requested public comment on the proposed action. The means of effectuating this action is to remove, in its entirety, the translocation rule at 50 CFR 17.84(d), which governs the establishment, goals, operation, and termination of the translocation program. By removing the translocation rule in its entirety through the final rulemaking, we are eliminating all of the internal components of the rule, including the requirements to remove sea otters from San Nicolas Island and from the management zone following a determination that the program has failed.

This rulemaking process is consistent with that set forth in 50 CFR 17.84(d)(8), which requires the Service to amend the rule to terminate the program if we determine the program has failed. The only difference is that we are eliminating the rule in its entirety—including the requirement to remove sea otters from the management zone and San Nicolas Island—rather than amending the rule to terminate the program while leaving the removal requirements in place. Given the significant opportunities we have provided to stakeholders and members of the public to review and comment on the proposed action, we do not agree that a two-step rulemaking process, which would require the development, publication, and public comment and review of a separate intervening amendment to 50 CFR 17.84(d)(8) to eliminate the obligation to remove southern sea otters from San Nicolas Island and the management zone prior to elimination of 50 CFR 17.84(d) in its entirety, is necessary. Indeed, the extensive public comment we received on the draft SEIS, the revised draft SEIS, and the proposed rulemaking to remove 50 CFR 17.84(d) demonstrates that members of the public are well informed about the proposed action and its consequences. We note that the obligation to remove sea otters from San Nicolas Island and from the management zone in the event of a failure determination is not triggered under 50 CFR 17.84(d) until the rule has been amended to terminate the translocation program. For that reason, we consider the Marine Mammal Commission's concern that we would be compelled to remove sea otters upon declaration of failure and prior to finalization of the proposed rulemaking that eliminates the removal requirement to be misplaced.

*Comment:* The Marine Mammal Commission notes that the Service issued a biological opinion under Section 7 of the ESA in July 2000 finding that continuing to carry out otter containment activities in the management zone would jeopardize the continued existence of the southern sea otter. Based on that opinion, the Service published a policy statement on 22 January 2001 (66 FR 6649) that it would no longer capture and remove sea otters found in the management zone. Presumably, the rationale for that biological opinion and the Service's policy about removing sea otters also applies to sea otters within the translocation zone. If this is the case, the Marine Mammal Commission believes that this issue should be discussed within the scope of this rulemaking and reflected in the administrative record. This would provide an alternative legal basis to support a decision not to remove otters from the translocation zone upon finalizing a failure determination. That is, even if the translocation regulations are interpreted as requiring that otters be removed from the translocation zone, the Service would have a sound basis for arguing that doing so would constitute jeopardy and that adherence to the requirements of Section 7 takes precedence over the provisions of Public Law 99–625 and its implementing regulations.

*Our Response:* Our decision to declare the program a failure but to retain sea otters at San Nicolas Island is based in part on the recognition that if sea otters were removed from the island, some would return, some would die, and the introduction of these sea otters into the mainland population would likely further stress that food-limited population. The effects of moving large numbers of otters from the management zone back into the parent population were thoroughly evaluated in our 2000 biological opinion on the containment component of the translocation program (USFWS 2000). We concluded that moving large numbers of sea otters back into the parent range was likely to jeopardize the continued existence of the species. The effects of removing the population of southern sea otters from San Nicolas Island and relocating them into the parent population would be similar to those analyzed in the 2000 biological opinion that resulted in our jeopardy determination. Prior to removing sea otters from San Nicolas Island, we would have to complete a formal internal Section 7 consultation

under the ESA and determine that such relocation would not result in jeopardy to southern sea otters.

*Comment:* Termination of the translocation program does not change the statutory status of sea otters translocated under the program. Without amending the statute, once translocated, the translocated population of sea otters remains under the special status afforded by Public Law 99–625.

*Our Response:* Public Law 99–625 authorized but did not require the Secretary to develop and implement the translocation plan. The statute further provided that if the Secretary chose to develop and implement such a plan, it must include a translocation zone and a management zone. The translocation and management zones are component parts of the translocation plan implemented by the Secretary and were designated by regulation when the translocation program was put in place (52 FR 29754; August 11, 1987) and codified at 50 CFR 17.84(d). Termination of the program, also by regulation, eliminates the zones to which the provisions defining the status of sea otters found in those zones are attached.

*Comment:* The difference between the No Action Alternative and the proposed action, Alternative 3C, is minor and is not supported by adequate comparative analysis and science, even though the No Action Alternative is a valid option. As such, a decision to follow Alternative 3C over the No Action Alternative, or some combination of the two, is arbitrary and capricious.

*Our Response:* The environmental consequences of the No Action Alternative (status quo) and Alternative 3C (the proposed action) are identical except with respect to changes in the regulatory status of sea otters in southern California that would occur under Alternative 3C. Under Alternative 3C, the exemptions from the take prohibitions of the ESA and/or MMPA that currently exist in the management zone and translocation zone would end.

The No Action Alternative is not a viable alternative. It would continue the translocation program, even though the program has failed to meet its primary recovery objective, and even though a primary component of the program—maintenance of an otter-free zone—cannot be legally implemented. It would also legally restrict, though without an ability to enforce that restriction, the natural movement of southern sea otters southward from central California into their historic range in the Southern California Bight, in contravention of the recovery needs of the species. Alternative 3C, on the other hand, would terminate the translocation program while leaving in place the San Nicolas Island population of southern sea otters and any sea otters in the management zone. It would contribute to the recovery of southern sea otters by allowing for natural range expansion and the continuation of the San Nicolas Island population free of the artificial boundaries and legal strictures imposed pursuant to Public Law 99–625.

*Comment:* The California Coastal Commission has stated unequivocally that any decision by the Service to declare the translocation a failure, to terminate the management zone, and to allow sea otters to remain at San Nicolas Island will require a determination by the Coastal Commission regarding the consistency of any such action with California's coastal zone management plan as to the impact on commercial fisheries.

*Our Response:* On June 14, 2012, by a unanimous vote, the California Coastal Commission concurred with the consistency determination that the Service submitted for the termination of the southern sea otter translocation program. The Commission found the project to be consistent to the maximum extent practicable with the California Coastal Management Program.

*Comment:* Because the zonal management program is in violation of section 7(a)(2) of the ESA, it is not hard to find that the program also violates the Service's affirmative duty to conserve the species under section 7(a)(1) of the ESA to pursue sea otter conservation. The ESA defines ''conservation'' as ''the use of all methods and procedures, which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.'' The courts construe this duty to be a strong mandate on the Secretary and the Service to not carry out programs adverse to species recovery and conservation. The Service has concluded that containment practices are ineffective and harmful to sea otters, and thus they can no longer be supported as conservation measures for the benefit of the species. Therefore, the Service must discontinue any containment actions and leave all remaining southern sea otters at San Nicolas Island. Failing to do so would be directly contrary to conservation. Thus, the obligations imposed on the Service under section 7(a)(1) require a complete end to the translocation and containment program.

*Our Response:* This rulemaking terminates the southern sea otter translocation program, including any containment actions, and retains sea otters at San Nicolas Island.

*Comment:* The Service is obligated to act in accordance with the Recovery Plans it develops for listed species. In *Friends of Blackwater* v. *Salazar,* 772 F.Supp.2d 232 (D.D.C. 2011), the court held that the Service violated the protections of Section 4 by deciding to delist a species based on considerations not included in the management actions and conservation and survival goals included in their recovery plan. While the recovery plan may be a guidance document, the Service is bound by its definitions of ''recovery.'' *Id.* Here, the recovery plan acknowledges that the southern sea otter's recovery is dependent on the termination of zonal management and allowing the existing San Nicolas Island population to remain in its current location. This finding similarly ''binds'' the Service to act accordingly and finalize the proposed rulemaking.

*Our Response:* One of the high-priority recovery actions identified in the Final Revised Recovery Plan for the Southern Sea Otter (USFWS 2003) is to evaluate the translocation program in light of changed circumstances and determine whether one or more failure criteria have been met. While we have analyzed a full range of alternatives, including resuming implementation of the program, we recognize that this rulemaking reflects the recommendations made by the Southern Sea Otter Recovery Team and affords the best opportunity for sea otter recovery.

*Comment:* Congress set forth specific requirements in Public Law 99–625 that would govern the establishment and implementation of the management zone. One of these requirements is the mandate that the management zone be established so as to ''not include the existing range of the parent population or adjacent range where expansion is necessary for the recovery of the species.'' As explained in the legislative history, in creating the zone to provide sufficient room for range expansion the Service ''must accommodate, among other important biological needs, the feeding behavior of the sea otter.'' Thus, foraging, as well as all other biological needs of the sea otter, were required to be taken into account in establishing this zone. The zone boundaries, as currently determined, are not in compliance with these requirements. As stated in the 2003 recovery plan, natural range expansion is necessary to achieve recovery. In addition, the Doak analysis confirms that zonal management will greatly impede recovery and that large

numbers of sea otters would have to be moved continuously, resulting in mortality and negative effects on the parent population. Over the 10-year period contemplated by the Service, Dr. Doak anticipates that 393 sea otters would have to be removed from the management zone, resulting in an anticipated 67 deaths.

*Our Response:* Portions of the central California range are now food-limited, which further suggests the necessity of range expansion for sea otter recovery. This rulemaking reflects the recovery strategy of allowing natural range expansion.

*Comment:* The containment program violates Public Law 99–625, and the Service accordingly must declare it a failure. Public Law 99–625(b)(4), in stating the purpose of the management zone, requires that the ''Service shall use all feasible *non-lethal* means and measures'' to implement the containment policy and remove otters from the management zone (emphasis added). The history of the containment program and the available containment methods and technologies have proven that the capture and removal of sea otters cannot be undertaken by nonlethal means. Many sea otters are certain to die as a result of capture and removal. The Service's 2000 biological opinion notes that ''the stress of being captured, held in captivity, and (for some individuals) undergoing surgery to implant tracking devices resulted in a mortality rate that was higher than the anticipated mortality rate of three to five percent (Benz, pers. comm. in Service 1987b) that had been expected to result from the handling of southern sea otters during translocation.'' The 2000 biological opinion also states that, ''[b]y the time of the 1993 draft evaluation, seven southern sea otters had died at Monterey Bay Aquarium while waiting to be translocated to San Nicolas Island or after surgery to implant radios, three died at San Nicolas Island while waiting to be released, one died after being captured in the parent range for translocation and released at the point of capture, and four died within two weeks of being released after being captured during containment activities.'' This level of mortality is far higher than what was anticipated when the containment program was developed. The Service's current estimate of expected mortality of 17 percent is far higher than the 1987 biological opinion's estimates of three to five percent, and can in no reasonable way be interpreted as ''non-lethal'' as required under Public Law 99–625.

*Our Response:* Comment noted. We acknowledge that the level of mortality resulting from the capture and relocation of sea otters was higher than anticipated.

*Comment:* There is nothing in Public Law 99–625 that requires the removal of the San Nicolas Island sea otters. Public Law 99–625 refers only to the removal of any sea otters in the management zone. The fact that Congress considered whether to require the removal of sea otters after a failure determination, and declined to include the translocation zone in the area from which capture would occur, indicates an intention to allow the animals to remain at San Nicolas Island. The absence of any statutory requirement for removal of animals from San Nicolas Island also confirms the discretion available to the Service for this purpose.

*Our Response:* Public Law 99–625 authorized but did not mandate the development and implementation of the translocation program. Nor did Public Law 99–625 address the potential failure of the program. The command in the legislation to remove sea otters from the management zone applies while the plan is in effect. By rulemaking implementing the translocation program, the Service specified criteria to evaluate whether the program is a failure and set forth the consequences of a failure determination, which included an obligation to remove sea otters from the management zone and from San Nicolas Island (50 CFR 17.84(d)). By removing the translocation rule in its entirety through the present rulemaking, we are eliminating all of the internal components of the rule at 50 CFR 17.84(d), including the requirements to remove sea otters from San Nicolas Island and from the management zone following a determination that the program has failed.

**Assessment of Failure Criteria Identified in Translocation Plan**

Public Law 99–625 authorized southern sea otter translocation and provided requirements for a southern sea otter translocation plan should we pursue such a plan. It did not address the possibility of the program's failure. As a consequence, it did not specify criteria that would be used to determine whether the program had failed, nor did it recommend actions that should be taken in the case of failure. When we developed the translocation plan and implementing regulations for the program, we received public comment asking us to define what constituted failure of the program and what actions we would take if the program failed. We responded by delineating specific failure criteria in the 1987 Translocation Plan (52 FR 29754; August 11, 1987).

The purpose of the failure criteria was to identify circumstances under which we would generally consider the translocation program to have failed. The five failure criteria were defined before any translocations of southern sea otters were undertaken and without the benefit of what we know today about the translocation, containment, and recovery needs of southern sea otters. The criteria focus on the status of the translocated population and, in hindsight, do not address all the circumstances that are relevant to a complete evaluation of the program. For example, the failure criteria do not address the possibility that containment might not be successfully accomplished because of southern sea otters entering the management zone from the mainland range rather than from the population at San Nicolas Island, the possibility that the founding population of the San Nicolas Island colony might be fewer than 70 animals, or even the possibility that an ''established'' population at San Nicolas Island (as defined at 52 FR 29754; August 11, 1987) may be insufficient to attain the recovery goals established for the program. Similarly, the failure criteria do not anticipate the possibility that the capture and relocation of sea otters from the management zone could result in the deaths of some animals. Ultimately, failure is determined by our inability to attain the objectives of the translocation program, which are clearly set out in the final rule for the establishment of an experimental population of southern sea otters (52 FR 29754; August 11, 1987).

In the final translocation program evaluation (Appendix C to the final SEIS), we find that the translocation program meets failure criterion 2. A summary of our analysis of each failure criterion in the final translocation program evaluation is given below.

*Criterion 1:* If, after the first year following initiation of translocation or any subsequent year, no translocated southern sea otters remain within the translocation zone, and the reasons for emigration or mortality cannot be identified and/or remedied.

Criterion 1 has not been met. Southern sea otters have been observed in the translocation zone at San Nicolas Island every year since the beginning of the program.

*Criterion 2:* If, within 3 years from the initial transplant, fewer than 25 southern sea otters remain in the translocation zone and the reason for emigration or mortality cannot be identified and/or remedied.

Criterion 2 has been met. The initial transplant occurred in August 1987. Within 3 years of the initial transplant

(August 1990), a maximum of 17 sea otters (14 independent animals and 3 pups) resided in the translocation zone.

We chose to delay declaring the translocation program a failure in 1990 because southern sea otters were reproducing, dispersal into the management zone had abated, and CDFG expressed a desire to continue zonal management of southern sea otters. Although sea otters at the island continue to reproduce, the colony remains small to this day; dispersal of sea otters from the parent range into the management zone is now regularly occurring; and CDFG informed us in 1997 that it would no longer be able to assist us if we resumed capturing sea otters in the management zone.

We consider emigration from San Nicolas Island to be the primary reason for the small size of the population (17 sea otters, including pups) remaining at the island within 3 years of the initial transplant. Fifty-four (54) translocated sea otters were later detected elsewhere (either back in the mainland range or in southern California waters). The number of sea otters resighted in the mainland range (36), despite the absence of a focused effort to identify them there (efforts were focused instead at San Nicolas Island and in the management zone), suggests that additional sea otters may have returned without being detected. There is some evidence of sea otter mortality at San Nicolas Island (three sea otters were found dead at San Nicolas Island within days of being translocated), but no additional deaths of translocated sea otters at San Nicolas Island were verified. Of the animals that remain unaccounted for, it seems likely that most either emigrated successfully and escaped further detection or attempted to emigrate but died before reaching suitable habitat.

Although high rates of dispersal had been seen in all earlier sea otter translocations (Estes *et al.* 1989), we believed that the translocation to San Nicolas Island would not result in the significant dispersal of animals because of the abundance of prey items, the apparent suitability of the habitat, and the perceived barrier imposed by the surrounding deep water. After the first year of translocation, we made significant changes to the program with the intent of minimizing or eliminating emigration (53 FR 37577; September 27, 1988). These changes were implemented during the second year of the program, when we selected younger sea otters for translocation, transported sea otters more quickly and in smaller groups, abandoned the use of holding pens at the island, and released newly translocated sea otters in the vicinity of sea otters already residing at the island. Despite our efforts, none of these changes appeared to result in a decrease in emigration. In the final year of the translocation effort, we attempted to gain more information on sea otter movements by implanting radio transmitters in sea otters immediately prior to their transport to San Nicolas Island. Two of the initial three southern sea otters that received implants died before they could be transported to the island, causing us to abandon this effort.

We conclude that the translocation program has failed under criterion 2. We conclude that emigration from San Nicolas Island is the primary reason that substantially fewer than 25 otters remained in the translocation zone within 3 years of the initial transplant. Although we modified the program significantly after the first year in an attempt to reduce emigration and otherwise reduce sea otter mortality associated with the program, we were unable to remedy the situation. Therefore, failure criterion 2 has been met.

The fact that the translocation program has failed under criterion 2 does not necessarily mean that the sea otter colony at San Nicolas Island is destined to disappear. In fact, it appears to have a low cumulative probability of extinction (Carswell 2008). However, the final rule establishing the program clearly states, ''The Service does not consider the mere presence of sea otters in the translocation zone as an indication that a new population is established'' (52 FR 29754 at 29774; August 11, 1987). The colony would be considered ''established'' when at least 150 southern sea otters resided at the island and the population had a minimum annual recruitment of 20 animals (52 FR 29754 at 29774; August 11, 1987). The initial high rate of dispersal of translocated sea otters from San Nicolas Island is the primary cause of failure under this criterion not only because of its direct effect on the subsequent size of the San Nicolas Island colony, but also because of its implications for the recovery strategy at the heart of the program: the intended function of the San Nicolas Island population as a self-sustaining ''reserve colony for providing stock to restore subsequently damaged areas'' in the southern sea otter's range (52 FR 29754 at 29774; August 11, 1987). The high rate of dispersal of translocated sea otters suggests it is unlikely that the colony will ever be large enough to supply the numbers of sea otters necessary to perform a successful translocation and reestablishment of the population in the mainland range if the parent population were reduced or eliminated by a catastrophic event.

*Criterion 3:* If, after 2 years following the completion of the transplant phase, the experimental population is declining at a significant rate, and the translocated southern sea otters are not showing signs of successful reproduction (that is to say no pupping is observed); however, termination of the project under this and the previous criterion may be delayed, if reproduction is occurring and the degree of dispersal into the management zone is small enough that the effort to remove southern sea otters from the management or no-otter zone would be acceptable to us and the affected State.

We are unable to evaluate whether the program has failed under criterion 3 because we never reached the minimum number of sea otters at San Nicolas Island required to complete the transplant phase of the program. The translocation plan defines the transplant phase as ending when there are at least 70 healthy southern sea otters of mixed ages and sexes within the translocation zone and we determine that the population is increasing due to natural reproduction. Although we translocated twice this number, we never achieved the requisite core population of 70 animals.

From a practical perspective, however, the transplant phase ended when the last sea otter was translocated to the island in 1990. The population declined at a significant rate from the program's inception in 1987 to 1993, at which time the number of independent sea otters at the island was 12. Although pups were observed from 1987 to 1993, there appeared to be little or no recruitment into the population. The 15 sea otters at the island in 1993 (12 independent animals and 3 pups) were fewer than the minimum number (25) required to avoid a declaration of failure under failure criterion 2; however, under provisions of failure criterion 3 we could delay termination of the program because pupping was occurring and dispersal of translocated sea otters into the management zone had abated.

The experimental population has fluctuated in number since 1993, and now appears to be increasing overall; reproduction continues to occur. Although pupping is occurring, it is not certain that the San Nicolas colony will persist. If it does persist, it will have been founded on a small subset of the core number of 70 healthy sea otters of mixed ages and sexes that were intended to found the population, a fact that has implications for the genetic makeup of the resulting population. The current rate of emigration from the

island is unknown, but we now know that the deep ocean channels surrounding the island do not present the anticipated barrier to dispersal.

*Criterion 4:* If we determine, in consultation with the affected State and the Marine Mammal Commission, that southern sea otters are dispersing from the translocation zone and becoming established within the management zone in sufficient numbers to demonstrate that containment cannot be successfully accomplished. This standard is not intended to apply to situations in which individuals or small numbers of southern sea otters are sighted within the management zone or temporarily manage to elude capture. Instead it is meant to be applied when it becomes apparent that, over time (1 year or more), southern sea otters are relocating from the translocation zone to the management zone in such numbers that: (1) An independent breeding colony is likely to become established within the management zone; or (2) they could cause economic damage to fishery resources within the management zone. It is expected that we could make this determination within a year, provided that sufficient information is available.

Technically, criterion 4 has not been met. This criterion clearly specifies that the program would be declared a failure if sea otters moved from the translocation zone and became established in the management zone. The criterion does not strictly apply if animals immigrate into the management zone from the parent range. Nevertheless, beginning in 1998, large groups (50 to 150 individuals) of sea otters have seasonally moved into the management zone from the parent range. Since 2006, monthly surveys have counted an average of 40 otters with considerable variation over time (standard deviation of +/− 19) (K.D. Lafferty, USGS, pers. comm. 2011). In January 2011, three pups were detected, suggesting that a permanent breeding colony may be establishing itself in the management zone. Commercial fishing interests contend that local shellfish populations available to the fishery have been reduced by the presence of these sea otters.

The difficulties associated with sea otter capture and transport, our concern for the welfare of animals removed from the management zone, the adverse effects of sea otter containment on the parent population, and the adverse effects on fisheries are concerns regardless of whether sea otters enter the management zone from the parent range or from San Nicolas Island. Although criterion 4 is specific and applies only to sea otters originating from San Nicolas Island, our experience with sea otters entering the management zone from either the parent range or the translocation zone indicates that successful containment of sea otters, or maintenance of an ''otter-free'' management zone, cannot be accomplished by simply capturing animals in the management zone and moving them to another location.

*Criterion 5:* If the health and well-being of the experimental population should become threatened to the point that the colony's continued survival is unlikely, despite Federal and State laws. An example would be if an overriding military action for national security was proposed that would threaten to devastate the colony and the removal of southern sea otters was determined to be the only viable way of preventing loss of the colony.

Criterion 5 has not been met. The experimental population at San Nicolas Island, although small and vulnerable, has persisted. There are no proposed Federal, State, or local actions that threaten to devastate the colony. The Department of Defense is responsible for the majority of human activity at San Nicolas Island. They have conferred with us and given consideration to southern sea otters when developing projects at San Nicolas Island. To date, no projects have posed a threat to the colony.

**Conclusion**

We therefore conclude that the translocation program has failed under Criterion 2. Criterion 3 cannot be evaluated. Criteria 1, 4, and 5 have not been met.

The primary purpose of the southern sea otter translocation program was to advance southern sea otter recovery, with the ultimate goal of delisting the species. Based on a broader evaluation of the translocation program against the goals for which it was undertaken and current recovery goals, in concert with the failure criteria established for the program's assessment, we again conclude that the translocation program has failed. It has failed to fulfill its purpose, and our recovery and management goals for the species cannot be met by continuing the program.

The San Nicolas Island sea otter colony remains small, and its future is uncertain. Even if the colony were to become established, the resulting population would not likely be sufficient to ensure survival of the species should the parent population be adversely affected by a widespread catastrophic event. Recovery of the southern sea otter will ultimately depend on the growth and expansion of the southern sea otter's range. Although we recognize that there are conflicts between an expanding sea otter population and fisheries that have developed in the absence of sea otters, zonal management of sea otters has proven to be ineffective and compromises the ability of the species to recover.

We therefore terminate the translocation program and remove the regulations at 50 CFR 17.84(d) in their entirety. This action:

- Terminates the designation of the experimental population of southern sea otters;
- Abolishes the southern sea otter translocation and management zones;
- Eliminates future actions, required under the previous regulations, to capture and relocate southern sea otters for the purposes of establishing an experimental population or restricting movements of southern sea otters into an ''otter-free'' management zone; and
- Allows southern sea otters to continue to expand their range naturally into southern California waters.

Removal of the translocation program regulations in their entirety also eliminates the previous requirement at 50 CFR 17.84(d)(8)(vi) to remove southern sea otters from San Nicolas Island and from the management zone upon termination of the program.

*Regulatory Environment*

Public Law 99–625 states that the Service, through the Secretary of the Interior, ''may'' develop and implement a plan for the relocation and management of sea otters, and then goes on to specify what must be included if such a plan is developed. Therefore, termination of the translocation program and removal of the regulations governing the program renders the specific provisions of Public Law 99–625 inoperative. The translocation and management zones are abolished, and the exemptions under Public Law 99–625 from the duty to consult under section 7 of the ESA for defense-related activities within the former translocation zone and for all Federal activities within the former management zone, as well as the exemption from the incidental take prohibitions of the ESA and the MMPA for activities within the former management zone, end.

Under both the ESA and the MMPA, incidental take is prohibited unless it has been authorized. Any incidental take by a Federal agency (authorized through the ESA section 7 process) or by a State or tribal government or private entity (authorized through the ESA section 10 process) also has to be

authorized under the MMPA. Section 101(a)(5)(A) of the MMPA states that we may authorize the taking of small numbers of marine mammals within a specified geographical region over periods of not more than 5 consecutive years, provided we find that the total of such taking during the period will have a negligible impact on the species or stock. Section 101(a)(5)(D) allows for similar authorization, for not more than 1 year for the incidental taking by harassment of only small numbers of marine mammals. Provisions specific to military readiness activities may also apply to the authorization of incidental take under the MMPA for defense-related agency actions.

The incidental take authorization provisions under section 101(a)(5) of the MMPA apply to activities other than commercial fishing. Take incidental to commercial fishing is authorized under different provisions of the MMPA. However, because of specific amendments to the provisions under section 118 of the MMPA, incidental take of southern sea otters in commercial fisheries cannot be authorized under the MMPA. Therefore, incidental take of southern sea otters by commercial fisheries in southern California waters is prohibited, as it is throughout the remainder of the range of the species (north of Point Conception). All intentional take of southern sea otters continues to be prohibited unless authorized under both the ESA and the MMPA.

Federal agencies proposing actions (including the permitting or funding of actions proposed by non-Federal entities) that may affect southern sea otters anywhere in southern California waters, including all actions planned within the former management zone and defense-related actions in the former translocation zone, are required to consult with the Service under section 7 of the ESA, as they do within the remainder of the species' range. Under section 7, we must determine whether a proposed Federal action is likely to jeopardize the continued existence of the southern sea otter. Our determination is made through the issuance of a biological opinion at the conclusion of the consultation stating our opinion whether the action, if carried out as proposed, is likely to jeopardize the continued existence of the species. If we conclude the proposed action would likely result in jeopardy, we also indicate any reasonable and prudent alternatives to the proposed action that would meet its intended purpose while avoiding jeopardy to the southern sea otter. If a proposed action is likely to jeopardize the continued existence of the southern sea otter, it may not go forward unless the Federal action agency applies for and is granted an exemption under section 7(h) of the ESA. If we determine that the proposed Federal action is not likely to jeopardize the continued existence of the southern sea otter, we may include an incidental take statement that exempts take of sea otters incidental to the proposed action from the take prohibition of section 9 of the ESA. Our incidental take statement would include terms and conditions that must be complied with to minimize the effects of any incidental take by the Federal action agency. In addition, the entity conducting the action would need to obtain incidental take authorization under the MMPA, as discussed above.

The exemption under State law for incidental take of southern sea otters in the management zone also ends with this action. While California Fish and Game Code Section 4700 generally prohibits the take of southern sea otters, section 8664.2 of the Fish and Game Code provides that ''the taking of a sea otter that is incidental to, and not for the purpose of, the carrying out of an otherwise lawful activity within the sea otter management zone * * * is not a violation of the California Endangered Species Act * * * or Section 4700.'' Section 8664.2 further provides, ''this section shall become inoperative if the sea otter translocation experiment is declared a failure pursuant to the provisions of Public Law 99–625.'' Recently, California amended the Natural Community Conservation Planning Act to allow CDFG to authorize the incidental take of fully protected species, including the southern sea otter, that are conserved under an approved Natural Community Conservation Plan (Cal. Fish and Game Code § 2835).

To the extent otherwise allowable under State law, proposed non-Federal activities in California that would result in take of southern sea otters will require an incidental take permit from the Service under section 10(a)(1)(B) of the ESA. Among other requirements, an applicant for an incidental take permit under section 10(a)(1)(B) of the ESA must submit a conservation plan that we find minimizes and mitigates the impacts of the proposed take to the maximum extent practicable. In addition, we must find that the proposed take will avoid appreciably reducing the likelihood of the survival and recovery of the southern sea otter in the wild.

## Economic Analysis

An economic analysis for this rulemaking and associated alternatives is included in our final SEIS on the translocation of southern sea otters. A copy of the final SEIS is posted on *http://www.regulations.gov* and may also be obtained from the Ventura Fish and Wildlife Office (see **ADDRESSES** section). When compared to the existing baseline (suspension of southern sea otter translocation and containment), this rulemaking and subsequent actions have no economic effects except possible indirect effects that may occur as a result of regulatory changes. The benefits to fisheries that may result from enforcing a southern sea otter management zone and retaining incidental take exemptions within this zone are included in our economic analysis for comparative purposes.

## Required Determinations

### *Regulatory Planning and Review*

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. 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*

Under the Regulatory Flexibility Act (RFA, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (such as small businesses, small organizations, and small government jurisdictions) (5 U.S.C. 601 *et seq.*). However, no regulatory flexibility analysis is required if the head of an agency certifies that the

rule would not have a significant economic impact on a substantial number of small entities. Thus, for a regulatory flexibility analysis to be required, impacts must exceed a threshold for ''significant impact'' and a threshold for a ''substantial number of small entities.'' See 5 U.S.C. 605(b). SBREFA amended the RFA to require Federal agencies to provide a statement of the factual basis for certifying that a rule would not have a significant economic impact on a substantial number of small entities.

Federal courts have held that an RFA analysis should be limited to impacts on entities subject to the requirements of the regulation, but not entities that may be indirectly affected by the regulation. This rulemaking directly affects only southern sea otters, with respect to their regulatory status in southern California waters under the ESA and MMPA. Economic effects potentially resulting from future regulatory changes applicable to commercial fisheries are indirect. Potential effects of sea otter range expansion on the nearshore marine environment, including the availability of certain prey species for harvest by commercial fishers, are identical to effects under baseline conditions and are also indirect. Because the Service does not have direct regulatory authority over marine fisheries, there are no direct effects on small businesses from the proposed termination of the translocation program. Therefore we certify that this rulemaking will not have a significant economic impact on a substantial number of small entities and a regulatory flexibility analysis is not required. Notwithstanding our certification, we acknowledge that in its guidance to Federal agencies on conducting screening analyses, the Small Business Administration (SBA) recommends considering impacts on entities that may be indirectly affected by the proposed regulation. Therefore, we prepared a Final Regulatory Flexibility Analysis (FRFA), which we briefly summarize below, to accompany this rulemaking.

The Service is terminating the southern sea otter translocation program and allowing all sea otters currently in southern California waters to remain there. We are taking this action because we concluded, in a final translocation program evaluation, that the program has failed to meet its objectives and that our recovery and management goals for the species under the ESA and MMPA cannot be met by continuing it. The Service has management authority for the southern sea otter, which is listed as ''threatened'' under the ESA and is considered ''depleted'' under the MMPA, and is authorized by regulations (50 CFR 17.84(d)(8)) implementing the translocation program under Public Law 99–625 to promulgate a rule to terminate the translocation program if we determine the program has failed.

Summary of Economic Analysis

A detailed economic analysis for this rulemaking and associated alternatives is included in the final SEIS. The following discussion estimates the baseline and the expected economic effects of terminating the southern sea otter translocation program.

The purpose of this rulemaking is to terminate the southern sea otter translocation program, to allow all sea otters to remain where they are upon termination of the program, and to remove the experimental population designation from the sea otters at San Nicolas Island. This action allows southern sea otters to recolonize their historic range throughout southern California. We define the baseline (status quo) as the current physical and regulatory environment (that is to say the biological and socioeconomic environment resulting from management practices that have been in place since 1993). These practices include the suspension of containment activities in the management zone. Using the current physical and regulatory environment (rather than the environment as it might be today if containment activities had not been suspended) as the baseline is essential to an accurate characterization of present conditions and to predictions of how conditions would change under each of the alternatives in the final SEIS. Under baseline (current) conditions, southern sea otter movement throughout the species' range is not restricted or contained. Under this rulemaking, containment activities will not be resumed. Southern sea otters continue to have the ability, as they have since 1993, to expand their range into southern California waters southeast of Point Conception, and to increase in number at San Nicolas Island. Accordingly, the economic effects of both the baseline and this rulemaking are the same (in that sea otters are allowed to expand their range naturally in both cases) except in the case of potential indirect economic effects on gill and trammel net fisheries stemming from regulatory changes, which we describe below. This statement should not be interpreted to mean that economic changes are not expected to occur as a result of natural range expansion. An expanding sea otter population will have numerous effects, including effects on certain commercial and recreational fisheries and the industries that depend on them. Effects of all the alternatives under consideration in the final SEIS are examined in detail in that document, including an alternative that would entail resuming full implementation of the translocation program and its associated translocation and management zones (Alternative 1), the economic effects of which we present here for comparison.

Here and in the final SEIS, we limit the quantitative analysis to a 10-year time horizon. (In the final SEIS, we additionally describe long-term economic and other effects, but in qualitative terms only.) The rationale for limiting the quantitative analysis to 10 years is based in part on the extent of uncertainty involved in predicting sea otter range expansion, in part on the indirect nature of most projected impacts (and hence possible changes over time in the relationship between sea otter presence and resultant impacts), and in part on the uncertainty associated with management regimes and economic conditions beyond 10 years.

The uncertainty involved in predicting range expansion stems from: (1) The possibility that the southern sea otter range expansion model (Tinker *et al.* 2008a), although it is the best available, may not capture all population dynamics that might ultimately prove to be relevant to range expansion; and (2) the possibility that future variation in the vital rates and movements of southern sea otters, on which predictions are based, will be different from what has been observed in the past. The uncertainty arising from the indirect nature of most impacts stems from the fact that (1) any departure from predicted range expansion will also change associated impacts, and (2) changes in the ecosystem resulting from the presence of sea otters may occur differently than anticipated because of changes in a multitude of other variables unrelated to the presence of sea otters, such as global climate change, the spread of novel diseases or invasive species, or human activity (overexploitation of marine organisms, inputs of pollutants, and so forth). The uncertainty associated with management regimes and economic conditions results from the fact that (1) fisheries may open, close, or be subject to permit or gear restrictions for reasons unrelated to the presence or absence of sea otters, and (2) commercial fisheries revenues are driven largely by market forces (which are themselves influenced by the global economic environment)

that determine consumer demand. Because of these manifold sources of uncertainty, we consider it unreasonable to attempt to establish a baseline for the impact topics we consider, and thus to attempt to quantify impacts, beyond a limited time horizon. Although the choice of 10 years rather than 5 or 15 years is somewhat arbitrary, a review of past changes in southern sea otter population dynamics and commercial fisheries landings indicates that a 10-year time horizon represents a reasonable timeframe within which to quantify impacts. Whether sea otters will reoccupy other areas of the Southern California Bight in subsequent years will be a function of sea otter demographic rates, food supply, and other variables. Based on past rates of range expansion, it is expected that sea otters will not be present in most areas of southern California for decades.

To capture some of the uncertainty involved in forecasting range expansion, we present range expansion in terms of upper and lower confidence bounds. To the extent that the range expansion model captures the key population dynamics and that future variation in vital rates and movements is not fundamentally different from the range of variation already observed, these bounds have a 95-percent probability of encompassing the realized range expansion. Within the 10-year time horizon, economic effects are projected for two areas where sea otter numbers are expected to increase under baseline conditions: (1) The coastline from Point Conception to Carpinteria (lower 95 percent confidence bound) or Oxnard (upper 95 percent confidence bound), and (2) San Nicolas Island. We project that an expanding sea otter population will have economic effects on commercial fisheries (sea urchin, crab, lobster, and sea cucumber), recreational fisheries (lobster), and the sea urchin processing industry in southern California. Assumptions underlying the economic analysis are described in Chapter 6 of the final SEIS. Numerous other noneconomic effects are expected to occur as a result of sea otter range expansion within 10 years. We discuss these effects in the final SEIS, but because these effects are difficult or impossible to quantify in economic terms, we do not discuss them here.

*Baseline.* Selected fisheries, both commercial (sea urchin, crab, lobster, and sea cucumber) and recreational (lobster), will likely be eliminated in mainland coastline areas predicted to be reoccupied by sea otters over the next 10 years: Point Conception to Carpinteria (lower bound) or Oxnard (upper bound). These fisheries are also likely to be affected, to some degree, by a growing sea otter population at San Nicolas Island. During this period, commercial sea urchin landings averaging 56,360 to 61,016 pounds annually along the affected portion of the mainland coastline are expected to be eliminated. Average annual landings at San Nicolas Island are expected to be reduced from 351,333 pounds to 324,280 pounds. These losses represent 1 percent and 0.2 percent, respectively, of annual commercial sea urchin landings in southern California. Commercial lobster landings averaging 54,674 to 75,649 pounds annually along the affected portion of the mainland coastline are expected to be eliminated. Average annual landings at San Nicolas Island are expected to be reduced from 41,622 pounds to 38,417 pounds. These losses represent 8 to 11 percent and 0.4 percent, respectively, of annual commercial lobster landings in southern California. Commercial crab landings averaging 253,572 to 385,743 pounds annually along the affected portion of the mainland coastline are expected to be eliminated. Average annual landings at San Nicolas Island are expected to be reduced from 10,634 pounds to 9,816 pounds. These losses represent 23 to 35 percent and 0.06 percent, respectively, of annual commercial crab landings in southern California. Commercial sea cucumber landings averaging 155,714 to 158,636 pounds annually along the affected portion of the mainland coastline are expected to be eliminated. Average annual landings at San Nicolas Island are expected to be reduced from 53,683 to 49,549 pounds. These losses represent 27 to 28 percent and 1.5 percent, respectively, of annual commercial sea cucumber landings in southern California. Also during this 10-year period, the seafood processing industry would be affected by the declining sea urchin harvest. However, because the decline in sea urchin harvest represents less than 2 percent of the sea urchin harvest in southern California over the next 10 years, anticipated impacts on the seafood processing industry will be negligible.

With respect to the recreational lobster fishing industry, trips on commercial passenger fishing vessels (CPFVs) along the affected mainland coastline are negligible. Trips at San Nicolas Island are expected to be reduced from an annual average of 434 to 401. This loss represents approximately 0.5 percent of total recreational lobster fishing trips taken annually in southern California on CPFVs, assuming recreational lobster fishers do not choose to fish from CPFVs at a different location. Information from the limited number of lobster report cards returned from 2008 through 2011 indicates that, under the baseline, if all lobster trips (both private and CPFV) are eliminated as a result of sea otter recolonization of the coastline to Carpinteria (lower bound) or Oxnard (upper bound) within the next 10 years, then the total number of trips in the Southern California Bight will be reduced by 3–7 percent. Because the proportion of trips to San Nicolas Island is already so small relative to the total number of trips in the Southern California Bight, the projected increase in the number of sea otters at San Nicolas Island would not be expected to have a detectable effect there. These proportional reductions should be considered provisional because they are based on limited data.

In the longer term, those areas reoccupied by sea otters will likely cease to support commercial and recreational shellfish fisheries, but the magnitude and timing of this potential change is unknown.

*Economic Effects of Rulemaking (Alternative 3C).* This rulemaking will not result in economic effects beyond those described above for baseline conditions, except in the case of potential indirect economic effects stemming from regulatory changes, namely the elimination of incidental take exemptions associated with the management zone upon termination of the translocation program. Federal agencies planning activities that may affect sea otters in southern California will be required to consult with the Service under the ESA, and if their activities would result in take of southern sea otters, to seek authorization for incidental take under both the ESA and the MMPA. The economic effects of this change are expected to be negligible in the context of already existing consultation and permitting requirements for other endangered or threatened species and marine mammals under the ESA and MMPA, particularly in light of the fact that few otherwise legal activities result in take of southern sea otters and the expectation that sea otters will not be present in most areas of southern California for decades. If otherwise allowable under applicable State law, non-Federal activities that would result in take of southern sea otters in California will require an incidental take permit from the Service under the ESA and authorization for incidental take of sea otters under the MMPA. Incidental take of southern sea otters in commercial fisheries cannot be

authorized under the MMPA. Therefore, incidental take of southern sea otters in commercial fisheries throughout southern California is prohibited, as it is currently prohibited in the remainder of the range of the species (north of Point Conception, California).

Gill and trammel nets are known to be lethal to sea otters (Herrick and Hanan 1988; Wendell *et al.* 1986; Cameron and Forney 2000; Carretta 2001; Forney *et al.* 2001). Therefore, the regulatory changes associated with this rulemaking may indirectly affect portions of the commercial halibut and white seabass fisheries utilizing gill and trammel net gear. The use of gill and trammel nets is already banned throughout much of California. With respect to southern California, the Marine Resources Protection Act of 1990 (California Constitution Article 10B) prohibits the use of gill and trammel nets in waters less than 70 fathoms or within 1 mile of the Channel Islands, whichever is less, and generally within 3 nautical miles offshore of the mainland coast from Point Arguello to the Mexican border. However, some areas within southern California waters are characterized by a relatively shallow shelf that extends beyond the area currently closed to gill net fishing. The primary fisheries using gill and trammel net gear in these areas target halibut and white seabass. Effects on these fisheries would occur if the State or NMFS acted, in response to regulatory changes associated with this rulemaking, to extend the existing gill and trammel net closure in southern California waters to depths that protect southern sea otters (that is to say depths that encompass 99 percent of all known dives). Furthermore, effects would occur only in areas where sea otters are not already fully protected, and likely only in areas that sea otters were expected to recolonize in the near future. (A closure to protect sea otters would not likely be imposed in areas where sea otters did not occur and were not expected to occur in the near future.) No effects would occur at San Nicolas Island because incidental take by commercial fisheries is currently prohibited within the translocation zone and will continue to be prohibited with termination of the program.

Estimated annualized costs for the commercial halibut fishery range from $0 (no additional closure) to $250,000 (immediate closure of the affected area), representing a loss of 0 to 21 percent to the commercial halibut fishery in southern California. To calculate the present value for a 10-year time period, the social discount rates of 3 percent and 7 percent are applied per OMB guidance. The 10-year present-value impact to the commercial halibut fishery would be approximately $2.2 million discounted at 3 percent or $1.7 million discounted at 7 percent. Estimated annualized costs for the white seabass fishery range from $0 (no additional closure) to $285,000 (immediate closure of the affected area), representing a loss of 0 to 42 percent to the commercial white seabass fishery in southern California. The 10-year present-value impact to the commercial white seabass fishery would be approximately $2.3 million discounted at 3 percent or $1.7 million discounted at 7 percent. Estimates of maximum effects represent an upper bound. Realized effects are likely to be lower because (1) the appropriate State or Federal authority may not impose an immediate closure and (2) participants in the fishery already using alternate gear would benefit from the increased availability of halibut and white seabass.

*Economic Effects from Enforcement of the Management Zone (Alternative 1).* As discussed, this rulemaking (Alternative 3C) will not result in any additional economic effects compared to the baseline except the potential indirect effects stemming from regulatory changes summarized above. For comparison purposes, we present the economic effects that would occur if southern sea otters were excluded from the management zone through a resumption of zonal management under Alternative 1. These effects are further detailed in the final SEIS. Implementation of sea otter containment in the management zone would affect the coastline southeast of Point Conception. Sea otters have been seasonally sighted in the Cojo Anchorage area since 1998. Since 2006, monthly surveys have counted an average of 40 otters with considerable variation over time (standard deviation of ± 19) (K.D. Lafferty, USGS, pers. comm. 2011). The enforcement of containment in the management zone, if fully successful, would remove any sea otters from these areas and reestablish an otter-free management zone, thereby possibly increasing fishery harvests and also increasing the Service's administrative costs. The cost to the Service of implementing a zonal management program to contain southern sea otter range expansion over 10 years would total approximately $4.3 million discounted at 7 percent or $5.6 million discounted at 3 percent.

Effects on fisheries could occur due to (1) increased shellfish populations resulting from the elimination of sea otter predation currently occurring within the management zone (in other words, the restoration of a pre-sea-otter baseline), and (2) increased shellfish populations due to the future containment of sea otters. These estimates differ from the baseline not only in direction but also in magnitude because the baseline does not account for effects on commercial and recreational fisheries that would result from the removal of sea otters that are currently in the management zone. If sea otter containment in the management zone were to be enforced and fully successful, then the estimated annualized ex-vessel revenue benefit for the commercial sea urchin, lobster, crab, and sea cucumber fisheries would be $184,000 to $186,000, $420,000 to $530,000, $210,000 to $310,000, and $116,000 to $118,000, respectively, relative to the baseline. To calculate the present value for a 10-year time period, the social discount rates of 3 percent and 7 percent are applied per OMB guidance. Discounted at 3 percent, the 10-year present value impact for the commercial sea urchin, lobster, crab, and sea cucumber fisheries would be $1.4 to $1.5 million, $3.2 to $4.1 million, $1.6 to $2.4 million, and $893,000 to $903,000, respectively. Discounted at 7 percent, the 10-year present value impact for the commercial sea urchin, lobster, crab, and sea cucumber fisheries would be $1.1 million, $2.3 to $2.9 million, $1.1 to $1.7 million, and $641,000 to $653,000, respectively. Minor positive effects on the sea urchin processing industry could result from an increase in sea urchin landings, depending on operating capacity and consumer demand. Recreational lobster fishing trips on CPFVs may increase along the coastline from Point Conception to Santa Barbara, but this increase is expected to result in negligible economic benefit because the mainland coastline is not an important area for recreational lobster fishing from CPFVs. Information from the limited number of lobster report cards returned from 2008 through 2011 suggests that 3–7 percent of the total number of recreational lobster fishing trips (including CPFV trips) in the Southern California Bight occur along the portion of mainland coastline that is expected to be affected by natural range expansion under baseline conditions during the next 10 years. Alternative 1 would prevent the reduction in trips expected under baseline conditions from occurring. Effects at San Nicolas Island are the same as under the baseline.

Effects on Small Businesses

Potential impacts to small businesses, such as owners of halibut fishing vessels

and white seabass fishing vessels, are summarized below. For more information pertaining to the economic impacts, please refer to the final SEIS.

The SBA defines a ''small business'' as one with an annual revenue or number of employees that meets or is below an established size standard. The SBA ''small business'' size standard is $4 million for ''Finfish Fishing'' and ''Shellfish Fishing'' (North American Industry Code (NAICS) 114111 and 114112) and fewer than 500 employees for ''Fresh and Frozen Seafood Processing'' (NAICS 311712). Most of the businesses in the finfish and shellfish fishing industries have fewer than 5 employees, and all of the businesses in the seafood processing industry have fewer than 500 employees. Therefore, all businesses participating in these industries are considered ''small businesses.'' The numbers of commercial fishing vessels participating in selected southern California fisheries in the area expected to be affected within 10 years and in southern California as a whole are shown in Table 1. Although some establishments may own more than one vessel, we utilize the vessel estimate provided by CDFG to ensure a conservative approach to our analysis of the number and proportion of small entities affected (*i.e.,* we may overestimate the number and proportion of small entities affected).

**Table 1. Number of commercial fishing vessels making at least one landing in selected fisheries south of Point Conception.**

| | Fishery | Number of vessels making at least one landing in southern California (2000–2009 average) | Number of vessels making at least one landing from area expected to be affected within 10 years (2000–2009 average) | Percentage of Small Businesses Affected Under Proposed Rulemaking | Percentage of Small Businesses Affected Under Alternative 1 |
|---|---|---|---|---|---|
| Finfish Fishing | Calif. halibut, with set and drift gill nets | 49 | 19 | 39% | – |
| | Calif. halibut, all other gear | 138 | 57 | 41% | – |
| | White seabass, with set and drift gill nets | 45 | 18 | 40% | – |
| | White seabass, all other gear | 42 | 25 | 60% | – |
| Shellfish Fishing | Sea urchin | 131 | 18–20* | – | 14% – 15%* |
| | Calif. lobster | 169 | 23–31* | – | 14% – 18%* |
| | Crab (all species) | 147 | 34–58* | – | 23% – 39%* |
| | Sea cucumber | 49 | 13–15* | – | 27% – 31%* |

Source: California Department of Fish and Game (2010, 2011)
*Numbers of vessels are presented as a range not because of uncertainty in the number of vessels making at least one landing from a particular statistical block but because of uncertainty regarding the extent of area likely to be recolonized by sea otters within 10 years.

Impacts on Small Businesses Due to This Rule (Alternative 3C)

This rulemaking does not result in any effects on small entities, relative to the baseline, except potential indirect economic impacts stemming from regulatory changes by the State or NMFS. Thus, the sea urchin, lobster, crab, sea cucumber, and recreational fishing industries are not affected by this rulemaking. However, an additional gill and trammel net closure, if imposed by the appropriate State or Federal authority in response to the elimination of incidental take exemptions associated with the management zone, would affect portions of the halibut and white seabass fisheries utilizing gill and trammel net gear in Santa Barbara County and Ventura County within the next 10 years. Industries in Los Angeles, Orange, San Diego, Santa Barbara, and Ventura Counties (hereafter referred to collectively as ''southern California'') are included in the analysis because of their proximity to the affected area.

Estimates of the relative impact on vessels and the number of vessels affected may be overestimates because the data available to us do not allow us

to account for vessels participating in multiple fisheries. Additionally, estimates of relative impact are averages (that is to say, some vessels will be more affected than others in the same fishery). All estimates of decreases in ex-vessel revenues assume that fishers would not choose to fish elsewhere or with alternate gear and hence would not supplement their revenues or increase harvest pressure in other areas. Finally, ex-vessel values reflect gross rather than net revenues and thus overestimate impacts because they fail to account for the savings in boat fuel and labor that could be reemployed elsewhere if commercial fishing activity in affected areas were reduced. Ex-vessel revenue and vessel number data are from CDFG.

Table 2 shows the potential indirect effects if the appropriate State or Federal authority closes additional areas to gill and trammel net fishing in Santa Barbara and Ventura Counties. Potential indirect annualized effects on the commercial halibut fishery range from $0 (no additional closure) to $250,467 (immediate closure of the affected area), representing a loss to the commercial halibut fishery in southern California of 0 to 41 percent of landings made using gill and trammel net gear only (or 0 to 21 percent of all halibut landings) relative to the baseline. Potential indirect annualized effects on the commercial white seabass fishery range from $0 (no additional closure) to $284,638 (immediate closure of the affected area), representing a loss to the commercial white seabass fishery in southern California of 0 to 44 percent of landings made using gill and trammel net gear only (or 0 to 42 percent of all white seabass landings) relative to the baseline.

TABLE 2—ESTIMATED MAXIMUM ANNUAL IMPACT ON EX-VESSEL REVENUE FOR SELECTED FISHERIES FROM THIS RULEMAKING (2009$)

| | Total annualized industry gross revenue loss (2012–2021) | Annual gross revenue decrease per small business |
|---|---|---|
| Halibut fishery (with set and drift gill nets) | $250,467 | $13,182. |
| Seabass fishery (with set and drift gill nets) | $284,638 | $15,813. |
| Sea urchin fishery | no impact | no impact. |
| Spiny lobster fishery | no impact | no impact. |
| Crab fishery | no impact | no impact. |
| Sea cucumber fishery | no impact | no impact. |

Impacts on Small Businesses Due to Alternative 1

For comparison purposes, we analyze the effects on small entities that would occur if southern sea otters were excluded from the management zone through a resumption of zonal management (full implementation of the translocation program) as detailed in the final SEIS under Alternative 1. These effects are also indirect and stem from estimated impacts of sea otter predation on species targeted by commercial shellfish fisheries. If zonal management were resumed as described under Alternative 1 in the revised draft SEIS, the following industries would be affected, relative to the baseline: (1) Shellfish Fishing (NAICS 114112), and (2) Seafood Manufacturing (NAICS 3117). Industries that support recreational lobster fishing (*i.e.,* CPFVs) are not included here because economic impacts to those entities are expected to be negligible, as shown in the baseline section. Under baseline conditions, changes over the next 10 years are expected to occur along the coastlines of Santa Barbara County and Ventura County as a result of a naturally expanding sea otter population. Alternative 1 would prevent this expansion and would entail the removal of sea otters currently residing within the management zone. Enforcement of a management zone, if successful, would benefit commercial shellfish fisheries because competition with sea otters would be eliminated. Industries in southern California are included in the analysis because of their proximity to the affected area. Within the shellfish fishing industry, we analyze four fisheries in depth: the sea urchin fishery, lobster fishery, crab fishery, and sea cucumber fishery. These predation effects are expected to occur under the baseline and under implementation of this rulemaking, but would not occur if sea otters were excluded from all southern California waters except those surrounding San Nicolas Island, as would be required under Alternative 1.

Impacts under Alternative 1 are summarized in Table 3. Potential indirect annualized effects on the commercial sea urchin fishery are estimated to be $184,054 to $186,140 relative to the baseline, representing a gain to the commercial sea urchin fishery in southern California of 3 percent of landings relative to the baseline. Potential indirect annualized effects on the commercial lobster fishery are estimated to be $419,812 to $528,611 relative to the baseline, representing a gain to the commercial lobster fishery in southern California of 6 to 7 percent of landings relative to the baseline. Potential indirect annualized effects on the commercial crab fishery are estimated to be $207,601 to $311,647 relative to the baseline, representing a gain to the commercial crab fishery in southern California of 15 to 16 percent of landings relative to the baseline. Potential indirect effects on the commercial sea cucumber fishery are estimated to be $116,157 to $118,338 relative to the baseline, representing a gain to the commercial sea cucumber fishery in southern California of 15 percent of landings relative to the baseline. Minor positive indirect effects on the sea urchin processing industry could result from an increase in sea urchin landings, depending on operating capacity and consumer demand. Thirty-two (32) seafood product preparation and packaging entities meet the SBA ''small business'' size standard in southern California. Maximum benefits would reflect the gain to the commercial sea urchin fishery in southern California of 3 percent of landings relative to the baseline.

TABLE 3—ESTIMATED ANNUAL EX-VESSEL REVENUE BENEFIT FOR SELECTED FISHERIES FROM ALTERNATIVE 1 (2009$)

| | Annualized industry gross revenue benefit (2012–2021) | Gross revenue annual impact per small business |
|---|---|---|
| Sea urchin fishery | $184,054 to $186,140 | $9,307 to $10,225. |
| Spiny lobster fishery | $419,812 to $528,611 | $17,052 to $18,253. |
| Crab fishery | $207,601 to $311,647 | $5,373 to $6,106. |
| Sea cucumber fishery | $116,157 to $118,338 | $7,889 to $8,935. |
| Halibut fishery (with set and drift gill nets) | no impact | no impact. |
| Seabass fishery (with set and drift gill nets) | no impact | no impact. |

Under Alternative 1, the regulatory environment for fishing would remain unchanged relative to the baseline. Because any potential effects on the portion of the halibut and seabass fisheries using gill and trammel net gear would stem from regulatory changes, there is no effect on these two fisheries.

Under Alternative 1, impacts to the sea urchin processing industry would be a positive function of the change in sea urchin landings. Impacts to the sea urchin processing industry would be dependent upon whether individual companies are operating at capacity and whether they are capable of processing different seafood products. If companies are operating at capacity, then there may be room for growth in the industry for an additional company. If companies are not operating at capacity, then revenues may increase in relation to any increase in raw product. Companies receiving sea urchins harvested along the affected coastline would be disproportionately affected. Because of the expected 3 percent increase in sea urchin inputs from the Southern California Bight, Alternative 1 is not expected to have a significant impact on the seafood processing industry.

*Small Business Regulatory Enforcement Fairness Act*

Amendment of title 50 of the Code of Federal Regulations to remove § 17.84(d) is not a major rule under 5 U.S.C. 804(2). Our economic analysis concludes that removal of 50 CFR 17.84(d):

- Would not have an annual effect on the economy of $100 million or more. The maximum annualized ex-vessel revenue loss to the halibut and white seabass industries would be $535,105 (10-year present value of $4.5 million discounted at 7 percent and $3.4 million discounted at 3 percent).
- Would not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.
- Would not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

*Unfunded Mandates Reform Act*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), the Service makes the following findings:

- This rulemaking would 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, 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; AFDC 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.''

This rulemaking to terminate the southern sea otter translocation program does not impose a legally binding duty on non-Federal government entities or private parties.

- This rulemaking will not significantly or uniquely affect small governments because it will not produce a mandate of $100 million or greater in any year; that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. This determination is based on the economic analysis prepared as part of the final SEIS on the sea otter translocation program. As such, a Small Government Agency Plan is not required.

*Takings*

In accordance with Executive Order 12630, this rulemaking will not have significant implications concerning taking of private property by the Federal Government. While small segments of the fishing industry may be indirectly affected by changes resulting from termination of the southern sea otter translocation program, fishery resources are public resources in which private entities have no Constitutionally protected property interest. This rulemaking will substantially advance a legitimate government interest (conservation and recovery of listed species) and will not present a bar to all reasonable and expected beneficial use of private property.

*Federalism Assessment*

In accordance with Executive Order 13132, the amendment to title 50 of the Code of Federal Regulations to remove § 17.84(d) does not have significant Federalism effects. A Federalism assessment is not required. The amendment will not have substantial direct effects on the State, in the relationship between the Federal Government and the State, or on the distribution of power and responsibilities among the various levels of government. In keeping with Department of the Interior policy, we requested information from, and coordinated with, the State of California

to the extent possible on the development of this rulemaking.

*Civil Justice Reform*

In accordance with Executive Order 12988, the amendment to Title 50 of the Code of Federal Regulations to remove § 17.84(d) does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

*Paperwork Reduction Act*

The amendment to Title 50 of the Code of Federal Regulations to remove § 17.84(d) does not contain any information collection requirements for which Office of Management and Budget approval under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* is required. The proposed amendment will not impose new recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations.

*National Environmental Policy Act*

We have considered this action with respect to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and determined that this action required the preparation of an environmental impact statement. A final SEIS is available at *http://www.regulations.gov,* at *http://www.fws.gov/ventura/,* or by contacting the Ventura Fish and Wildlife Office (see **ADDRESSES** section).

*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, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with federally recognized Tribes on a Government-to-Government basis. We have evaluated possible effects on federally recognized Indian Tribes and have determined that there are no effects.

*Energy Supply, Distribution, or Use (Executive Order 13211)*

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rulemaking is not expected to significantly affect energy supplies, distribution, and use. Although adoption of this rulemaking will result in additional consultation requirements for energy activities that may affect southern sea otters, in the context of the current regulatory environment, it would not significantly affect energy supplies, distribution, and use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

*Endangered Species Act*

In accordance with the requirements under section 7 of the Endangered Species Act of 1973, as amended, (16 U.S.C. 1531 *et seq.*), we have evaluated the effects of this action on the endangered white abalone, the endangered black abalone, and designated critical habitat for the black abalone. We determined that this action will have no effect on these species or designated critical habitat. In addition, we performed an internal Service consultation and found that the effects of this action are not likely to adversely affect the southern sea otter.

**References Cited**

A complete list of all references cited in this rulemaking is available on *http://www.regulations.gov* or upon request from the Ventura Fish and Wildlife Office (see **ADDRESSES** section).

**Author**

The primary author of this rulemaking is Lilian Carswell of the Ventura Fish and Wildlife Office (see **ADDRESSES** section).

**List of Subjects in 50 CFR Part 17**

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

**Regulation Promulgation**

Accordingly, for the reasons set forth in the preamble, 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 is revised to read as follows:

**Authority:** 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. In § 17.11(h), in the List of Endangered and Threatened Wildlife under Mammals, amend the entries for ''Otter, southern sea *(Enhydra lutris nereis)''* as follows:

■ a. Revise the first entry; and

■ b. Remove the second entry.

The revision reads as follows:

**§ 17.11 Endangered and threatened wildlife.**

(h) * * *

| Species | | Historic range | Vertebrate population where endangered or threatened | Status | When listed | Critical habitat | Special rules |
|---|---|---|---|---|---|---|---|
| Scientific name | Common name | | | | | | |
| MAMMALS | | | | | | | |
| * | * | * | * | * | * | | * |
| Otter, southern sea .. | *Enhydra lutris nereis* | West Coast, U.S.A. (CA, OR, WA) south to Mexico (Baja California). | Entire ..... | T | 21 | NA | NA |
| * | * | * | * | * | * | | * |

**§ 17.84 [Amended]**

■ 3. Amend § 17.84 by removing and reserving paragraph (d).

Dated: December 13, 2012.

**Michael J. Bean,**

*Acting Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. 2012–30486 Filed 12–18–12; 8:45 am]

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# FEDERAL REGISTER

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Part III

## Department of Homeland Security

6 CFR Part 115

Standards To Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities; Proposed Rule

**DEPARTMENT OF HOMELAND SECURITY**

**6 CFR Part 115**

**[ICEB–2012–0003]**

**RIN 1653–AA65**

## Standards To Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities

**AGENCY:** Department of Homeland Security.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY**: The Department of Homeland Security (DHS) proposes to issue regulations setting standards to prevent, detect, and respond to sexual abuse and assault in DHS confinement facilities.

**DATES:** Comments and related material must either be submitted to our online docket via *http://www.regulations.gov* on or before 11:59 p.m. on February 19, 2013 or reach the Mail or Hand Delivery/Courier address listed below in **ADDRESSES** by that date.

**ADDRESSES:** You may submit comments, identified by DHS Docket No. ICEB–2012–0003, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Office of Policy; U.S. Immigration and Customs Enforcement, Department of Homeland Security; Potomac Center North, 500 12th Street SW., Washington, DC 20536; Contact Telephone Number (202) 732–4292. To ensure proper handling, please reference DHS Docket No. ICEB–2012–0003 on your correspondence.
- *Hand Delivery/Courier:* Office of Policy; U.S. Immigration and Customs Enforcement, Department of Homeland Security; Potomac Center North, 500 12th Street SW., Washington, DC 20536; Telephone: (202) 732–4292 between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

To avoid duplication, please use only one of these three methods. See the ''Public Participation'' portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

**FOR FURTHER INFORMATION CONTACT:** Alexander Y. Hartman, Office of Policy; U.S. Immigration and Customs Enforcement, Department of Homeland Security; Potomac Center North, 500 12th Street SW., Washington, DC 20536; Telephone: (202) 732–4292 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

### I. Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. Please note that all comments received are considered part of the public record and made available for public inspection online at http://www.regulations.gov and in the DHS public docket. Such information includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

You are not required to submit personal identifying information in order to comment on this rule. Nevertheless, if you still want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online or made available in the public docket, you must include the phrase ''PERSONAL IDENTIFYING INFORMATION'' in the first paragraph of your comment. You must also place all the personal identifying information you do not want posted online or made available in the public docket in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it to be posted online or made available in the public docket, you must include the phrase ''CONFIDENTIAL BUSINESS INFORMATION'' in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted online or made available in the public docket.

Personal identifying information and confidential business information identified and located as set forth above will be redacted and the comment, in redacted form, will be posted online and placed in the DHS public docket file. Please note that the Freedom of Information Act applies to all comments received. If you wish to inspect the agency's public docket file in person by appointment, please see the **FOR FURTHER INFORMATION CONTACT** section above.

#### *A. Submitting Comments*

If you submit a comment, please include the docket number for this rulemaking (ICEB–2012–0003), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by mail or hand delivery. Please use only one of these means.

To submit your comment online, go to *http://www.regulations.gov,* click on the ''submit a comment'' box, which will then become highlighted in blue. In the ''Document Type'' drop down menu select ''Proposed Rule'' and insert ''ICEB–2012–0003'' in the ''Keyword'' box. Click ''Search'' then click on the balloon shape in the ''Actions'' column. If you submit comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the mailing address, please enclose a stamped, self-addressed postcard or envelope.

We will consider all comments and material received during the comment period and may change this proposed rule based on your comments.

#### *B. Viewing Comments and Documents*

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* and click on the ''read comments'' box, which will then become highlighted in blue. In the ''Keyword'' box insert ''ICEB–2012–0003'', click ''Search'' and then click ''Open Docket Folder'' in the ''Actions'' column. Individuals without internet access can make alternate arrangements for viewing comments and documents related to this rulemaking by contacting DHS at the contact number listed in the **FOR FURTHER INFORMATION CONTACT** section above.

#### *C. Public Meeting*

We do not now plan to hold a public meeting, but you may submit a request for one to the docket using one of the methods specified under **ADDRESSES**. In your request, explain why you believe a public meeting would be beneficial. If we determine that a public meeting would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

### II. Abbreviations

ADA Americans with Disability Act of 1990, as amended
ANPRM Advance Notice of Proposed Rulemaking
BJS Bureau of Justice Statistics
CBP U.S. Customs and Border Protection
CDF Contract Detention Facility
CFR Code of Federal Regulations
CMD Custody Management Division
CRCL DHS Office for Civil Rights and Civil Liberties
DHS Department of Homeland Security

DOJ Department of Justice
ERO Enforcement and Removal Operations
FR Federal Register
HHS Department of Health and Human Services
ICE U.S. Immigration and Customs Enforcement
IGSA Intergovernmental Service Agreement
INA Immigration and Nationality Act
IRIA Initial Regulatory Impact Analysis
LEP Limited English Proficiency
NAICS North American Industry Classification System
NPREC National Prison Rape Elimination Commission
NPRM Notice of Proposed Rulemaking
OMB Office of Management and Budget
PBNDS Performance Based National Detention Standards
PLRA Prison Litigation Reform Act
PREA Prison Rape Elimination Act of 2003
PSA Prevention of Sexual Abuse
RFA Regulatory Flexibility Act
SAAPID Sexual Abuse and Assault Prevention and Intervention Directive
SPC Service Processing Center
SSV Survey of Sexual Violence
UMRA Unfunded Mandate Reform Act of 1995
U.S.C. United States Code
USMS U.S. Marshals Service

## III. Executive Summary

### *A. Purpose of the Regulatory Action*

The purpose of this regulatory action is to propose regulations setting standards to prevent, detect, and respond to sexual abuse in Department of Homeland Security (DHS) confinement facilities.[1] Sexual violence, against any victim, is an assault on human dignity and an affront to American values. Many victims report persistent, even lifelong mental and physical suffering. As the National Prison Rape Elimination Commission explained in its 2009 report:

> Until recently * * * the public viewed sexual abuse as an inevitable feature of confinement. Even as courts and human rights standards increasingly confirmed that prisoners have the same fundamental rights to safety, dignity, and justice as individuals living at liberty in the community, vulnerable men, women, and children continued to be sexually victimized by other prisoners and corrections staff. Tolerance of sexual abuse of prisoners in the government's custody is totally incompatible with American values.[2]

The commitment to eliminate sexual abuse behind bars applies equally to DHS confinement facilities, which detain individuals for civil immigration purposes. Sexual abuse is not an inevitable feature of detention, and with DHS's strong commitment, DHS immigration detention and holding facilities can have a culture that promotes safety and refuses to tolerate abuse. DHS is fully committed to a zero-tolerance policy against sexual abuse in its confinement facilities, and the proposed standards will effectively apply that policy across DHS confinement facilities. DHS is also fully committed to the full implementation of the proposed standards in DHS confinement facilities, and to robust oversight of these facilities to ensure this implementation.

The proposed standards build on current U.S. Immigration and Customs Enforcement (ICE) Performance Based National Detention Standards (PBNDS) and other DHS detention policies, and respond to the President's May 17, 2012 Memorandum, ''Implementing the Prison Rape Elimination Act,'' which directs all agencies with Federal confinement facilities to work with the Attorney General to propose rules or procedures setting standards to prevent, detect, and respond to sexual abuse in confinement facilities. DHS seeks and welcomes public comments to this proposal.

### *B. Summary of the Provisions of the Regulatory Action*

The proposed DHS provisions span eleven categories that were originally used by the National Prison Rape Elimination Commission (NPREC) to discuss and evaluate prison rape elimination standards: prevention planning, responsive planning, training and education, assessment for risk of sexual victimization and abusiveness, reporting, official response following a detainee report, investigations, discipline, medical and mental care, data collection and review, and audits and compliance. Each provision proposed under these categories reflects the DHS experience in confinement of individuals and draws upon the unique experiences and requirements DHS faces in fulfilling its missions.

For example, DHS has broken down the standards to cover two distinct types of DHS facilities: (1) Immigration detention facilities, which are overseen by U.S. Immigration and Customs Enforcement (ICE) and used for longer-term detention of individuals involved in immigration removal operations or processes; and (2) holding facilities, which are used by ICE, U.S Customs and Border Protection (CBP), and other DHS component agencies for temporary administrative detention of individuals pending transfer to a court, jail, prison, other agency or other unit of the facility or agency.

In addition, the standards reflect the characteristics of the population encountered by DHS in carrying out its border security and immigration enforcement missions by providing, for example, for language assistance services for limited-English proficient detainees, safe detention of family units, and other provisions specific to DHS's needs. A more detailed discussion of all of the proposed provisions in the rulemaking is included below in section V of this notice of proposed rulemaking, ''Discussion of Proposed Rule,'' including a section-by-section analysis of the DHS proposal.

### *C. Costs and Benefits*

The anticipated costs of full nationwide compliance with the proposed rule, if ultimately made final, as well as the benefits of reducing the prevalence of sexual abuse in DHS immigration detention facilities and holding facilities, are discussed at length in section VI, entitled ''Statutory and Regulatory Requirements—Executive Orders 12866 and 13563'' and in the accompanying Initial Regulatory Impact Analysis (IRIA), which is found in the Federal rulemaking docket for this rulemaking.

As shown in the Summary Table below, DHS estimates that the costs of these standards would be approximately $57.7 million over the period 2013–2022, discounted at 7 percent, or $8.2 million per year when annualized at a 7 percent discount rate.

With respect to benefits, DHS conducts what is known as a ''break even analysis,'' by first estimating the monetary value of preventing various types of sexual abuse (from incidents involving violence to inappropriate touching) and then, using those values, calculating the reduction in the annual number of victims that would need to occur for the benefits of the rule to equal the cost of compliance. This analysis begins by estimating the current levels of sexual abuse in covered facilities. In 2011, ICE had two substantiated sexual abuse allegations in immigration detention facilities. During the same year, DHS experienced one substantiated allegation of sexual abuse of an individual detained in a DHS holding facility. (This does not include allegations involved in still-open investigations or allegations outside the scope of these proposed regulations.) The regulatory impact analysis extrapolates the number of substantiated and founded allegations at immigration detention facilities based on the premise that there may be additional detainees

[1] As discussed in greater detail below, in these proposed standards, ''sexual abuse'' includes sexual abuse and assault of a detainee by another detainee, as well as sexual abuse and assault of a detainee by a staff member, contractor, or volunteer.

[2] National Prison Rape Elimination Commission Report 1 (2009), *http://www.ncjrs.gov/pdffiles1/226680.pdf.*

who may have experienced sexual abuse, but did not report it.

Next, DHS estimates how much monetary benefit (to the victim and to society) accrues from reducing the annual number of victims of sexual abuse. This is, of course, an imperfect endeavor, given the inherent difficulty in assigning a dollar figure to the cost of such an event. Executive Order 13563 states that agencies ''may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.'' Each of these values is relevant here, including human dignity, which is offended by acts of sexual abuse.

DHS uses the DOJ estimates of unit avoidance values for sexual abuse. DOJ estimates extrapolate from the existing economic and criminological literature regarding rape in the community.[3] The RIA concludes that when all facilities and costs are phased into the rulemaking, the breakeven point would be reached if the standards reduced the annual number of incidents of sexual abuse by 55 from the estimated benchmark levels, which is 79 percent of the total number of assumed incidents in ICE confinement facilities, including an estimated number of those who may not have reported an incident. Chapter 3 of the IRIA presents detailed descriptions of the monetized benefits and break-even results. The Summary Table, below, presents a summary of the benefits and costs of the Notice of Proposed Rulemaking (NPRM). The costs are discounted at seven percent.

SUMMARY TABLE—ESTIMATED COSTS AND BENEFITS OF NPRM

[$millions]

| | Immigration detention facilities | Holding facilities | Total DHS PREA rulemaking |
|---|---|---|---|
| 10-Year Cost Annualized at 7% Discount Rate | $4.9 | $3.3 | $8.2 |
| % Reduction of Sexual Abuse Victims to Break Even with Monetized Costs | N/A | N/A | * 79% |
| Non-monetized Benefits | An increase in the general wellbeing and morale of detainees and staff, the value of equity, human dignity, and fairness for detainees in DHS custody. | | |
| Net Benefits | N/A | N/A | N/A |

* For ICE confinement facilities.

## IV. Background

Rape is violent, destructive, and a crime, no matter where it takes place. In response to concerns related to incidents of rape of prisoners in Federal, State, and local prisons and jails, as well as the lack of data available about such incidents, Congress passed PREA in July 2003. The bill became law with the President's signature in September 2003. *See* Public Law 108–79 (Sept. 4, 2003). Some of the key purposes of the statute were to ''develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape,'' and to ''increase the available data and information on the incidence of prison rape.'' 42 U.S.C. 15602(3), (4). As the memorandum issued by the President on May 17, 2012 makes clear, the Administration concluded that PREA applies to all federal confinement facilities, including those operated by DHS.

To accomplish these ends, PREA established the NPREC to conduct a ''comprehensive legal and factual study of the penological, physical, mental, medical, social, and economic impacts of prison rape in the United States,'' and to recommend national standards for the reduction of prison rape. 42 U.S.C. 15606. PREA charged the Attorney General, within one year of NPREC issuing its report, to ''publish a final rule adopting national standards for the detection, prevention, reduction, and punishment of prison rape * * * based upon the independent judgment of the Attorney General, after giving due consideration to the recommended national standards provided by [NPREC] * * * and being informed by such data, opinions, and proposals that the Attorney General determines to be appropriate to consider.'' 42 U.S.C. 15607(a)(1)–(2).

The NPREC released its findings and recommended national standards in a report (the NPREC report) dated June 23, 2009. The report is available at *http://www.ncjrs.gov/pdffiles1/226680.pdf.* In that report, NPREC set forth four sets of recommended national standards for eliminating prison rape and other forms of sexual abuse. Each set was applicable to one of four unique confinement settings: (1) Adult prisons and jails; (2) lockups; (3) juvenile facilities; and (4) community corrections facilities. NPREC report at pgs. 215–235. The NPREC report recommends supplemental standards for facilities with immigration detainees. *Id.* at 219–220. Specifically, and of particular interest to DHS, the NPREC made eleven recommendations for supplemental standards for facilities with immigration detainees and four recommendations for supplemental standards for family facilities. NPREC felt that standards for facilities with immigrant detainees must be enforced in any facility that is run by ICE or through an ICE contract. Although immigrants are detained in various settings, efforts to prevent and respond to sexual abuse should require attention to the vulnerabilities of this detained population.

As stated above, PREA provides that the Attorney General's final rule ''shall be based upon the independent judgment of the Attorney General, after giving due consideration to the recommended national standards provided by the Commission * * * and being informed by such data, opinion, and proposals that the Attorney General determines to be appropriate to consider.'' 42 U.S.C. 15607(a)(2).

### *A. Department of Justice Rulemaking*

In response to the NPREC report, the Attorney General established a PREA Working Group to review the NPREC's proposed standards and to assist him in the rulemaking process. The Working Group included representatives from DOJ offices including the Access to

[3] Department of Justice, National Standards to Prevent, Detect, and Respond to Prison Rape, Final Rule, Final Regulatory Impact Analysis, Docket No. DOJ–OAG–2011–0002, available at *www.regulations.gov.*

Justice Initiative, the Bureau of Prisons (including the National Institute of Corrections), the Civil Rights Division, the Executive Office for United States Attorneys, the Office of Legal Policy, the Office of Legislative Affairs, the Office of Justice Programs (including the Bureau of Justice Assistance, the Bureau of Justice Statistics (BJS), the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, and the Office for Victims of Crime), the Office on Violence Against Women, and the United States Marshals Service. On March 10, 2010, DOJ published an advance notice of proposed rulemaking (ANPRM) to solicit public comment on the NPREC's proposed standards and to receive information useful in publishing a proposed rule proffering national standards as required under PREA. 75 FR 11077 (Mar. 10, 2010). Throughout the rulemaking process, DOJ solicited and received substantial public input in the form of written comments and from listening sessions with key stakeholders. In general, the commenters to the DOJ ANPRM supported the broad goals of PREA and the overall intent of the NPREC's recommendations. The commenters were sharply divided, however, as to the merits of a number of the NPREC's recommended national standards. Some commenters, particularly those whose responsibilities involve the care and custody of detainees, expressed concern that the NPREC's recommended national standards implementing PREA would impose unduly burdensome costs on already tight State and local government budgets. Other commenters, particularly advocacy groups concerned with protecting the health and safety of detainees, expressed concern that the NPREC's standards were not protective enough, and, therefore, would not fully achieve PREA's goals.

On February 3, 2011, after reviewing the public input to the ANPRM, DOJ issued a notice of proposed rulemaking (NPRM) setting forth proposed national PREA standards. 76 FR 6248 (Feb. 3, 2011). The DOJ NPRM solicited comments on DOJ's proposed standards, and posed 64 specific questions on the proposed standards and the accompanying economic analysis.

In response to the NPRM, DOJ received over 1,300 comments, representing the same broad range of stakeholders as commented to the DOJ ANPRM. Commenters provided general assessments of DOJ's efforts as well as specific and detailed recommendations regarding each standard. Pertinent to DHS, there was specific concern expressed by the commenters with respect to NPREC's recommended supplemental standards for immigration detention number six, which proposed to mandate that immigration detainees be housed separately from criminal detainees. The NPRM noted that several comments to the DOJ ANPRM raised a concern that this requirement would impose a significant burden on jails and prisons, which often do not have the capacity to house immigration detainees and criminal detainees separately. *Id.* The NPRM also noted DOJ's concern about other proposed supplemental standards, such as imposing separate training requirements, and requiring agencies to attempt to enter into separate memoranda of understanding with immigration-specific community service providers. *Id.* Furthermore, comments to the NPRM addressed whether the proposed standards should cover immigration detention facilities, prompting DOJ to examine the application of PREA to other federal confinement facilities, which is discussed further below.

Following the public comment period for the NPRM, DOJ issued a final rule setting national standards to prevent, detect, and respond to prison rape. 77 FR 37106 (June 20, 2012). The final rule incorporates changes based upon the public comments and sets a national framework of standards to prevent, detect, and respond to prison rape at DOJ confinement facilities, as well as State prisons and local jails.

*B. Application of PREA Standards to Other Federal Confinement Facilities*

DOJ's NPRM interpreted PREA to bind only facilities operated by the Bureau of Prisons, and extended the standards to U.S. Marshals Service (USMS) facilities under other authorities of the Attorney General. 76 FR 6248, 6265. Numerous commenters criticized this interpretation of the statute. In light of those comments, DOJ re-examined whether PREA extends to Federal facilities beyond those operated by DOJ and concluded that PREA does, in fact, encompass *any* Federal confinement facility ''whether administered by [the] government or by a private organization on behalf of such government.'' 42 U.S.C. 15609(7).

In its final rule, DOJ further concluded that, in general, each Federal department is accountable for, and has statutory authority to regulate, the operations of its own facilities and, therefore, is best positioned to determine how to implement the federal laws and rules that govern its own operations, the conduct of its own employees, and the safety of persons in its custody. 77 FR 37106, 37113. In particular, DOJ noted that DHS possesses great knowledge and experience regarding the specific characteristics of its immigration facilities, which differ in certain respects from DOJ, State, and local facilities with regard to the manner in which they are operated and the composition of their populations. Thus, and given each department's various statutory authorities to regulate conditions of detention, DOJ stated that Federal departments with confinement facilities, like DHS, will work with the Attorney General to issue rules or procedures consistent with PREA.

*C. The Presidential Memorandum on Implementing the Prison Rape Elimination Act*

On May 17, 2012, the same day DOJ released its final rule, President Obama issued a Presidential Memorandum reiterating the goals of PREA and directing Federal agencies with confinement facilities that are not already subject to the DOJ final rule to propose rules or procedures necessary to satisfy the requirements of PREA within 120 days of the Memorandum. In the Memorandum, the President firmly establishes that sexual violence, against any victim, is an assault on human dignity and an affront to American values, and that PREA established a ''zero-tolerance standard'' for rape in prisons in the United States. The Memorandum further expresses the Administration's conclusion that PREA encompasses all Federal confinement facilities, including those operated by executive departments and agencies other than DOJ, whether administered by the Federal Government or by an organization on behalf of the Federal Government, and that each agency is responsible for, and must be accountable for, the operations of its own confinement facilities. The President charged each agency, within the agency's own expertise, to determine how to implement the Federal laws and rules that govern its own operations, but to ensure that all agencies that operate confinement facilities adopt high standards to prevent, detect, and respond to sexual abuse. The President directed all agencies with Federal confinement facilities that are not already subject to the DOJ final rule, such as DHS, to work with the Attorney General to propose rules or procedures that will satisfy the requirements of PREA.

As Congress and the President have concluded, sexual abuse in custodial environments is a serious concern with dire consequences for victims. DHS is firmly committed to protecting detainees from all forms of sexual abuse.

By this regulation, DHS responds to and fulfills the President's directive by proposing comprehensive, national regulations for the detection, prevention and reduction of sexual abuse at DHS immigration detention facilities and at DHS holding facilities.

*D. Types of DHS Confinement Facilities*

Unlike DOJ, which followed the pattern of the NPREC report by issuing regulations related to four types of confinement facilities, DHS has just two types of confinement facilities: (1) Immigration detention facilities and (2) holding facilities.[4]

As proposed in this rule, DHS defines an immigration detention facility as a ''confinement facility operated by or affiliated with U.S. Immigration and Customs Enforcement (ICE) that routinely holds persons for over 24 hours pending resolution or completion of immigration removal operations or processes, including facilities that are operated by ICE, facilities that provide detention services under a contract awarded by ICE, or facilities used by ICE pursuant to an Intergovernmental Service Agreement.'' These facilities are designed for long-term detention (more than 24 hours) and house the largest number of DHS detainees. ICE is the only DHS component agency with immigration detention facilities, and it has several types of such facilities: service processing center (SPC) facilities are ICE-owned facilities staffed by a combination of Federal employees and contract staff; contract detention facilities (CDFs) are owned by private companies and contracted directly with ICE; detention services at Intergovernmental Service Agreement (IGSA) facilities are provided to ICE by States or local governments through agreements and may be owned by the State or local government, or a private entity; and Intergovernmental Agreement (IGA) facilities are provided to ICE by States or local governments through intergovernmental agreements and may be owned by the State or local government, but not private entities. In addition, there are two types of IGSA facilities: dedicated IGSA facilities, which house only detained aliens, and non-dedicated IGSA facilities, which house a variety of detainees. The standards set forth in Subpart A of these proposed regulations are meant ultimately to apply to all of these various types of immigration detention facilities—but not, notably, to USMS facilities used by ICE under intergovernmental agreements; those facilities and their immigrant detainees would be covered by the DOJ PREA standards and not the provisions within Subpart A of these proposed rules.

The proposed regulations would not apply to CDF and IGSA facilities directly; rather, standards for these facilities would be phased in through new contracts and contract renewals. Specifically, the proposed regulations would require that when contracting for the confinement of detainees in immigration detention facilities operated by non-DHS private or public agencies or other entities, the agency include in any new contracts or contract renewals the obligation to adopt and comply with these standards. In other words, DHS intends to enforce the proposed standards though terms in its contracts with facilities.

DHS defines a holding facility similarly to DOJ's definition of ''lockup.'' A ''holding facility'' is a facility that contains holding cells, cell blocks, or other secure enclosures that are: (1) Under the control of the agency; and (2) primarily used for the short-term confinement of individuals who have recently been detained, or are being transferred to or from a court, jail, prison, or other agency. These facilities, which are operated by ICE, CBP, or other DHS components, are designed for confinement that is short-term in nature, but are permanent structures intended primarily for the purpose of such confinement. Temporary-use hold rooms and other types of short-term confinement areas not primarily used for confinement are not amenable to compliance with these standards, but are covered by other DHS policies and procedures. We discuss the distinctions between these facilities in more detail later in this proposal.

1. ICE Detention Facilities

As stated above, the NPREC report contained eleven recommended standards for facilities with immigration detainees and four recommended standards specifically addressing family facilities. ICE oversees immigration detention facilities nationwide. The vast majority of facilities are operated through government contracts, State and local entities, private entities, or other federal agencies. The ICE Office of Enforcement and Removal Operations (ERO) is the subdivision within ICE that manages ICE operations related to the immigration detention system.

ERO is responsible for providing adequate and appropriate custody management to support the immigration removal process. This includes providing traditional and alternative custody arrangements for those in removal proceedings, providing aliens access to legal resources and representatives of advocacy groups, and facilitating the appearance of detained aliens at immigration court hearings. Through various immigration detention reform initiatives, ERO is committed to providing and maintaining appropriate conditions of confinement, providing required medical and mental healthcare, housing detainees in the least restrictive setting commensurate with their criminal background, ensuring appropriate conditions for all detainees, employing fiscal accountability, increasing transparency, and strengthening critical oversight, including efforts to ensure compliance with applicable detention standards through inspection programs.

The ERO Custody Management Division (CMD) provides policy and oversight for the administrative custody of immigration detainees; one of the most highly transient and diverse populations of any correctional or detention system in the world. CMD's mission is to manage ICE detention operations efficiently and effectively to provide for the safety, security and care of aliens in ERO custody.

ERO is currently responsible for providing custody management to approximately 158 authorized immigration detention facilities, consisting of 6 SPCs, 7 CDFs, 9 dedicated IGSA facilities, and 136 non-dedicated IGSA facilities (of which 64 are covered by the DOJ PREA rule, not this proposed rule, because they are USMS IGA facilities). ERO has 91 other authorized immigration detention facilities that typically hold detainees for more than 24 hours and less than 72 hours, including 55 USMS IGA facilities and 36 non-dedicated IGSA facilities. In addition, ICE has 149 holding facilities that hold detainees for less than 24 hours. These holding facilities are nationwide and are located within ICE ERO Field and Sub-Field Offices.

2. ICE Sexual Abuse and Assault Policies

The proposed regulation for immigration detention facilities and holding facilities discussed in this rulemaking supports existing sexual abuse policies promulgated by ICE, including ICE's PBNDS 2011 and its 2012 Sexual Abuse and Assault Prevention and Intervention Directive (SAAPID),[5] which provide strong

[4] For simplicity, all persons confined in DHS immigration detention facilities and holding facilities are referred to as ''detainees'' in this rulemaking.

[5] ICE, *Performance-Based National Detention Standards* (2011), *http://www.ice.gov/doclib/detention-standards/2011/pbnds2011.pdf*; ICE,

safeguards against all sexual abuse of individuals within its custody, consistent with the goals of the PREA.

ICE's PBNDS 2011 standard on ''Sexual Abuse and Assault Prevention and Intervention'' was developed in order to enhance protections for immigration detainees as well as ensure a swift and effective response to allegations of sexual abuse. This standard derived in significant part from earlier policies contained in the agency's PBNDS 2008, promulgated in response to the passage of PREA, and took into consideration the subsequently released recommendations of the NPREC (including those for facilities housing immigration detainees) in June 2009 and ensuing draft standards later issued by DOJ in its Advance Notice of Proposed Rulemaking in March 2010. In drafting the PBNDS 2011, ICE also incorporated the input of the DHS Office for Civil Rights and Civil Liberties (CRCL), local and national advocacy organizations, and representatives of DOJ (including correctional experts from the Bureau of Prisons) on methods for accomplishing the objectives of PREA in ICE's operational context, and closely consulted information and best practices reflected in policies of international corrections systems, statistical data on sexual violence collected by the DOJ BJS, and reports published by the United Nations High Commissioner for Refugees and the Inter-American Commission on Human Rights of the Organization of American States regarding sexual abuse and other issues affecting vulnerable populations in U.S. correctional systems. The PBNDS 2011 establish responsibilities of all immigration detention facility staff with respect to preventative measures such as screening, staff training, and detainee education, as well as effective response to all incidents of sexual abuse, including timely reporting and notification, protection of victims, provision of medical and mental health care, investigation, and monitoring of incident data.

The 2012 ICE SAAPID complements the requirements established by the 2011 PBNDS by delineating ICE-wide policy and procedures and corresponding duties of agency employees for reporting, responding to, investigating, and monitoring incidents of sexual abuse. In conjunction with the PBNDS, the Directive ensures an integrated and comprehensive system of preventing and responding to all incidents or allegations of sexual abuse of individuals in ICE custody.

ICE's combined policies prescribe a comprehensive range of protections against sexual abuse addressing prevention planning, reporting, response and intervention, investigation, and oversight, including: articulation of facility zero-tolerance policies; designation of facility and agency sexual abuse coordinators; screening and classification of detainees; staff training; detainee education; detainee reporting methods; staff reporting and notification; first responder duties following incidents or allegations of sexual abuse (including to protect victims and preserve evidence); emergency and ongoing medical and mental health services; investigation procedures and coordination; discipline of assailants; and sexual abuse incident data collection and review.

These policies are tailored to the unique operational and logistical circumstances encountered in the DHS confinement system in order to maximize their effective achievement of the goals of the PREA within the immigration detention context. To further improve transparency and enforcement, DHS has decided to issue this regulation and adopt the overall structure of the DOJ standards, as well as the wholesale text of various individual DOJ standards where it has deemed them appropriate and efficacious for DHS facilities, to meet the President's goal of setting high standards, government-wide, consistent with the goals of PREA. Where appropriate, DHS has also used the results of DOJ research and considered public comments submitted in response to the DOJ ANPRM and NPRM in formulating the DHS proposals.

3. U.S. Customs and Border Protection Detention Facilities

U.S. Customs and Border Protection (CBP) has a priority mission of keeping terrorists and their weapons out of the United States. CBP is also responsible for securing and facilitating trade and travel while enforcing hundreds of U.S. statutes and regulations, including immigration and drug laws. All persons, baggage, and other merchandise arriving in or leaving the United States are subject to inspection and search by CBP officials under legal authorities for any number of reasons relating to its immigration, customs, and other law enforcement activities.

CBP detains individuals in a wide range of facilities. CBP detains some individuals in secured detention areas, while others are detained in open seating areas where agents or officers interact with the detainee. CBP uses ''hold rooms'' in its facilities for case processing, and to search, detain, or interview persons who are being processed. CBP does not currently contract for staff within its holding facilities, but exercises oversight of detainees with its own employees.

CBP generally detains individuals for only the short time necessary for inspection and processing, including pending release or transfer of custody to appropriate agencies. Some examples of situations in which CBP detains individuals prior to transferring them to other agencies are: (1) Persons processed for administrative immigration violations may, for example, be repatriated to contiguous territory or transferred to ICE pending removal from the United States or removal proceedings with the Executive Office of Immigration Review; (2) unaccompanied alien children placed in removal proceedings under section 240 of the Immigration and Nationality Act (INA), 8 U.S.C. 1229a, are transferred, in coordination with ICE, to the Department of Health and Human Services (HHS), Office of Refugee Resettlement; (3) persons detained for criminal prosecution are temporarily held pending case processing and transfer to other Federal, State, local or tribal law enforcement agencies. CBP policies and directives currently cover these and other detention scenarios.

4. CBP Detention Directives and Guidance

The various CBP policies and directives containing guidance on the topics addressed in these proposed regulations include, but are not limited to:

*Personal Search Handbook,* Office of Field Operations, CIS HB 3300–04B, July 2004—describes the procedures for personal searches as well as detention of juveniles, short-term detention, and those persons being detained who require medical examinations. The handbook further details the procedures for transportation of, detention of and, reporting procedures for persons detained for prolonged medical examinations as well as detentions lasting more than two hours.

CBP Directive No. 3340–030B, *Secure Detention, Transport and Escort Procedures at Ports of Entry*—includes general guidelines on detention. The policy also defines procedures for the handling of juveniles, medical situations, meals, water, restrooms, phone notifications, sanitation of the hold room, restraining procedures, classification of detainees,

*Directive No. 11062.1: Sexual Abuse and Assault Prevention and Intervention* (2012), *http://www.ice.gov/detention-standards.* These documents are available, redacted as appropriate, in the docket for this rule where indicated under **ADDRESSES.**

transportation, emergency procedures, escort procedures, transfer procedures, and property disposition.

U.S. Border Patrol Policy No. 08–11267, *Hold Rooms and Short-Term Custody*—establishes national policy describing the responsibilities and procedures for the short-term custody of persons in Border Patrol hold rooms pending case disposition. The policy also contains requirements regarding the handling of juveniles in Border Patrol custody.

DHS referenced all of these policies in its consideration of DHS-wide standards to prevent, detect, and respond to sexual abuse in DHS confinement facilities. The policies are available, redacted as appropriate, in the docket for this rule where indicated under **ADDRESSES.**

## V. Discussion of Proposed Rule

### *A. The DHS Proposal*

Sexual violence, against any victim, is an assault on human dignity. Such acts are particularly damaging in the detention environment, where the power dynamic is heavily skewed against victims and recourse is often limited. Until recently, however, this has been widely viewed as an inevitable aspect of imprisonment within the United States. This view is not only incorrect but incompatible with American values.

DHS keeps records of any known or alleged sexual abuse incidents in its facilities. ICE keeps records of any claims in its Joint Integrity Case Management System (JICMS). ICE records indicate 138 sexual abuse allegations from 2010 to June 2012. Of those, 57 percent were inmate- or detainee-on-detainee allegations, 38 percent were contract staff-on-detainee, and the remaining 5 percent were ICE and/or State or local staff-on-detainee. These figures are unacceptable to DHS and the Administration, which has articulated a ''zero-tolerance'' standard for sexual abuse in confinement facilities. Accordingly, DHS has a mandate to work towards eliminating all such incidents.

With respect to its proposal, DHS did not begin its work from a blank slate. Many correctional administrators have developed and implemented policies and practices to more effectively prevent and respond to sexual abuse in DHS confinement facilities. DHS applauds these efforts, and views them as an excellent first step. However, DHS needs a national effort to meet PREA's goals and comply with the President's directive that can be applied effectively to all covered facilities in light of their particular physical characteristics, the nature of their diverse populations, and resource constraints.

DHS appreciates the considerable work DOJ has done in this area, and also recognizes that each DHS component has extensive expertise regarding its own facilities, particularly those housing unique populations, and that each DHS component is best positioned to determine how to implement the Federal laws and rules that govern its own operations, the conduct of its own employees, and the safety of persons in its custody. Thus DHS, because of its own unique circumstances, has adopted the overall structure of DOJ's regulations and has used its content to inform the provisions of this proposed rule, but has tailored individual provisions to maximize their efficacy in DHS confinement facilities.

DHS also emphasizes that these proposed standards are not intended to establish a safe harbor for otherwise constitutionally-deficient conditions regarding detainee sexual abuse. Likewise, while the DHS standards aim to include a variety of best practices, the need to adopt standards applicable to a wide range of facilities while accounting for costs of implementation means that the proposed standards do not incorporate every promising avenue of combating sexual abuse. The proposed standards represent policies and practices that are attainable by DHS components and their contractors, while recognizing that other DHS policies and procedures can, and in some cases currently do, exceed these standards in a variety of ways. DHS applauds such efforts, and encourages its components and contractors to further support the identification and adoption of additional innovative methods to protect detainees from sexual abuse.

### *B. Section by Section Analysis*

The DHS proposal follows the DOJ rule in devising separate sets of standards tailored to different types of confinement facilities utilized by the DHS: ''immigration detention facilities'' and ''holding facilities.'' Each set of standards consists of the same eleven categories used by the DOJ rule: prevention planning, responsive planning, training and education, assessment for risk of sexual victimization and abusiveness, reporting, official response following a detainee report, investigations, discipline, medical and mental care, data collection and review, and audits and compliance. As in the DOJ rule, a General Definitions section applicable to both sets of standards is provided.

*Definitions.* Sections 115.5 and 115.6 provide definitions for key terms used in the proposed standards, including definitions related to sexual abuse. The definitions in this section largely mirror those used in the DOJ rule, with adjustments as necessary for DHS operational contexts. DHS has also largely relied on the NPREC's definitions in the Glossary sections that accompanied the NPREC's four sets of standards, but has made a variety of adjustments and has eliminated definitions for various terms that either do not appear in the DHS proposed standards or whose meaning is sufficiently clear so as not to need defining. Below is an explanation for key definitions modified or added by DHS:

*Agency.* The rule proposes to define agency as the unit or component of DHS responsible for operating or supervising any facility, or part of a facility, that confines detainees. This definition reflects the common understanding of the term agency as a unit of the Federal government and permits DHS to more appropriately and clearly place responsibility for compliance with the individual standards set forth in the proposed rule on the DHS component responsible for overseeing or supervising the facility, including the DHS component's responsibility for implementing DHS policy.

*Exigent circumstances.* The rule proposes a definition for this term, which is used in several standards. The term is defined to mean ''any set of temporary and unforeseen circumstances that require immediate action in order to combat a threat to the security or institutional order of a facility or a threat to the safety or security of any person.'' Such circumstances include, for example, the unforeseen absence of a staff member whose presence is indispensable to carrying out a specific standard, or an outbreak of violence within the facility that requires immediate action.

*Facility.* A facility for purposes of the proposed rule means a place, building (or part thereof), set of buildings, structure, or area (whether or not enclosing a building or set of buildings) that was built or retrofitted for the purpose of detaining individuals and is routinely used by the agency to detain individuals in its custody. The proposed rule also clarifies that ''[r]eferences to requirements placed on facilities extend to the entity responsible for the direct operation of the facility'' to ensure that there is no ambiguity about each operator's responsibility to comply with given standards within the proposed rule. In the case of long-term detention facilities and holding facilities used by ICE, this generally refers to the

corporate contractor or State or local government entity responsible for the day-to-day operation of the facility. In the case of CBP holding facilities, this generally refers to the agency itself. This definition does not include temporary locations—such as U.S. Coast Guard vessels, hotel rooms, and conference rooms—temporarily or sporadically used to detain individuals for short periods of time during agency operations.

*Family unit.* DHS, unlike DOJ, oversees a Family Residential Program which houses non-criminal residents in a family-friendly, shelter-like setting. In order to facilitate placing families into this arrangement, ICE is required to identify family units. As such, DHS proposes to adopt the definition of ''family unit'' from the ICE Family Detention and Intake Guidance.[6] In the Guidance, and in this proposed rule, family unit means a group of detainees that includes one or more non-United States citizen juvenile(s) accompanied by his/her/their parent(s) or legal guardian(s), none of whom has a known history of criminal or delinquent activity, or of sexual abuse, violence, or substance abuse.

*Holding Facility.* The DHS proposed rule uses the DOJ's definition of ''lockup,'' as the basis for its definition of ''holding facility'' which is more consistent with terminology used throughout DHS policy documents. Important to this definition is that the holding facility must be ''primarily used'' for the short-term confinement of individuals who have recently been detained. As with the definition of ''facility'' above, the definition does not include temporary locations—such as U.S. Coast Guard vessels, hotel rooms, and conference rooms—temporarily or sporadically used to detain individuals for short periods of time during agency operations. These are governed separately by other agency operational policies.

*Immigration detention facility.* DHS detains the largest number of its detainees at ICE immigration detention facilities around the country. DHS and ICE define an immigration detention facility as a confinement facility operated by or affiliated with ICE that routinely holds persons for over 24 hours pending resolution or completion of immigration removal operations or processes, including facilities that are operated by ICE, facilities that provide detention services under a contract awarded by ICE, or facilities used by ICE pursuant to an IGSA. ICE ERO is responsible for providing custody management to approximately 158 authorized immigration detention facilities that house detainees for over 72 hours, including 6 SPCs, 7 CDFs, 9 dedicated IGSA facilities, and 136 non-dedicated IGSA facilities (62 of the non-dedicated IGSA facilities and 2 of the dedicated IGSA facilities are covered by the DOJ PREA rule, not this proposed rule, because they are USMS IGA facilities). ICE ERO also provides custody management to an additional 91 authorized immigration detention facilities that are contracted to hold detainees for less than 72 hours, including 36 non-dedicated IGSA facilities and 55 USMS IGA facilities. The provisions within Subpart A below apply to all of the facilities just mentioned that are not USMS facilities, which are already covered by the DOJ PREA rule: 94 over 72-hour facilities and 36 under 72-hour facilities. Please see Table 1 in Section VI.A.2 Summary of Affected Populations.

*Juvenile.* DHS's existing detention policies define a juvenile as any person under the age of 18. The DOJ rule further qualified this with the phrase ''unless under adult court supervision and confined or detained in a prison or jail.'' DHS does not operate or oversee prison or jail facilities and, as such, this phrase was not included as it is not applicable to DHS facilities. DHS does not incorporate this qualification because the juveniles DHS detains are detained for civil administrative purposes.

*Sexual abuse.* The DHS definition of sexual abuse in the proposed rule differs slightly from DOJ's definition of sexual abuse in the DOJ final rule. Both the DHS and DOJ standards define staff-on-detainee sexual abuse to cover all types of sexual contact between detainees and staff members, volunteers, or contractors that is unrelated to proper searches or medical duties, as well as any attempts by staff to engage in such contact or to coerce a detainee into doing so. Detainee-on-detainee sexual abuse is similarly defined by both standards to encompass all types of sexual contact between detainees accomplished through force, coercion, or intimidation. In order to account for the fact that DHS detainees are often held with prisoners, inmates, and facility residents, the proposed rule includes sexual abuse of a detainee by a prisoner, inmate, or resident in the definition of ''sexual abuse of a detainee by another detainee.'' However, whereas the DOJ standards include *attempted* acts of sexual abuse (in addition to completed acts of sexual abuse) only in their definition of staff-on-detainee abuse, DHS believes it is important to provide equal protection against attempted sexual abuse in all instances, and therefore includes attempted acts of sexual abuse in its definitions of both staff-on-detainee and detainee-on-detainee sexual abuse. In addition, DOJ separately defines sexual harassment by an inmate to include ''[r]epeated and unwelcome sexual advances, requests for sexual favors, or verbal comments, gestures, or actions of a derogatory or offensive sexual nature by one inmate, detainee, or resident directed toward another.'' DHS, instead, incorporates much of the same behavior into the proposed definition of sexual abuse, which forbids ''threats, intimidation, or other actions or communications by one or more detainees aimed at coercing or pressuring another detainee to engage in a sexual act.''

In addition, DHS has included sexual harassment within its definition of staff-on-detainee sexual abuse, as DHS believes that combating precursors to sexual abuse represents an important aspect of preventing sexual abuse. DHS also has included unnecessary or inappropriate visual surveillance of a detainee as part of the definition of sexual abuse of a detainee by a staff member, contractor, or volunteer. The DHS prohibition on unnecessary or inappropriate visual surveillance is consistent with and addresses the same types of conduct as DOJ's prohibition on voyeurism, as that term is defined in DOJ's PREA final rule. Under the DHS rule, unnecessary or inappropriate surveillance generally derives from a prurient interest and is carried out through one or a series of embarrassing, intimidating, or degrading incidents involving leering, unnecessary supervision, or improper photography or videotaping of the detainee in a state of undress or performing bodily functions. For example, as DOJ explained in its PREA final rule, a staff member who happens to witness a detainee in a state of undress while conducting rounds has not engaged in unnecessary and inappropriate visual surveillance. On the other hand, a staff member who, outside of their official duties, takes images of all or part of a detainee's naked body, or of an inmate performing bodily functions, for the staff member's own use or for further distribution, has likely engaged in unnecessary and inappropriate visual surveillance.

*Coverage:* Section 115.10 clarifies that Subpart A of the proposed rule is only applicable to ICE immigration detention

[6] *See* Memorandum from David J. Venturella, Acting Dir., Office of Detention and Removal Operations, to Field Office Directors (Aug. 14, 2009). This document is available, redacted as appropriate, in the docket for this rule where indicated under **ADDRESSES.**

facilities. DHS holding facilities are governed by Subpart B of the proposed rule. DHS recognizes the importance of preventing, detecting, and responding to all sexual abuse, but also that the resources and environment of immigration detention facilities and holding facilities are different by nature and need to have a respectively different set of standards tailored to each of them for an effective outcome.

*Prevention Planning:* Sections 115.11, 115.111, 115.12, 115.112, 115.13, 115.113, 115.14, 115.114, 115.15, 115.115, 115.16, 115.116, 115.17, 115.117, 115.18 and 115.118. DHS believes it is important to establish what actions facilities are expected to take to prevent sexual abuse. Sections 115.11 and 115.111 require each DHS agency responsible for operation of confinement facilities and each immigration detention facility covered by Subpart A to establish a written zero-tolerance policy toward sexual abuse outlining the agency's or facility's approach to preventing, detecting, and responding to such conduct.

Sections 115.11 and 115.111 also mandate that each covered agency appoint an upper-level, agency-wide Prevention of Sexual Abuse Coordinator (PSA Coordinator) to oversee agency efforts to comply with DHS sexual abuse prevention, detection, and response standards and that each immigration detention facility covered by Subpart A appoint a Prevention of Sexual Abuse Compliance Manager (PSA Compliance Manager) to oversee facility efforts in this regard. A similar facility-level requirement is not included for Subpart B holding facilities, as those are very numerous, often small, and operated directly by the agency, and thus overseen by the PSA Coordinator through the normal agency chain of command.

With respect to the reporting level of the DHS component PSA Coordinator, DHS's proposed standard requires that the position be ''upper-level'' but does not require that the coordinator report directly to the DHS component head. The PSA Coordinator should have access to agency and facility leadership on a regular basis, and have the authority to work with other staff, managers, and supervisors to effectuate change if necessary. By contrast, the facility-specific PSA Compliance Manager need not be ''upper-level,'' but should have access to facility staff, managers, and supervisors in order to guide implementation of facility sexual abuse prevention and intervention policies and procedures.

Sections 115.12 and 115.112 require that agencies that contract with private entities for the confinement of detainees include the entity's obligation to comply with the DHS sexual abuse standards in new contracts or contract renewals. Although the proposed regulation would not directly apply to non-DHS private or public agencies or other entities, the proposed regulation requires that new contracts or renewals include the entity's obligation to adopt and comply with these standards and ''provide for agency contract monitoring to ensure that the contractor is complying with these standards.''

Sections 115.13 and 115.113 govern the supervision and monitoring of detainees. The DHS proposal recognizes that direct staff supervision and video monitoring are two methods of achieving one goal: reducing the opportunity for sexual abuse to occur unseen. DHS recognizes that different agencies and facilities rely on staffing and technology to varying degrees depending upon their specific characteristics. Accordingly, the DHS proposal considers these issues together.

DHS is also mindful that staffing and video-monitoring systems are both expensive. Staff salaries and benefits are typically the largest item in a correctional agency's budget, *see, e.g., National Institute of Corrections, Staffing Analysis: Workbook for Jails* (2d ed.) at 2, and economies of scale are difficult to obtain: increasing staffing by 25% is likely to increase staff costs by 25%. Likewise, video-monitoring systems may be beyond the financial reach of some agencies and facilities, although the costs of such systems may diminish in future years as technology advances.

DHS, however, recognizes the importance of detainee supervision in combating sexual abuse and believes that the correctional community shares this view. *See, e.g., American Correctional Association, Public Correctional Policy on Offender Sexual Abuse* (Jan. 12, 2005) (recommending that agencies ''[m]aintain adequate and appropriate levels of staff to protect detainees against sexual assault''). Although proper detainee supervision and monitoring cannot eliminate the risk of sexual abuse, it can play a key role in reducing opportunities for it to occur.

At the same time, DHS recognizes that determining adequate detainee supervision and monitoring is a facility-specific enterprise. For example, the appropriate means of supervision and monitoring, including appropriate staffing levels, depends upon a variety of factors, including (but not necessarily limited to) the physical layout of a facility, the security level and gender of the detainees, whether the facility houses adults or juveniles, the length of time detainees reside in the facility, the amount of programming that the facility offers, and the facility's population density (i.e., comparing the number of detainees to the number of beds or square feet). Also, the facility's reliance on video monitoring and other technology may reduce staffing requirements, as long as the facility employs sufficient staff to monitor the video feeds or other technologies such as call buttons or sensors. The viability of technology may in turn depend upon, among other factors, the characteristics of the confined population.

Due to the complex interaction of these factors, DHS does not believe that it is possible to craft an agency-wide or facility-wide formula that would set appropriate staffing levels for all populations—although DHS is aware that some States do set such levels for juvenile facilities. Nor is it likely that an auditor would be able to determine the appropriate staffing level in the limited amount of time available to conduct an audit. Relying on reported incidents of sexual abuse to determine appropriate staffing levels is also an imperfect method given the uncertainty as to whether an incident will be reported. Indeed, facilities where detainees feel comfortable reporting abuse, and where investigations are conducted effectively, may be more likely than other facilities to experience substantiated allegations of sexual abuse, even if the facility is safer than its counterparts. For this reason, DHS, like DOJ, has opted not to adopt general across-the-board standards on this issue, as proposed by some commenters to the DOJ rulemaking.

Accordingly, DHS is of the view that any standard that governs detainee supervision and monitoring must protect detainees by providing sufficient clarity as to its requirements, recognizing that the adequacy of detainee supervision and monitoring depends on several factors that interact differently for each facility, and accounting for the costs involved in employing additional staff and in purchasing and deploying additional technology. The agency or the facility itself must, therefore, make its own comprehensive assessment of adequate supervision levels, taking into account its use, if any, of video monitoring or other technology. The fact that multiple factors bear on the adequacy of detainee supervision and monitoring is no barrier to requiring an agency to conduct such an assessment for each of its facilities. The agency or facility must reassess at least annually such adequate

supervision and monitoring, including through appropriate staffing levels, and should also reassess its use of video monitoring systems and other technologies. This annual assessment will include an examination of the adequacy of resources the agency or facility has available to ensure adequate levels of detainee supervision and monitoring. The purpose of mandating such inquiries within these standards is to institutionalize the practice of assessing detainee supervision and monitoring in the context of considering how supervision and monitoring contribute to efforts to combat sexual abuse. DHS is interested in receiving comments on whether and to what extent this standard should include additional or alternative requirements.

DHS notes, however, that this standard, like all the standards, is not intended to serve as a legal safe harbor. A facility that makes its best efforts to design and comply with its detainee supervision plan is not necessarily in compliance with legal requirements, even if a staffing shortfall is due to budgetary factors beyond its control.

DHS also believes that heightened protection should be accorded detainees who are assessed to be at a high risk of victimization for sexual abuse. The proposed rule thus provides in the holding facility context under proposed 115.141 that the agency provide such detainees heightened protection, to include continuous direct sight and sound supervision, single-cell housing, or placement in a cell actively monitored on video by a staff member sufficiently proximate to intervene, unless no such option is determined to be feasible. In the immigration detention context, heightened protection is addressed at another section of the proposed rule, 115.43, which imposes requirements more consistent with the long-term detention context and the more extensive resources found within those facilities, including consideration of administrative segregation. The proposed rule also includes proposed 115.13(d), which calls for unannounced security inspections to augment the safety of detainees held in the immigration detention facilities. This provision is not included in the holding facility provisions as the agency visual supervision of detainees in that context is frequently direct and more continuous than in the long-term detention context.

In general, DHS provides that juveniles will be detained in the least restrictive setting appropriate to the juvenile's age and special needs, provided that such setting is consistent with the need to protect the juvenile's well-being and that of others, as well as any other laws, regulations, or legal requirements. Nearly all juveniles in ICE detention are located in family facilities, specifically in two family detention facilities that house juvenile detainees along with adult family members. Although the concern raised by potential mixing of adult and juvenile populations is thus unlikely to be an issue in ICE facilities as a whole, DHS has proposed a standard in section 115.14 that restricts, but does not forbid, the placement of juveniles in adult facilities. This provision is in recognition that it is possible under certain circumstances that adult and juvenile populations potentially could mix and it is important to clarify in regulation that DHS seeks to restrict such an outcome whenever possible.

The BJS previously reported that, based on its surveys of facility administrators, 20.6% of victims of substantiated incidents of inmate-on-inmate sexual violence in adult jails in 2005 were under the age of 18, and 13% of such victims in 2006 were under 18,[7] despite the fact that under-18 inmates accounted for less than one percent of the total jail population in both years.[8] These findings derived from facility responses to the BJS's *Survey of Sexual Violence* (SSV), which was administered to a representative sampling of jail facilities in addition to all Federal and State prison facilities. However, upon further review, BJS has determined that these figures are not statistically significant due to the small number of reported incidents and the small number of jails contained in the sample. Indeed, in reporting data from the 2007 and 2008 SSVs, BJS determined that the standard errors around the under-18 estimates for adult jails were excessively large, and consequently did not report the estimates separately, but rather reported combined figures for inmates under the age of 25. BJS has now determined that it should have done the same for 2005 and 2006.

However, this conclusion does not impact the findings of the same BJS surveys performed in State prisons, which surveyed all State prisons (in contrast to the jails surveys, which included only a sampling of jails). According to SSV reports, from 2005 through 2008, 1.5% of victims of substantiated incidents of inmate-on-inmate sexual violence in State prisons were under 18, even though under-18 inmates constituted less than 0.2% of the State prison population. While the number of such substantiated incidents is small from 2005 through 2008—a total of 10—the combined data indicates that State prison inmates under the age of 18 are more than eight times as likely as the average State prison inmate to have experienced a substantiated incident of sexual abuse. Furthermore, the true prevalence of sexual abuse is undoubtedly higher than the number of substantiated incidents, due to the fact that many incidents are not reported, and some incidents that are reported are not able to be verified and thus are not classified as ''substantiated.'' Indeed, it is quite possible that prison inmates under 18 are more reluctant than the average inmate to report an incident because of their age and relative newness to the prison system.

DOJ's review of State procedures in its final rule indicates that at least 28 States have laws, regulations, or policies that restrict the confinement of juveniles in adult facilities in varying degrees. Some jurisdictions house these juveniles in juvenile facilities until they reach a threshold age and then transfer them to an adult facility. Other jurisdictions require physical separation or sight and sound separation between these juveniles and adult offenders. Yet other jurisdictions maintain dedicated programs, facilities, or housing units for juveniles in the adult system. Overall, there appears to be a national trend toward limiting interaction between juveniles and adult inmates. In recent years, a number of States have imposed greater restrictions on the placement of juveniles in adult facilities or have passed legislation to allow juveniles tried as adults to be housed in juvenile facilities.[9]

[7] *See* Beck, Sexual Violence Reported by Correctional Authorities, 2005, Table 4, BJS (2006); and Beck, Sexual Violence Reported by Correctional Authorities, 2006, Appendix Table 5, BJS (2007).

[8] *See* Minton, Jail Inmates at Midyear 2010—Statistical Tables, Table 7, BJS (2011).

[9] *See* 77 FR 37106, 37128 n.14 (June 20, 2012) (citing 42 Pa. C.S.A. § 6327 (under-18 Pennsylvania inmates awaiting trial as adults may be detained in juvenile facilities until reaching 18); Va. S.B. 259, 2010 Gen. Assem., Reg. Sess. (eff. July 1, 2010) (presumption that under-18 Virginia inmates awaiting trial as adults be held in juvenile facilities); Colo. Rev. Stat. § 19–2–517 (2012) (preventing 14 and 15-year-olds from being tried as adults except in murder and sexual assault cases; requires prosecutors to state reasons and hear from defense counsel before exercising discretion to try 16 and 17-year-olds as adults); Ariz. S.B. 1009, 49th Leg., 2d Reg. Sess. (2010) (eliminating eligibility of some juveniles to be tried as adults by requiring a criminal charge brought against the juvenile to be based on their age at the time the offense was committed and not when the charge was filed); Utah H.B. 14, Gen. Sess. (Utah 2010) (granting justice court judge discretion to transfer a matter at any time to juvenile court if it is in the best interest of the minor and the juvenile court concurs); Miss. S.B. 2969, 2010 Leg., Reg. Sess. (2010) (limiting the types of felonies that 17 year olds can be tried for as an adult);Wash. Rev. Code

Continued

Furthermore, several accrediting and correctional associations have formulated position statements, issued standards, or provided comments urging either that all persons under 18 be held in juvenile facilities only, or that they be housed separately from adult inmates. For example, the National Commission on Correctional Healthcare, the American Jail Association, the National Juvenile Detention Association, and the National Association of Juvenile Correctional Agencies all support separate housing or placement for juveniles.[10] So too does the American Bar Association.[11]

Although many jurisdictions have moved away from incarcerating adults with juveniles, a significant number of juveniles continue to be integrated into the adult inmate population. DOJ estimates that in 2009, approximately 2,778 juveniles were incarcerated in State prisons and 7,218 were held in local jails.[12]

Taking these statistics and DHS operational requirements into consideration, DHS has decided to propose standards aimed at preventing unsupervised contact with adults without inadvertently causing harm to juveniles. The standard requires juveniles to be detained in the least restrictive setting appropriate to the juvenile's age and special needs, provided that such setting is consistent with the need to protect the juvenile's well-being and that of others, as well as any other laws, regulations or legal requirements.

In section 115.14, Juvenile and family detainees, the proposed standard for ICE immigration detention facilities is consistent with ICE's Family Detention and Intake Guidance and recognizes that in some circumstances ICE detains families together. Under this standard, ICE immigration detention facilities would not be required to hold juveniles apart from adults if the adult is a member of the family unit and no other adult non-relative detainees are in the same detention cell, and provided there are no safety or security concerns with the arrangement. ICE policy and the standards would further require that facilities provide priority attention to unaccompanied alien children, as defined by 6 U.S.C. 279, whom DHS is legally required to transfer to a HHS Office of Refugee Resettlement facility within 72 hours, except in exceptional circumstances. If the unaccompanied alien child has been convicted of a sexual abuse-related crime as an adult, ICE will provide the entity taking custody of the juvenile—generally the facility or the HHS Office of Refugee Resettlement—with the releasable information regarding the conviction(s) to ensure the appropriate placement of the alien in an HHS Office of Refugee Resettlement facility.

Section 115.114, the standard for detaining juveniles in holding facilities, leaves open the possibility that families detained while travelling or living together may be detained together, while providing that unaccompanied juveniles be held separately from adult detainees. This distinction is intended to protect unaccompanied juveniles who may be at an increased vulnerability to sexual abuse by virtue of their unaccompanied status but permit families travelling together to remain together while confined for temporary processing or other agency operations.

With these sections, DHS is mindful of agency concerns regarding cost, feasibility, and preservation of State law prerogatives. The proposed standard still affords facilities and agencies some flexibility in devising an approach to protecting juveniles. Compliance may be achieved by, for example: (1) Confining juveniles to a separate unit, (2) transferring juveniles to a facility within the agency that enables them to be confined to a separate unit, (3) entering into a cooperative agreement with an outside jurisdiction to enable compliance, or (4) ceasing to confine juveniles in adult facilities as a matter of policy, or State or local law. Agencies may, of course, combine these approaches as they see fit.

Sections 115.15 and 115.115 address limits on cross-gender viewing and searches. The proposed rule would require policies and procedures that enable detainees to shower (where showers are available), perform bodily functions, and change clothing without being viewed by staff of the opposite gender, except in exigent circumstances or when such viewing is incidental to routine cell checks or is otherwise appropriate in connection with a medical examination or bowel movement under medical supervision. The proposed rule would also require that staff of the opposite gender announce their presence when entering an area where detainees are likely to be showering, performing bodily functions, or changing clothing. The rule would further prohibit cross-gender strip searches except in exigent circumstances, or when performed by medical practitioners, and prohibits facility staff from conducting body cavity searches of juveniles, requiring instead that all body cavity searches of juveniles be referred to a medical practitioner. These DHS provisions are the same for immigration detention facilities and holding facilities, and reflect the existing policies related to ICE immigration detention operations.

In Subpart A, the DHS proposal imposes limits on immigration detention facilities' cross-gender searches that are broader in scope than the DOJ PREA final rule, generally prohibiting cross-gender pat-down searches of all detainees, male or female. The DOJ regulations governing adult prisons and jails prohibit cross-gender pat-down searches of female inmates only, with a relatively narrow exception for exigent circumstances. DHS adopts the DOJ standard on cross-gender pat-down searches of female inmates (for DHS's purposes, female detainees). DHS has also incorporated the PBNDS 2011 standard prohibiting cross-gender pat-down searches of male detainees, with an exception for situations where, after reasonable diligence, staff of the same gender is not available at the time the pat-down search is required or in exigent circumstances. DHS intends this

§ 13.04.030(1)(e)(v)(E)(III) (2012) (allowing juveniles to be transferred back to juvenile court upon agreement of the defense and prosecution); Wash. Rev. Code § 13.40.020 (14) (providing that juveniles previously transferred to adult court are not automatically treated as adults for future charges if found not guilty of original charge); 2009 Nev. Stat. 239 (raising the age a juvenile may be presumptively certified as an adult from 14 to 16); Me. Rev. Stat. Ann. tit. 17–A § 1259 (2011) (providing that juveniles under 16 who receive adult prison sentence must serve sentence in juvenile correctional facility until their 18th birthday); 2008 Ind. Acts 1142–1144 (limiting juvenile courts' ability to waive jurisdiction to felonies and requiring access for Indiana criminal justice institute inspection and monitoring of facilities that are or have been used to house or hold juveniles); Conn. Gen. Stat. § 54–76b–c (2012) (creating presumption that 16–17 year olds are eligible to be tried as youthful offenders unless they are charged with a serious felony or had previously been convicted of a felony or adjudicated a serious juvenile offender); 75 Del. Laws 269 (2005) (limiting Superior Court's original jurisdiction over robbery cases involving juveniles to crimes committed by juveniles who had previously been adjudicated delinquent for a felony charge and thereafter committed a robbery in which a deadly weapon was displayed or serious injury inflicted); 705 Ill. Comp. Stat. 405/5–130 (2011) (eliminating the requirement that 15–17 year olds charged with aggravated battery with a firearm and violations of the Illinois Controlled Substances Act, while on or near school or public housing agency grounds, be tried as adults)).

[10] *See* Letter from Campaign from Youth Justice, *et al.,* to Attorney General Holder, at 4, April 4, 2011; NCCHC Position Statement, Health Services to Adolescents in Adult Correctional Facilities, adopted May 17, 1998, *http://www.ncchc.org/resources/statements/adolescents.html.*

[11] See ABA Criminal Justice Standards on the Treatment of Prisoners, at 23–3.2(b), *http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/Treatment_of_Prisoners.authcheckdam.pdf.*

[12] *See* West, Prison Inmates at Midyear 2009—Statistical Tables, Table 21, BJS (Rev. 2011); Minton, Jail Inmates at Midyear 2010—Statistical Tables, Table 6, BJS (Rev. 2011).

standard to require facilities to make considerable efforts to facilitate same-gender staff availability. Whereas DOJ's rule is being phased in over three to five years, depending on the size of the affected facility, DHS proposes implementation of this standard at the same time as all other requirements placed on facilities through this rulemaking. DHS is soliciting public comment on this proposed approach to restrictions on cross-gender pat-down searches.

DOJ explained in its final rule that it had received numerous comments on its proposed limits on cross-gender pat-down searches during the course of its rulemaking. Multiple State and local agencies expressed concern about a complete prohibition on cross-gender pat-down searches, as applied to male inmates. The commenters wrote that such a requirement might affect an agency's ability either to hire significant numbers of additional male staff or to lay off significant numbers of female staff, due to their overwhelmingly male inmate population and substantial percentage of female staff. In addition, many agencies expressed concern that the necessary adjustments to their workforce could violate Federal or State equal employment opportunity laws. DHS has taken note of these comments in formulating its proposals but believes its circumstances can accommodate the proposed prohibition of cross-gender pat-down searches unless staff of the same gender is not available, after reasonable diligence, or in exigent circumstances.

Accordingly, and consistent with existing DHS policies, in Section 115.15, DHS proposes to prohibit cross-gender pat-down searches in its immigration detention facilities unless, after reasonable diligence, staff of the same gender is not available at the time the pat-down search is required (for male detainees), or in exigent circumstances (for female and male detainees alike). DHS proposes to require that all cross-gender pat-down searches conducted pursuant to these exceptions be documented. Cross-gender pat-downs are not prohibited in the holding facility context, in Section 115.115, because of the exigencies encountered in those environments and the staffing and timing constraints in those small and short-term facilities.

Sections 115.15 and 115.115, consistent with existing DHS policy, also bar examinations of detainees for the sole purpose of determining gender status. Rather, if the detainee's gender is unknown, it may be determined during conversations with the detainee, by reviewing medical records (if available), or, if necessary, learning that information as part of a broader medical examination conducted in private by a medical practitioner. The proposed standard also mandates that agencies train security staff, in the immigration detention facility context, and law enforcement staff, in the holding facility context, in proper procedures for conducting all pat-down searches, including cross-gender pat-down searches and searches of transgender and intersex detainees. The DHS standard mandates that all pat-down searches be conducted in a professional and respectful manner, and in the least intrusive manner possible consistent with security needs, including officer safety concerns, and existing agency policy.

Sections 115.16 and 115.116 govern the accommodation of detainees with disabilities and detainees with limited English proficiency (LEP). As the NPREC noted, ''[t]he ability of all detainees to communicate effectively and directly with staff, without having to rely on detainee interpreters, is crucial for ensuring that they are able to report sexual abuse as discreetly as possible.'' *Prison/Jail Standards* at 13. Moreover, the Americans with Disabilities Act (ADA) requires State and local governments and their instrumentalities to make their services, programs, and activities accessible to individuals with all types of disabilities. *See* 42 U.S.C. 12132. The ADA also requires State and local governments to ensure that their communications with individuals with disabilities affecting communication (blindness, low vision, deafness, or other speech or hearing disability) are as effective as their communications with individuals without disabilities. In addition, the ADA requires each State and local government to make reasonable modifications to its policies, practices, and procedures when necessary to avoid discrimination against individuals with disabilities, unless it can demonstrate that making the modifications would fundamentally alter the nature of the relevant service, program, or activity. These nondiscrimination obligations apply to all confinement facilities operated by or on behalf of State or local governments. *See Pa. Dep't of Corr.* v. *Yeskey,* 524 U.S. 206, 209–10 (1998).

DHS's proposed standard requires all facilities to take appropriate steps to ensure that detainees with disabilities (including, for example, detainees who are deaf or hard of hearing, those who are blind or have low vision, or those who have intellectual, psychiatric, or speech disabilities) have an equal opportunity to participate in or benefit from all aspects of the agency's efforts to prevent, detect, and respond to sexual abuse. Such steps would include, when necessary, ensuring effective communication with detainees who are deaf or hard of hearing, and providing access to in-person, telephonic, or video interpretive services. In addition, DHS will provide all facilities with written materials related to sexual abuse in formats or through methods that ensure effective communication with detainees with disabilities, including detainees who have intellectual disabilities, limited reading skills, or who are blind or have low vision. Consistent with DOJ regulations under title II of the ADA, 28 CFR 35.164, the agency would not be required to take actions that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity, or in undue financial and administrative burdens.

Similarly, DHS agencies would be required to take reasonable steps to ensure meaningful access for LEP detainees to all aspects of the agency's efforts to prevent, detect, and respond to sexual abuse, including steps to provide in-person or telephonic interpretive services to enable effective, accurate, and impartial interpretation, both receptively and expressively, using any necessary specialized vocabulary. These requirements are consistent with the existing DHS-wide Language Access Plan.[13]

With respect to relying on detainee interpreters, 115.16(c) limits reliance on detainee interpreters in circumstances related to allegations of sexual abuse. Specifically, the DHS standard proposes to require that the agency provide access to in-person or telephonic interpretation services by someone other than another detainee when dealing with issues related to sexual abuse, but would not prohibit reliance on a detainee interpreter where the detainee expresses a preference for a detainee interpreter and the agency determines that such interpretation is appropriate. A detainee would not be an appropriate interpreter if he or she is the alleged abuser or a witness to the alleged abuse, or has some significant relationship with the alleged abuser. The provision of interpreter services by minors, alleged abusers, detainees who witnessed the alleged abuse, and detainees who have a significant relationship with the alleged abuser to provide interpretation is not appropriate in matters relating to allegations of sexual abuse. This provision is intended to ensure access to

[13] The DHS Language Access Plan can be found at *www.dhs.gov/crcl-lep.*

the effective, accurate, and impartial interpretation that is essential when addressing sensitive issues such as those involving allegations of sexual abuse, but to accommodate detainees who prefer to have another detainee interpret for them.

DHS re-emphasizes that the requirements in this proposed standard are not intended to relieve agencies of any preexisting obligations imposed by the ADA, the Rehabilitation Act of 1973, or the meaningful access requirements of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.,* and Executive Order 13166. DHS encourages all agencies to refer to the relevant statutes, regulations, and guidance when determining the extent of their obligations.

Sections 115.17 and 115.117 govern hiring and promotion decisions. Like the DOJ standards, the proposed DHS standard would restrict agencies' ability to hire or enlist the services of anyone who may have contact with detainees and who previously engaged in sexual abuse in a prison, jail, holding facility, community confinement facility, juvenile facility, or other institution (as defined in 42 U.S.C. 1997); who has been convicted of engaging or attempting to engage in sexual activity facilitated by force, overt or implied threats of force, or coercion, or if the victim did not consent or was unable to consent or refuse; or who has been civilly or administratively adjudicated to have engaged in such activity. The agency or facilities will also be required to consider any substantiated allegations of sexual abuse made against staff in making promotion decisions.

Finally, like the DOJ final rule, the DHS proposal would require a background investigation before the agency or facility hires employees, staff, or contractors who may have contact with detainees. These background investigations will include accessing the standard criminal records databases maintained and widely used by law enforcement agencies. To ensure that facilities perform a background investigation consistent with agency standards, DHS proposes to require the facility to provide written documentation to the agency upon request showing the elements completed in the background check and the facility's final determination for the agency's approval. DHS will repeat these background checks for agency employees every five years. In addition, these proposed standards would require an updated background investigation every five years for those facility staff who may have contact with detainees and who work in immigration-only detention facilities. Unlike the DOJ final rule, however, DHS does not propose to require all facilities to repeat the background checks every five years; the burden of this requirement seems to outweigh its beneficial effect, particularly given that many facility staff do not frequently have contact with immigrant detainees.

Sections 115.18 and 115.118 require agencies and facilities to consider the effect of any facility designs, modifications, or technological upgrades on efforts to combat sexual abuse when designing or expanding facilities and when installing or updating a video monitoring system or other technology. DHS believes that it is appropriate to require agencies to consider the impact of their physical and technological upgrades. Indeed, the American Correctional Association has recommended that, as a means of deterring sexual abuse, agencies should promote facility design that enables effective supervision within facilities, including, for instance, direct lines of sight, video monitoring systems, and other physical and technology features. *American Correctional Association, Public Correctional Policy on Offender on Offender Sexual Abuse* (Jan. 12, 2005; Jan. 27, 2010). DHS agrees that it needs to be forward-looking in its strategy to prevent sexual abuse in its immigration detention and holding facilities, and believes that this provision will institute appropriate strategic thinking within DHS and its partners for future construction.

*Responsive Planning:* Sections 115.21, 115.121, 115.22 and 115.122. DHS believes it is important to establish standards that address how facilities are expected to respond to an incident of sexual abuse. Sections 115.21 and 115.121 set forth requirements to ensure each agency and facility establishes a protocol for the investigation of allegations of sexual abuse, or the referral of allegations of sexual abuse to the appropriate investigative authorities. Agencies and facilities are also required to establish protocols that maximize the potential for preserving usable physical evidence for administrative or criminal proceedings, and are required to publish the agency and facility protocols on their respective Web sites, or otherwise make those protocols available to the public. In addition, all detainee victims must be provided access to a forensic medical examination as appropriate, at no cost to the detainee.

These proposed standards make clear that DHS components and facilities must have protocols in place that maximize the potential for obtaining usable physical evidence. Similarly, the proposed standard specifies that the protocol must be developmentally appropriate for juveniles, where applicable. Recognizing the value of victim advocacy services in these circumstances, the proposed standards provide that immigration detention facilities must establish procedures to make available, to the extent possible, outside victim services following incidents of sexual abuse. DHS holding facilities would also be required to consider how best to utilize available community resources and victim services and if, in connection with an allegation of sexual abuse at a holding facility, the detainee is transported for an examination to an outside hospital that offers victim advocacy services, the detainee would be permitted to use such services to the extent available, consistent with DHS security needs.

This proposed standard takes into account the fact that some DHS component agencies and facilities are not responsible for investigating alleged sexual abuse within their facilities and that those agencies and facilities may not be able to dictate the conduct of investigations conducted by outside entities, such as law enforcement agencies. In such situations, the proposed standard requires the agency or facility to request that the investigating entity follow the relevant investigatory requirements set out in the standard.

Sections 115.22 and 115.122 propose standards to ensure that, to the extent the agency is responsible for investigating allegations of sexual abuse, an administrative and/or criminal investigation is completed for all allegations of sexual abuse. Where the agency or facility is not responsible for conducting such investigation, they would ensure that the allegations are promptly referred to an appropriate entity with the legal authority to conduct the investigation. The DHS proposal thus mandates that each DHS component have in place policies to ensure that allegations of sexual abuse either are investigated by the agency or are promptly referred to an appropriate entity for investigation. In order for the PSA Coordinator to have appropriate oversight of these allegations across the agency, and to support the PSA Coordinator's recordkeeping and reporting functions, all incidents of detainee sexual abuse would be promptly reported to the PSA Coordinator, and to the appropriate offices within the agency and within DHS.

Sections 115.22 and 115.122 also would require that when an allegation of detainee abuse that is criminal in

nature is being investigated, each agency shall ensure that any alleged detainee victim of criminal sexual abuse is provided access to relevant information regarding the U nonimmigrant visa process. DHS intends to implement this requirement by providing either the phone number to an appropriate national hotline or relevant informational materials printed by U.S. Citizenship and Immigration Services. In addition, facilities are required to post lists of pro bono legal service providers with contact information and Legal Orientation Program presentations and materials to assist detainees seeking information regarding the U nonimmigrant visa process. Should the available informational resources change, DHS will change its practices accordingly to satisfy this requirement.

*Training and Education:* Sections 115.31, 115.131, 115.32, 115.132, 115.33, 115.34, 115.134, and 115.35. DHS believes that training for individuals who may have contact with detainees is a key component in combating sexual abuse. Training will create awareness on the topic of sexual abuse in facilities, clarify staff responsibilities, provide staff with information regarding reporting mechanisms, and provide specialized information for staff with key roles in responding to sexual abuse. In addition, each standard in this category requires documentation that the required training was provided. In order to facilitate compliance, such documentation may be electronic.

Sections 115.31 and 115.131 require that all employees who have contact with detainees, and all facility staff receive training concerning sexual abuse, with refresher training to be provided thereafter as appropriate. This training must include at a minimum: the agency's zero-tolerance policies for all forms of sexual abuse; the right of detainees and staff to be free from sexual abuse, and from retaliation for reporting sexual abuse; definitions and examples of prohibited and illegal sexual behavior; recognition of situations where sexual abuse may occur; recognition of physical, behavioral, and emotional signs of sexual abuse, and methods of preventing such occurrences; and procedures for reporting knowledge or suspicion of sexual abuse; the requirement to limit reporting of sexual abuse to personnel with a need-to-know in order to make decisions concerning the victim's welfare and for law enforcement or investigative purposes. The agency or facility would need to document completion of the training and complete the training for current staff within one year of the effective date of the standard for immigration detention facilities and within two years of the effective date of the standard for holding facilities. The proposal permits holding facilities a longer period of time to implement the training. In light of the very large number of CBP personnel who will receive this training, two years is a more appropriate timeframe to ensure completion of the training. In the meantime, the agency will publish and disseminate to all agency personnel the agency policy mandating zero tolerance toward all forms of sexual abuse.

Section 115.32 ensures that volunteers and contractors at immigration detention facilities have been trained on their responsibilities under the agency's and the facility's sexual abuse prevention, detection, intervention and response policies and procedures; in holding facilities, volunteers and contractors are covered by 115.131.

DHS believes that educating detainees concerning sexual abuse protections is of the utmost importance. Section 115.132 requires the agency to make public its zero-tolerance policy regarding sexual abuse and ensure that key information regarding the agency's zero-tolerance policy is visible or continuously and readily available to detainees, for example, through posters, detainee handbooks, or other written formats.

Separately, section 115.33 requires each immigration detention facility to inform detainees about the agency's and the facility's zero-tolerance policies regarding sexual abuse. DHS believes that regular communication and publication of these policies are important means of creating the appropriate tone to ensure compliance. As such, section 115.33 requires that information about combating sexual abuse is provided to individuals in custody upon intake. Several agency commenters to the DOJ PREA proposed rule expressed concern that DOJ's standard would impose a vague mandate by requiring the provision of comprehensive education to detainees within a ''reasonably brief period of time'' following intake. The proposed DHS standard for immigration detention facilities requires the provision of comprehensive education upon intake, and not following intake. Given the relatively short amount of time that individuals are detained in DHS holding facilities, this requirement is limited to Subpart A.

Sections 115.34 and 115.134 require that the agency or facility provide specialized training to agency or facility investigators who conduct investigations into allegations of sexual abuse at confinement facilities, and require that all investigations into alleged sexual abuse be conducted by qualified investigators. To the extent not already included in agency training, ICE and CBP will train investigators on sexual abuse investigations, covering interviewing sexual abuse and assault victims; sexual abuse evidence collection in confinement settings; and the criteria and evidence required for administrative action or prosecutorial referral. DHS is also interested in receiving feedback on how it can provide additional assistance to facilities in developing and administering such training.

Section 115.35 requires that the agency provide specialized training to DHS employees who serve as full- and part-time medical practitioners and mental health practitioners in immigration detention facilities where medical and mental health care is provided. DHS believes that investigative and medical staff members serve vital roles in the response to sexual abuse and, due to the nature of their responsibilities, require additional training in order to be effective. With regard to facility medical staff, the standard requires that the agency review and approve the facility's policy and procedures to ensure that facility medical staff is trained in procedures for examining and treating victims of sexual abuse. A parallel standard is not included for DHS holding facilities, which usually do not employ or contract for medical or mental health practitioners.

*Assessment for Risk of Sexual Victimization and Abusiveness:* Sections 115.41, 115.141 and 115.42 and 115.43. DHS believes that the proper assessment of detainees is crucial to preventing sexual abuse. Protection of detainees in immigration detention and holding facilities requires that agencies and facilities obtain information from detainees and use such information to assign detainees to facilities or specific cells in which they are likely to be safe. These proposed standards are substantially similar to those implemented by DOJ, except that reassessment is required to take place 60–90 days after the initial assessment, rather than 30 days after. The average length of stay in ICE detention is 26 days, with many detainees staying just a few days or weeks more than that average. In addition, ICE has a robust onsite monitoring and review process that includes routine interaction with ICE detainees. This monitoring would allow ICE to be made aware of any

additional, relevant information after the intake assessment, to determine whether a reassessment is appropriate.

Sections 115.41 and 115.141 require that before placing any detainees together in a holding facility or housing unit, staff consider whether, based on the information before them, a detainee may be at a high risk of being sexually abused or abusing others. When appropriate, staff shall take necessary steps to mitigate any such danger to the detainee. In the list of factors to consider, DHS proposes, to the extent that the information is available, that the agency consider whether the detainee has a mental, physical, or developmental disability; the age of the detainee; the physical build and appearance of the detainee; whether the detainee has previously been incarcerated; the nature of the detainee's criminal history; whether the detainee has any convictions for sex offenses against an adult or child; whether the detainee has self-identified as being gay, lesbian, bisexual, transgender, intersex, or gender nonconforming; whether the detainee has self-identified as having previously experienced sexual victimization; and the detainee's own concerns about his or her physical safety. For holding facilities, under section 115.141, the proposed standard adds an abbreviated risk assessment process for facilities that do not hold detainees overnight, and a more extensive risk assessment process for holding facilities where detainees may be held overnight with other detainees.

Section 115.42 requires administrators of immigration detention facilities to use the information obtained in an assessment interview in order to separate individuals who are at risk of abuse from those at high risk of being sexually abusive. The proposed DHS regulation is substantially similar to the NPREC's standard with one exception. The proposed standard does not include the NPREC's recommended ban on assigning detainees to particular units solely on the basis of sexual orientation or gender identity, but requires that the facility consider detainees' gender self-identification and make an individualized assessment of the effects of placement on detainee mental health and well-being. DHS believes that retaining some flexibility will allow facilities to employ a variety of options tailored to the needs of detainees with a goal of offering the least restrictive and safest environment for individuals.

Section 115.43 governs the use of protective custody. Due to the importance of protective custody, DHS believes it warrants its own standard, applicable only to immigration detention facilities, as other types of DHS confinement facilities usually do not have protective custody assignments of this nature. The proposed standard provides that administrative segregation shall be used to protect vulnerable populations only in those instances where reasonable efforts have been made to provide appropriate housing, and shall be used for the least amount of time practicable, and when no other viable housing options exist, as a last resort. DHS recognizes that protective custody may be necessary in a confinement setting to ensure the safety of detainees and staff. However, DHS also notes that the prospect of placement in segregated housing may deter detainees from reporting sexual abuse. The new standard attempts to balance these concerns and ensure that alternatives to involuntary protective custody are considered. In addition, the proposed standard reflects the NPREC's recommendation that, to the extent possible, facilities that place detainees in administrative segregation for protective custody should provide those detainees access to programs, services, visitation, counsel and other services available to the general population to the maximum extent practicable.

*Reporting:* Sections 115.51, 115.151, 115.52, 115.53, 115.54, and 115.154. DHS believes that reporting instances of sexual abuse is critical to deterring future acts.

Sections 115.51 and 115.151 require agencies to enable detainees to privately report sexual abuse, retaliation for reporting sexual abuse, and related misconduct. The NPREC recommendations proposed that agencies be required to allow detainees to report abuse to an outside public entity, which would then forward reports to the facility head ''except when [a detainee] requests confidentiality.'' Several commenters to the DOJ PREA rulemaking expressed concern that a public entity would be required to ignore reports of criminal activity if a detainee requested confidentiality. DHS proposes that detainees be provided instruction on how to contact the DHS Office of the Inspector General or, as appropriate, another designated office, to confidentially report sexual abuse. However, DHS will also provide and facilities shall inform the detainees of at least one way for detainees to report sexual abuse to a public or private entity or office not part of the agency, and that is able to receive and immediately forward detainee's reports of sexual abuse to agency officials allowing the detainee to remain anonymous, upon request. In light of the short time in which individuals are detained in holding facilities, the requirement in section 115.151 would be met if information regarding consular notification is posted in holding facilities. DHS further proposes that policies and procedures include provisions for staff to accept reports of sexual abuse, and to promptly document any verbal reports.

Consistent with existing policy, DHS employees may report misconduct outside their chain of command to, for instance, the Joint Intake Center; likewise, the proposed rule requires an option for staff of non-chain-of-command reporting.

Section 115.52 governs grievance procedures and the methods by which detainees can, if they choose, file grievances related to sexual abuse. First, the proposal requires that facilities not impose any deadline on the submission of a grievance regarding sexual abuse incidents. Detainees are to be permitted to file a formal grievance at any time before, during, after, or in lieu of lodging an informal complaint related to sexual abuse. The facility then must issue a decision on the formal grievance within five days of receipt. To prepare a grievance, a detainee may obtain assistance from fellow detainees, the housing officer, other facility staff, family members, attorneys, or outside advocates. DHS does not use a formal grievance process to govern holding facilities because of the short-term, transitory nature of detention in such facilities; detainees can use any of the methods in Section 115.151 to report misconduct.

Several State correctional agencies asserted in comments to the DOJ PREA rulemaking that imposing a standard governing the exhaustion of administrative remedies would undermine or violate the Prison Litigation Reform Act (PLRA). DOJ determined that its corresponding standards were not, however, inconsistent with the PLRA. And in any event, the PLRA does not apply to immigration detainees, even if they are housed in correctional settings. See 18 U.S.C. 1997e.

Several agency commenters to the DOJ PREA rulemaking stated that a requirement to treat any notification of an alleged sexual assault as a grievance, regardless of the method by which notification was made (other than by notification by a fellow inmate), would pose administrative difficulties, particularly when such notification came from a third party. Commenters suggested that it would be burdensome and impracticable to require staff to complete a grievance form on behalf of

an inmate whenever staff learns of an allegation of sexual abuse. DHS agrees with these commenters and has not included a similar provision in its proposed rule.

Section 115.53 requires that agencies provide detainees access to outside confidential support services, similar to the NPREC's recommended standard. The DHS proposed standard modifies the NPREC's recommended language, which would require communications to be ''private, confidential, and privileged, to the extent allowable by Federal, State, and local law.'' Instead, the proposed DHS rule requires that each facility consider utilizing available community resources and services to provide valuable expertise and support in the areas of crisis intervention, counseling, investigation and the prosecution of sexual abuse perpetrators to most appropriately address victims' needs. DHS recognizes that allowing detainee access to outside victim advocacy organizations can greatly benefit detainees who have experienced sexual abuse yet who may be reluctant to report it to facility administrators, and notes that some agencies, such as the California Department of Corrections and Rehabilitation, have established successful pilot programs working with outside organizations.[14] At the same time, DHS recognizes that communications with outsiders raise legitimate security concerns. The proposed DHS standard strikes a balance by allowing confidentiality while recognizing the importance of safeguarding security. The DHS proposal further requires each facility's written policies to establish procedures to include outside agencies in the facility's sexual abuse prevention and intervention protocols, if resources are available, and to make available to detainees the names of local organizations that can assist detainee victims of sexual abuse. PSA Compliance Managers are in the best position to assist with identifying these community victim service resources given their familiarity with the local environment and should make such contact information available to victims. Under current ICE policy, the PSA Compliance Managers are required to develop written protocols, including any available outside agencies/resources in the facility's sexual abuse and assault prevention and intervention program. Again, DHS does not propose a requirement for access to outside confidential support services in DHS holding facilities due to the very short-term, transitory nature of detention in such facilities.

Sections 115.54 and 115.154 require that immigration detention facilities and holding facilities establish a method to receive third-party reports of sexual abuse and publicly distribute information on how to report such abuse on behalf of a detainee. DHS believes this provision is essential to promptly receiving reports of sexual abuse, as some reports of sexual abuse may undoubtedly come to the attention of third parties before they are brought to the agency.

*Official Response Following a Detainee Report:* Sections 115.61, 115.161, 115.62, 115.162, 115.63, 115.163, 115.64, 115.164, 115.65, 115.165, 115.66, 115.67 and 115.167. DHS proposes standards addressing the appropriate official response following a report of sexual abuse. These standards are intended to ensure coordinated, thorough, and complete reactions to reports of sexual abuse.

Sections 115.61 and 115.161 set forth staff and agency reporting duties regarding incidents of sexual abuse. The standards require all staff to report immediately and according to agency or facility policy: (1) Any knowledge, suspicion, or information regarding an incident of sexual abuse that occurred in any facility; (2) retaliation against detainees or staff who reported such an incident; and (3) any staff neglect or violation of responsibilities that may have contributed to an incident or retaliation. The standards would prohibit the agency from revealing any information related to a sexual abuse report to anyone other than to the extent necessary to make medical treatment, investigation, law enforcement, and other security and management decisions.

Sections 115.62 and 115.162 require generally that when an agency employee has a reasonable belief that a detainee is subject to a substantial risk of imminent sexual abuse, the agency must take immediate action to protect the detainee. Section 115.62 further places this protection duty on facility staff, given that in the immigration detention facility context often the facility staff is best positioned to take such protective action, for example, when conducting initial intake or receiving a detainee from another facility.

Sections 115.63 sets forth responsibilities for reporting allegations of sexual abuse to other confinement facilities. Upon receiving an allegation that a detainee was sexually abused, the facility is required to: (1) If the alleged sexual abuse occurred at a different facility than where it was reported, ensure that the appropriate office of the facility where the sexual abuse is alleged to have occurred is notified as soon as possible, but no later than 72 hours after receiving the allegation; (2) document the efforts taken under this section; and (3) ensure the allegation is referred for investigation, to the extent that the facility that receives the notification is covered by these regulations. Section 115.163 proposes that these same requirements also apply to DHS holding facilities, but instead places the reporting and documentation requirements on the agency, given that DHS components are responsible for the management and operation of DHS holding facilities.

Sections 115.64 and 115.164 address responder duties. Upon learning of an allegation that a detainee was sexually abused, the first security staff member at an immigration detention facility or law enforcement staff member at a holding facility to respond to the report, or his or her supervisor, would be required to separate the alleged victim and abuser, and to preserve and protect, to the greatest extent possible, any crime scene until appropriate steps can be taken to collect any evidence. If the abuse occurred within a time period that still allows for the collection of physical evidence, the agency would be required to request that the alleged victim not take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating. Similarly, if the abuse occurred within a time period that still allows for the collection of physical evidence, the agency would be required to ensure that the alleged abuser does not take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating.

Sections 115.65 and 115.165 require a coordinated approach to responding to sexual abuse. This includes utilizing a multidisciplinary team approach, with appropriate information sharing, as permitted by law, in the case of a transfer of a victim of sexual abuse between DHS facilities or from a DHS facility to a non-DHS facility.

Section 115.66 requires the agency to remove staff suspected of perpetrating sexual abuse from all duties requiring detainee contact pending the outcome of an investigation. In Section 115.166, the DHS proposal includes a similar

[14] *See* Testimony of Wendy Still, Assoc. Dir. of Female Offender Program and Services, Cal. Dep't of Corr. and Rehab., Testimony at a Public Hearing of the National Prison Rape Elimination Commission, Confidentiality and Reporting: Medical Ethics, Victim Safety, and Facility Security 230 (Dec. 5, 2007).

requirement for holding facilities, adjusted to reflect the smaller staff at holding facilities that would make an absolute rule administratively onerous. The proposal requires supervisors to affirmatively *consider* removing staff pending the completion of an investigation, and to remove them if the seriousness and/or plausibility of the allegation make such removal appropriate.

Section 115.67 would require that agency and/or facility staff, and immigration detention facility detainees, not retaliate against any person, including a detainee, who reports, complains about, or participates in an investigation into an allegation of sexual abuse, or for participating in sexual activity as a result of force, coercion, threats, or fear of force. Section 115.167 prescribes the same requirement for agency employees at DHS holding facilities. Retaliation for reporting instances of sexual abuse and for cooperating with sexual abuse investigations is a real and serious threat in detention facilities. Fear of retaliation, such as being subjected to harsh or hostile conditions, being attacked by other detainees, or suffering harassment from staff, may prevent many detainees and staff from reporting sexual abuse, which in turn would make it difficult to keep facilities safe and secure.

Section 115.68 requires facilities to take care to place detainee victims of sexual abuse in a supportive environment that represents the least restrictive housing option possible. A detainee in protective custody who has been subjected to sexual abuse shall not be returned to the general population until proper re-assessment, taking into consideration any increased vulnerability of the detainee as a result of the abuse, is completed. In addition, section 115.68 proposes that detainee victims shall not be held for longer than five days in any type of administrative segregation, except in unusual circumstances or at the request of the detainee. DHS does not propose such post-allegation protective custody requirements for the holding facility context. Detainees in a holding facility typically are in such confinement for a short period of time only and, accordingly, provision of post-allegation protective custody is not appropriate.

*Investigations:* Sections 115.71, 115.171, 115.72, 115.172, 115.73. It is important to set standards to govern investigations of allegations of sexual abuse. The DHS standard requires that investigations by the agency or facility with responsibility for investigating the allegations of sexual abuse be prompt, thorough, objective, fair, and concluded by specially trained, qualified investigators. The standard does not distinguish between third-party allegations of abuse and allegations from a victim, staff, etc. In instances where the agency or facility does not investigate allegations of sexual abuse, it must refer the allegation to the appropriate investigating authority. Because sexual abuse often has no witnesses and often leaves no visible injuries, investigators must be diligent in tracking down all possible evidence, including collecting DNA and electronic monitoring data, conducting interviews, assessing the credibility of alleged victims, witnesses, or suspects, document each investigation by written report, to include descriptions of the physical and testimonial evidence, reviewing prior complaints and reports of sexual abuse involving the alleged perpetrator, and retaining the report for as a long as the alleged abuser is detained or employed by the agency or facility plus an additional five years. The departure of the alleged abuser or victim from the employment or control of the facility or agency shall not provide a basis for terminating an investigation. Because of the delicate nature of these investigations, investigators should be trained in conducting sexual abuse investigations.

The proposed DHS standard also includes a requirement to establish a process for an administrative investigation of substantiated allegations of sexual abuse, only after consultation with the assigned criminal investigative entity or after a criminal investigation has concluded. Where a criminal investigation determines that an allegation was unsubstantiated, the standard nonetheless requires a review of any completed criminal investigation reports to determine whether an administrative investigation is necessary or appropriate. DHS intends the standard to ensure proper sequencing of the investigations and preservation of investigative resources should the leading investigation, usually the criminal investigation, find the allegations unsubstantiated.

Sections 115.72 and 115.172 set forth parameters on the evidentiary standard for administrative investigations regarding allegations of sexual abuse. Under these proposed standards, when an administrative investigation is undertaken the agency shall impose no standard higher than a preponderance of the evidence in determining whether allegations of sexual abuse are substantiated. This is the same standard found in the DOJ PREA final rule.

Section 115.73 addresses the agency's duty to report to detainees, a topic that the NPREC included as part of its Investigations (IN)-1 standard. Specifically, following an investigation into a detainee's allegation of sexual abuse, the agency shall notify the detainee as to the result of the investigation when the detainee is still in immigration detention, as well as where otherwise feasible. DHS does not propose a comparable provision to govern holding facilities, because holding facility detainees would no longer be in the custody of the holding facility by the time the investigation is completed.

The NPREC's recommended standard would require a facility to ''notif[y] victims and/or other complainants in writing of investigation outcomes and any disciplinary or criminal sanctions, regardless of the source of the allegation.'' Several agency commenters to the DOJ PREA rulemaking expressed concern with the NPREC's proposal on security or privacy grounds. These commenters questioned the wisdom of providing written information to victims and third-party complainants, where such information could easily become widely known throughout the facility and possibly endanger other detainees or staff. In addition, commenters noted that privacy laws may restrict the dissemination of certain information about staff members. DHS believes that its proposed standard strikes the proper balance between staff members' privacy rights and the detainee's right to know the outcome of the investigation, while protecting the security of both detainees and staff.

*Discipline:* Sections 115.76, 115.176, 115.77 and 115.177. DHS proposes two standards to ensure appropriate and proper discipline in relation to cases of sexual abuse with regard to staff, contractors, and volunteers. These standards are substantively similar to those offered by the NPREC and DOJ in its PREA final rule.

Sections 115.76 and 115.176 govern disciplinary sanctions for staff members who violate sexual abuse policies, regardless of whether they have been found criminally culpable. Imposing appropriate disciplinary sanctions against such staff members is critical not only to providing a just resolution to substantiated allegations of sexual abuse and sexual harassment but also to fostering a culture of zero tolerance for such acts. Staff are subject to disciplinary sanctions up to and including removal for violating agency sexual abuse rules, policies or standards. Removal from their position and from the Federal service is the

presumptive disciplinary sanction for staff who have engaged in or threatened to engage in sexual abuse, as defined under the definition of sexual abuse of a detainee by a staff member, contractor, or volunteer, paragraphs (1)–(4) and (7)–(8). Sections 115.76 and 115.176 further require the agency to review and approve policies and procedures regarding disciplinary sanctions for staff at immigration detention facilities and holding facilities. In order to limit the potential for additional sexual abuse by former staff, sections 115.76 and 115.176 would require that all removals or resignations in lieu of removal for violations of agency sexual abuse policies be reported to law enforcement agencies, unless the activity was clearly not criminal, and reasonable efforts be made to report such removals or resignations in lieu of removal to any licensing bodies, to the extent known.

Sections 115.77 and 115.177 govern corrective action for contractors and volunteers who have engaged in sexual abuse. DHS proposes to require that any contractor or volunteer who has engaged in sexual abuse be prohibited from contact with detainees. These sections would also require that reasonable efforts be made to report to any licensing body, to the extent known, incidents of substantiated sexual abuse by a contractor or volunteer.

Section 115.78 addresses the circumstance where a detainee is alleged to have sexually abused another detainee in an immigration detention facility. Holding detainees accountable for such abuse is an essential deterrent and a critical component of a zero-tolerance policy. As with sanctions against staff, sanctions against detainees must be fair and proportional, taking into consideration the detainee's actions, disciplinary history, mental disabilities or mental illness, and sanctions imposed on other detainees in similar situations, and must send a clear message that sexual abuse is not tolerated. The disciplinary process must also take into account any mitigating factors, such as mental illness or mental disability, and must consider whether to incorporate therapy, counseling, or other interventions that might help reduce recidivism. Holding facilities generally do not hold detainees for prolonged periods of time and do not impose discipline, and so agencies are not made responsible under these proposed standards for imposing disciplinary sanctions on holding facility detainees.

*Medical and Mental Health Care:* Sections 115.81, 115.82, 115.182 and 115.83. DHS has proposed three standards to ensure that detainees receive the appropriate medical and mental health care. Each proposed standard is substantially similar to that recommended by the NPREC and adopted by DOJ in its PREA rulemaking.

Section 115.81 requires that, pursuant to the assessment for risk of victimization and abusiveness in section 115.41, facility staff shall ensure immediate referral to a qualified medical or mental practitioner, as appropriate, for detainees found to have experienced prior sexual victimization or perpetrated sexual abuse. Although the proposed standards do not require detainees to answer the assessment questions, detainees should be informed that disclosing prior sexual victimization and abuse is in their own best interest as such information is used both to determine whether follow-up care is needed and where the detainee can be safely placed within the facility. The DHS proposal does not provide for these requirements in DHS holding facilities because detainees with medical needs are referred for treatment outside the holding facility instead of provided the treatment in the holding facilities themselves.

Some commenters to the DOJ PREA proposed rule suggested that the NPREC's recommended standard would be too costly because it would require that medical or mental health practitioners conduct these interviews. Unlike the NPREC's standard, the proposed DHS standard does not specify who should conduct this inquiry, but instead requires the detainee to receive a health evaluation no later than two working days from the date of the assessment, when a referral for a medical follow-up is initiated. In addition, when a referral for mental health follow-up is initiated, the detainee shall receive a mental health evaluation no later than 72 hours after the referral.

Neither the NPREC's recommended standard nor DHS's proposed standard applies to holding facilities. The proposed standard is not appropriate for holding facilities given the short time that those facilities are responsible for detainee care.

Sections 115.82 and 115.182, like the DOJ PREA final rule, require that victims of sexual abuse have timely, unimpeded access to emergency medical treatment if they have been a victim of sexual abuse. Under section 115.82, similar to the DOJ PREA final rule, the proposed DHS standard applicable to immigration detention facilities would expressly require timely, unimpeded access to emergency contraception and sexually transmitted infections prophylaxis, in accordance with professionally accepted standards of care, where appropriate under professional medical standards. Like the DOJ PREA final rule's standard on lockup detention, however, the proposed standard applicable to DHS holding facilities would not require such facilities to provide emergency contraception or sexually transmitted infections prophylaxis, in light of the very short-term nature of holding facility detention. Consistent with its obligation to provide timely, unimpeded access to emergency medical treatment, a DHS holding facility would transfer such a detainee to an appropriate emergency medical provider, which would be expected to provide such care as appropriate. Emergency medical treatment services would be provided to the victim at no financial cost to the victim and regardless of whether the victim names the abuser or cooperates with any investigation arising out of the incident.

Section 115.83 requires that victims of sexual abuse receive access to ongoing medical and mental health care. This proposed standard recognizes that victims of sexual abuse can experience a range of physical injuries and emotional reactions, even long after the abuse has occurred, that can require medical or mental health attention. Thus, this standard requires facilities to offer ongoing medical and mental health care during the victim's detention consistent with the community level of care for as long as such care is needed, without financial cost and regardless of whether the victim names the abuser or cooperates with any investigation arising out of the incident. This access to care includes pregnancy tests for detainee victims of sexual abuse including vaginal penetration by a male abuser. DHS believes that if specific mental health concerns have contributed to the abuse, treatment may improve facility security. The DHS proposal does not provide for these requirements in DHS holding facilities because agencies refer holding facility detainees with emergency medical needs for treatment instead of providing medical care in the holding facilities themselves.

*Data Collection and Review:* Sections 115.86, 115.186, 115.87, 115.187, 115.88, 115.188, 115.89 and 115.189. DHS has proposed standards addressing how agencies and facilities should collect and review data to identify those policies and practices that are contributing to or failing to prevent sexual abuse.

Sections 115.86 and 115.186 set forth the requirements for sexual abuse incident reviews, including when

reviews should take place and who should take part. The sexual abuse review is separate from the sexual abuse investigation, and is intended to evaluate whether the facility's or agency's policies and procedures would benefit from change in light of the incident or allegation. By contrast, the investigation is intended to determine whether the abuse actually occurred. A review would be required after every investigation, and consider whether changes in policy or practice could better prevent, detect, or respond to sexual abuse incidents like the one alleged. The DHS proposal further would require an annual review of all sexual abuse investigations, in order to assess and improve sexual abuse intervention, prevention and response efforts. Some commenters to the DOJ PREA rulemaking raised concerns about the cost of conducting sexual abuse incident reviews. There are, however, facilities that already do these reviews, and DHS believes that the required steps need not be onerous. The purpose of this requirement is not to require a duplicative investigation but rather to require the facility or agency to pause and consider what lessons, if any, it can learn from the investigation it has conducted and what additional steps, if any, it should take to further protect detainees.

Sections 115.87 and 115.187 specify the incident-based data each agency or facility is required to collect in order to detect possible patterns and help prevent future incidents. The agency or facility would be required, under this standard, to aggregate the incident-based sexual abuse data at least annually and to maintain, review, and collect data as needed from all available agency records. The agency would work with facilities to collect and aggregate the data in a manner that will facilitate the agency's ability to detect possible patterns and help prevent future incidents. Section 115.87 would provide for the PSA Coordinator to work on an ongoing basis with the relevant PSA Compliance Managers and DHS entities to share data regarding effective agency response methods to allegations of sexual abuse. Upon request, the agency would be required to provide all such data from the previous calendar year to the DHS Office for Civil Rights and Civil Liberties no later than June 30 of the next calendar year.

Sections 115.88 and 115.188 describe how the collected data should be analyzed and reported. The proposed DHS standard mandates that agencies use the data to identify problem areas, take ongoing corrective action, and prepare an annual report for each facility as well as the agency as a whole, including a comparison with data from previous years. The report must be made public through the agency's Web site or other means to help promote agency accountability.

Sections 115.89 and 115.189 provide guidance on how to store, publish, and retain the data collected pursuant to sections 115.87 and 115.187. Data must be stored in a way that protects its integrity and must be retained for an adequate length of time. In addition, data must protect the confidentiality of victims and alleged perpetrators. This standard also requires that the agency make its aggregated data publicly available at least annually on its Web site, consistent with existing agency information disclosure policies and processes, following the removal of all personal identifiers.

*Audits and Compliance:* Sections 115.93, 115.193, 115.201, 115.202, 115.203, 115.204, and 115.205. Like the NPREC and DOJ, DHS believes that audits are critical to ensuring that facilities are doing all they can to eliminate sexual abuse in detention facilities. The NPREC's proposed standard would require triennial audits of all facilities. The NPREC explained its inclusion of this standard as follows:

> Publicly available audits allow agencies, legislative bodies, and the public to learn whether facilities are complying with the PREA standards. Audits can also be a resource for the Attorney General in determining whether States are meeting their statutory responsibilities. Public audits help focus an agency's efforts and can serve as the basis upon which an agency can formulate a plan to correct any identified deficiencies.

*Prison/Jail Standards* at 57.

Numerous agency commenters to the DOJ PREA rulemaking criticized the NPREC's proposals on various grounds, including cost, duplication of audits performed by accrediting organizations, duplication of existing State oversight, and the possibility that disagreements in interpretation could lead to inconsistencies in auditing. Other commenters endorsed the NPREC's proposal as necessary to ensure proper oversight; some commenters suggested that audits should be more frequent than once every three years.

DHS believes that audits can play a key role in implementation of sexual abuse prevention standards. The proposed standards for audits clarify the requirements for an audit to be considered adequate and transparent. All audits would be required to be conducted using an audit instrument developed by the agency, in coordination with CRCL. CRCL has extensive experience in conducting civil rights site inspections of detention facilities, including inspections and investigations relating to sexual abuse prevention and response. The agency would coordinate external audits with CRCL, to ensure that CRCL is informed about the operation of the audit program and any findings relating to non-compliance, in support of CRCL's statutory advice and oversight role with respect to civil rights issues.

DHS believes that external audits are necessary to ensure that the audits are conducted independently and objectively, and with the full confidence of the public. In these proposed standards, DHS has incorporated many of DOJ's standards related to external auditing and has tailored them to suit the unique characteristics of immigration detention and holding facilities. The proposed DHS standards set forth in sections 115.201–205 would prescribe methods governing the conduct of such audits, including provisions for reasonable inspections of facilities, review of documents, and interviews of staff and detainees.

The DHS proposed standards would require that external audits be conducted by an outside entity or individual with relevant experience and certified by the agency. The DHS standards would preclude use of an outside auditor with a financial relationship with the agency within three years of an audit, except for contracts for other audits or for detention-reform related consulting.

DHS has attempted to incorporate objective criteria and written documentation requirements into these proposed standards wherever practicable, although auditors would retain appropriate discretion. The proposed standards provide that a facility would be required to allow the auditor to enter and tour facilities, review documents, and interview staff and detainees to conduct a comprehensive audit. The auditor would be permitted to review all relevant agency-wide policies, procedures, reports, and internal and external audits, as well as a sampling of relevant documents and other records and information for the most recent one-year period. Under the DHS proposed standards, the auditor would be permitted to request and receive copies of any relevant documents (including electronically stored information), and would be required to retain and preserve all documentation (such as videotapes and interview notes) relied upon in making audit determinations. In order to enhance the effectiveness of external audits, the proposed standards would permit the auditor to conduct

private interviews with detainees, and detainees would be permitted to send confidential information or correspondence to the auditor in the same manner as if they were communicating with legal counsel. Auditors would be required to attempt to communicate with community-based or victim advocates who may have insight into relevant conditions in the facility.

This rule proposes that the external auditor would determine whether the audited facility reaches one of the following: ''Exceeds Standard'' (substantially exceeds requirement of standard); ''Meets Standard'' (substantial compliance; complies in all material ways with the standard for the relevant review period); or ''Does Not Meet Standard'' (requires corrective action). The auditor would be required to prepare an audit summary indicating the number of provisions the facility has achieved at each grade level.

Any finding of ''Does Not Meet Standard'' would trigger a 180-day corrective action period. Under the proposed standards, the auditor, the agency, and the facility (if it is not operated by the agency) would jointly develop a corrective action plan to achieve compliance. The auditor would be required to take necessary and appropriate steps to verify implementation of the corrective action plan, such as reviewing updated policies and procedures or re-inspecting portions of a facility. After the end of the 180-day corrective action period, the auditor would be required to issue a final determination as to whether the facility has achieved compliance with those standards requiring corrective action. In the event that the facility does not achieve compliance with each standard, it would have the opportunity (at its discretion and cost) to request a subsequent audit, once it believes that it has achieved compliance. A facility would be permitted to file an appeal with the agency regarding any specific finding that it believes to be incorrect. If the agency determines that the facility has demonstrated good cause for a re-evaluation, the facility may, at its complete discretion and cost, commission a re-audit by a mutually agreed upon external auditor. The agency may also, in its complete discretion, commission a re-audit of any facility for any reason it deems appropriate. In order to further promote transparency, the proposed standards also provide that the agency would ensure that the auditor's final report is published on the agency's Web site.

Immigration Detention Facilities

The proposed standards provide that external audits of immigration detention facilities shall be conducted on a triennial cycle. During the three-year cycle, the agency would ensure that each immigration detention facility is audited at least once. DHS believes that this standard would allow substantial flexibility in scheduling audits within each three-year cycle while ensuring that external facility audits occur regularly. In addition, DHS provides a procedure for an expedited audit in the event the agency has reason to believe that a particular facility may be experiencing problems related to sexual abuse.

Immigration Holding Facilities

DHS operates immigration holding facilities under the authority of both CBP and ICE. The ICE holding facilities do not generally house detainees overnight and thus are not covered by the auditing requirements for holding facilities under proposed section 115.193.

CBP operates 768 holding facilities at ports of entry and Border Patrol stations, checkpoints, and processing facilities across the country. These holding facilities, which far outnumber those facilities operated directly by any other corrections/detention/law enforcement authority, nationwide (including ICE, the Bureau of Prisons, and other agencies), are currently subject to oversight by the CBP Office of Internal Affairs. All these holding facilities taken together hold, on average, approximately 1,100 detainees a day; however, hundreds of them may be unused on any given day.

For the CBP holding facilities that house detainees overnight, DHS proposes a two-part audit process. The proposed standards provide that all holding facilities that house detainees overnight shall be subject to an external audit within three years of the effective date of the rule. If an external audit determines that a holding facility is low-risk based on (1) whether it passed its current audit and (2) its physical characteristics, including lines of sight, other design features, and video and other monitoring technologies, the facility will be classified as low-risk. Low-risk facilities would be subject to further external audits once every five years, unless design changes are made that could increase the risk of sexual abuse. Facilities that are not classified as low-risk would be subject to audits once every three years. If additional holding facilities are established, they would be subject to an initial audit within three years to determine if they are low-risk. Audits of new holding facilities as well as holding facilities that have previously failed to meet the standards shall occur as soon as practicable within the three-year cycle. Where it is necessary to prioritize, priority shall be given to facilities that have previously failed to meet the standards.

Solicitation of Comments Specific to Audits

Given the potential costs associated with the proposed auditing requirements DHS is specifically seeking public input on the following:

- Would external audits of immigration detention facilities and/or holding facilities conducted through random sampling be sufficient to assess the scope of compliance with the standards of this proposed rule?
- Once a holding facility is designated as low risk, would it be a more cost effective yet still sufficient approach to furthering compliance with the standards to externally audit a random selection of such facilities instead of re-auditing each such facility once every five years?
- Would the potential benefits associated with requiring external audits outweigh the potential costs?
- Is there a better approach to external audits other than the approaches discussed in this proposed rule?
- In an external auditing process, what types of entities or individuals should qualify as external auditors?
- Would external audits of immigration detention facilities conducted through random sampling be sufficient to assess the scope of compliance with the standards of this proposed rule?

*Additional Provisions in Agency Policies.* Sections 115.95 and 115.195 provide that the regulations in both Subparts A and B establish minimum requirements for agencies. As such, they do not preclude agency policies from including additional requirements.

## VI. Statutory and Regulatory Requirements

### *A. Executive Orders 12866 and 13563*

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

emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. DHS considers this to be a ''significant regulatory action,'' although not an economically significant regulatory action, under section 3(f) of Executive Order 12866. Accordingly, the Office of Management and Budget (OMB) has reviewed this regulation. The IRIA, summarized below, is available in the docket. It contains a discussion of the costs and benefits of this rule.

1. Summary of Proposed Rule

The objective of the proposed rule is to propose minimum requirements for DHS immigration detention and holding facilities for the prevention, detection, and response to sexual abuse. The proposed rule, if made final, would require prevention planning; prompt and coordinated response and intervention; training and education of staff, contractors, volunteers and detainees; proper treatment for victims; procedures for investigation, discipline and prosecution of perpetrators; data collection and review for corrective action; and audits for compliance with the standards. The cost estimates set forth in this analysis represent the costs of compliance with, and implementation of, the proposed standards in facilities within the scope of the proposed rulemaking.

2. Summary of Affected Population

DHS has two types of confinement facilities: (1) Immigration detention facilities, and (2) holding facilities. Immigration detention facilities, which are operated or supervised by ICE, routinely hold persons for over 24 hours pending resolution or completion of immigration removal or processing. Holding facilities, used and maintained by DHS components including ICE and CBP, tend to be short-term. The analysis below presents immigration detention facilities and holding facilities separately.

This proposed rule will directly regulate the Federal Government, notably any DHS agency with immigration detention facilities or holding facilities. The sections below describe and quantify, where possible, the number of affected DHS immigration detention facilities or holding facilities.

a. Subpart A—Immigration Detention Facilities

ICE is the only DHS component with immigration detention facilities. ICE holds detainees during proceedings to determine whether they will be removed from the United States, and pending their removal, in ICE-owned facilities or in facilities contracting with ICE. Therefore, though this rule will directly regulate the Federal Government, it would require that its standards ultimately apply to some State and local governments as well as private entities through contracts with DHS. The types of authorized ICE immigration detention facilities are as follows:

- Contract Detention Facility (CDF)—owned by a private company and contracted directly with the government;
- Service Processing Center (SPC)—full service immigration facilities owned by the government and staffed by a combination of Federal and contract staff;
- Intergovernmental Service Agreement Facility (IGSA)—facilities at which detention services are provided to ICE by State or local government(s) through agreements with ICE and which may fall under public or private ownership and may be fully dedicated immigration facilities (housing detained aliens only) or non-dedicated facilities (housing various detainees).

ICE enters into Intergovernmental Service Agreements (IGSAs) with States and counties across the country to use space in jails and prisons for civil immigration detention purposes. Some of these facilities are governed by IGSAs that limit the length of an immigration detainee's stay to under 72 hours. Some of these facilities have limited bed space that precludes longer stays by detainees. Others are used primarily under special circumstances such as housing a detainee temporarily to facilitate detainee transfers or to hold a detainee for court appearances in a different jurisdiction. In some circumstances the under 72-hour facilities house immigration detainees only occasionally.

At the time of writing, ICE owns or has contracts with approximately 158 authorized immigration detention facilities that hold detainees for more than 72 hours. The 158 facilities consist of 6 SPCs, 7 CDFs, 9 dedicated IGSA facilities, and 136 non-dedicated IGSA facilities. (64 of the IGSA facilities are covered by the DOJ PREA, not this proposed rule, because they are USMS IGA facilities.) As the USMS IGA facilities are not within the scope of this rulemaking, this analysis covers the 94 authorized SPC, CDF, dedicated IGSA, and non-dedicated IGSA immigration detention facilities that hold detainees for more than 72 hours.

ICE additionally has 91 authorized immigration detention facilities that are contracted to hold detainees for less than 72 hours. All 91 facilities are non-dedicated IGSA facilities, but 55 of them are covered by the DOJ PREA rule, not this proposed rule, because they are USMS IGA facilities. Again, ICE excludes the USMS IGA facilities from the scope of this rulemaking and analysis; the analysis covers the 36 authorized non-dedicated IGSA immigration detention facilities that hold detainees for under 72 hours. Facilities that are labeled by ICE as ''under 72-hour'' still meet the definition of immigration detention facilities, because they process detainees for detention intake. Detainees housed in these facilities are processed into the facility just as they would be in a long-term detention facility.

Furthermore, ICE also has two authorized family residential centers. These are IGSA facilities that house only ICE detainees. One of the facilities accommodates families subject to mandatory detention and the other is a dedicated female facility. ICE family residential centers are subject to the immigration detention facility standards proposed in Subpart A. The table below summarizes the facilities included in this analysis. For the purposes of the cost analysis in Chapter 2, DHS includes the family residential facilities in the cost estimates for the over 72-hour authorized immigration detention facilities.

TABLE 1—SUMMARY OF ICE AUTHORIZED IMMIGRATION DETENTION FACILITIES

| Facility | Over 72 hours | Under 72 hours | Family Residential |
|---|---|---|---|
| Non-Dedicated IGSA | 74 | 36 | 0 |
| SPC | 6 | 0 | 0 |
| CDF | 7 | 0 | 0 |
| Dedicated IGSA | 7 | 0 | 2 |

TABLE 1—SUMMARY OF ICE AUTHORIZED IMMIGRATION DETENTION FACILITIES—Continued

| Facility | Over 72 hours | Under 72 hours | Family Residential |
|---|---|---|---|
| Total Covered by Rule | 94 | 36 | 2 |
| USMS IGA [a] | 64 | 55 | 0 |
| Total Authorized Facilities | 158 | 91 | 2 |

[a] Not within the scope of the proposed rule

b. Subpart B—Holding Facilities

A holding facility may contain holding cells, cell blocks, or other secure locations that are: (1) under the control of the agency and (2) primarily used for the confinement of individuals who have recently been detained, or are being transferred to another agency.

ii. U.S. Immigration and Customs Enforcement

Most ICE holding rooms are in ICE field offices and satellite offices. These rooms are rooms or areas that are specifically designed and built for temporarily housing detainees in ICE Enforcement and Removal Operations (ERO) offices. It may also include staging facilities. ICE holding facilities as presented in this analysis are exclusive of hold rooms or staging areas at immigration detention facilities, which are covered by the standards of the immigration detention facility under Subpart A of this proposed rule. ICE has 149 holding facilities that would be covered under Subpart B of the proposed rule.

i. U.S. Customs and Border Protection

There is a wide range of facilities where CBP detains individuals. Some individuals are detained in secured detention areas, while others are detained in open seating areas where agents or officers interact with the detainee. Hold rooms in CBP facilities where case processing occurs are used to search, detain, or interview persons who are being processed. CBP operates 768 holding facilities at ports of entry and Border Patrol stations, checkpoints, and processing facilities across the country.

3. Estimated Costs of Proposed Rule

The proposed rule will cover DHS immigration detention facilities and holding facilities. Table 2 summarizes the number of facilities covered by the proposed rulemaking over ten years.

TABLE 2—ESTIMATED POPULATION SUMMARY FOR PROPOSED RULE

| Year | Immigration detention facilities | Holding facilities | | Total |
|---|---|---|---|---|
| | ICE | ICE | CBP | |
| 1 | 132 | 149 | 768 | 1,049 |
| 2 | 134 | 149 | 768 | 1,051 |
| 3 | 136 | 149 | 768 | 1,053 |
| 4 | 138 | 149 | 768 | 1,055 |
| 5 | 140 | 149 | 768 | 1,057 |
| 6 | 142 | 149 | 768 | 1,059 |
| 7 | 144 | 149 | 768 | 1,061 |
| 8 | 146 | 149 | 768 | 1,063 |
| 9 | 148 | 149 | 768 | 1,065 |
| 10 | 150 | 149 | 768 | 1,067 |

The cost estimates set forth in this analysis represent the costs of compliance with, and implementation of, the proposed standards in facilities within the scope of the proposed rulemaking. This analysis concludes that compliance with the proposed standards, in the aggregate, would be approximately 57.7 million, discounted at 7 percent, over the period 2013–2022, or 8.2 million per year when annualized at a 7 percent discount rate. Table 3 below, presents a 10-year summary of the estimated benefits and costs of the Notice of Proposed Rulemaking (NPRM).

TABLE 3—TOTAL COST OF NPRM

[$millions]

| Year | Immigration detention facilities subpart A | | Holding facilities subpart B | | Total |
|---|---|---|---|---|---|
| | Over 72 hours | Under 72 hours | ICE | CBP | |
| 1 | $4.2 | $1.4 | $0.0 | $5.6 | $11.2 |
| 2 | 3.6 | 1.1 | 0.0 | 5.5 | 10.2 |
| 3 | 3.6 | 1.1 | 0.0 | 3.6 | 8.3 |
| 4 | 3.7 | 1.1 | 0.0 | 2.4 | 7.1 |
| 5 | 3.7 | 1.1 | 0.0 | 2.4 | 7.2 |

TABLE 3—TOTAL COST OF NPRM—Continued

[$millions]

| Year | Immigration detention facilities subpart A | | Holding facilities subpart B | | Total |
|---|---|---|---|---|---|
| | Over 72 hours | Under 72 hours | ICE | CBP | |
| 6 | 3.7 | 1.1 | 0.0 | 2.3 | 7.2 |
| 7 | 3.7 | 1.1 | 0.0 | 2.3 | 7.2 |
| 8 | 3.8 | 1.1 | 0.0 | 2.3 | 7.2 |
| 9 | 3.8 | 1.1 | 0.0 | 2.3 | 7.2 |
| 10 | 3.8 | 1.2 | 0.0 | 2.3 | 7.3 |
| Total | 37.6 | 11.4 | 0.0 | 31.0 | 79.9 |
| Total (7%) | 26.4 | 8.0 | 0.0 | 23.2 | 57.7 |
| Total (3%) | 32.1 | 9.7 | 0.0 | 27.2 | 69.0 |
| Annualized (7%) | 3.8 | 1.1 | 0.0 | 3.3 | 8.2 |
| Annualized (3%) | 3.8 | 1.1 | 0.0 | 3.2 | 8.1 |

The total cost, discounted at 7 percent, consists of 34.5 million for immigration detention facilities under Subpart A, and 23.2 million for holding facilities under Subpart B. The largest costs for immigration detention facilities are for staff training, documentation of cross-gender pat-downs, duties for the Prevention of Sexual Abuse Compliance Manager, and audit requirements. DHS estimates zero compliance costs for ICE holding facilities under the proposed rule as the requirements of ICE's Sexual Abuse and Assault Prevention and Intervention Directive and other ICE policies are commensurate with the requirements of the proposed rule. The largest costs for CBP holding facilities are staff training, audits, and facility design modifications and monitoring technology upgrades.

4. Estimated Benefits of the Rule

DHS has not estimated the anticipated benefits of this proposed rule. Instead, DHS conducts what is known as a ''break even analysis,'' by first estimating the monetary value of preventing victims of various types of sexual abuse (from incidents involving violence to inappropriate touching) and then, using those values, calculating the reduction in the annual number of victims that would need to occur for the benefits of the rule to equal the cost of compliance. The IRIA concludes that when all facilities and costs are phased into the rulemaking, the break even point would be reached if the standards reduced the annual number of incidents of sexual abuse by 55 from the estimated benchmark level, which is 79 percent of the total number of assumed incidents in ICE confinement facilities, including those who may not have reported an incident.

5. Alternatives

As alternatives to the preferred regulatory regime proposed in the NPRM, DHS examined three other options. The first is taking no regulatory action. For over 72-hour immigration detention facilities, the 2011 PBNDS sexual abuse standards might reach all facilities over time as the new version of the standards are implemented at facilities as planned. However, in the absence of regulatory action, proposed sexual abuse standards for ICE under 72-hour immigration detention facilities and DHS holding facilities would remain largely the same.

DHS also considered requiring the ICE immigration detention facilities that are only authorized to hold detainees for under 72 hours to meet the proposed standards for holding facilities under Subpart B, rather than the standards for immigration detention in Subpart A, as proposed in the NPRM. The standards proposed in Subpart B are somewhat less stringent than those for immigration detention facilities, as appropriate for facilities holding detainees for a much shorter time and with an augmented level of direct supervision.

Finally, DHS considered changing the audit requirements proposed under sections 115.93 and 115.193. Immigration detention facilities currently undergo several layers of inspections for compliance with ICE's detention standards. This alternative would have allowed ICE to incorporate the audit requirements for the proposed standards into current inspection procedures. However, it would require outside auditors for all immigration detention facilities. For holding facilities that hold detainees overnight, it would require 10 internal audits, 10 external audits, and 3 audits by CRCL be conducted annually. The following table presents the 10-year costs of the alternatives compared to the costs of the NPRM. These costs of these alternatives are discussed in detail in Chapter 2 of the IRIA.

TABLE 4—COST COMPARISON OF REGULATORY ALTERNATIVES TO THE PROPOSED NPRM

[$millions]

| 10-Year total costs by alternative | Total | Total (7%) | Total (3%) |
|---|---|---|---|
| Alternative 1—No Action | $0 | $0 | $0 |
| Alternative 2—Under 72-Hour | 77.7 | 56.1 | 67.1 |
| Alternative 3—Proposed Rule | 79.9 | 57.7 | 69.0 |
| Alternative 4—Audit Requirements | 70.0 | 50.5 | 60.4 |

*B. Executive Order 13132—Federalism*

This proposed regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. This proposed rule implements the Presidential Memorandum of May 17, 2012 ''Implementing the Prison Rape Elimination Act'' by recommending national DHS standards for the detection, prevention, reduction, and punishment of sexual abuse in DHS immigration detention and holding facilities. In drafting the standards, DHS was mindful of its obligation to meet the President's objectives while also minimizing conflicts between State law and Federal interests.

Insofar, however, as the proposal sets forth standards that might apply to immigration detention facilities and holding facilities operated by State and local governments and private entities, this proposed rule has the potential to affect the States, the relationship between the Federal government and the States, and the distribution of power and responsibilities among the various levels of government and private entities. With respect to the State and local agencies, as well as the private entities, that own and operate these facilities across the country, the Presidential Memorandum provides DHS with no direct authority to mandate binding standards for their facilities. Instead, these standards will impact State, local, and private entities only to the extent that they make voluntary decisions to contract with DHS for the confinement of immigration detainees. This approach is fully consistent with DHS's historical relationship to State and local agencies in this context. Therefore, in accordance with Executive Order 13132, DHS has determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Notwithstanding the determination that the formal consultation process described in Executive Order 13132 is not required for this rule, DHS welcomes consultation with representatives of State and local prisons and jails, juvenile facilities, community corrections programs, and lockups—among other individuals and groups—during the course of this rulemaking.

*C. Executive Order 12988—Civil Justice Reform*

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

*D. Unfunded Mandates Reform Act of 1995*

Section 202 of the Unfunded Mandate Reform Act of 1995 (UMRA) (Pub. L. 104–4, 109 Stat. 48, 2 U.S.C. 1532) generally requires agencies to prepare a statement before submitting any rule that may result in an annual expenditure of $100 million or more (adjusted annually for inflation) by State, local, or tribal governments, or by the private sector. DHS has assessed the probable impact of these proposed regulations and believes these regulations may result in an aggregate expenditure by State and local governments of approximately $4.3 million in the first year.

However, DHS believes the requirements of the UMRA do not apply to these regulations because UMRA excludes from its definition of ''Federal intergovernmental mandate'' those regulations imposing an enforceable duty on other levels of government which are ''a condition of Federal assistance.'' 2 U.S.C. 658(5)(A)(i)(I). Compliance with these standards, as proposed, would be a condition of ongoing Federal assistance through implementation of the standards in new contracts and contract renewals. While DHS does not believe that a formal statement pursuant to the UMRA is required, it has, for the convenience of the public, summarized as follows various matters discussed at greater length elsewhere in this rulemaking which would have been included in a UMRA statement should that have been required:

- These standards are being issued pursuant to the Presidential Memorandum of May 17, 2012, and DHS detention authorities.
- A qualitative and quantitative assessment of the anticipated costs and benefits of these standards appears below in the Regulatory Flexibility Act section;
- DHS does not believe that these standards will have an effect on the national economy, such as an effect on productivity, economic growth, full employment, creation of productive jobs, or international competitiveness of United States goods and services;
- Before it issues final regulations implementing standards DHS will:

(1) Provide notice of these requirements to potentially affected small governments, which it has done by publishing this notice of proposed rulemaking, and by other activities;

(2) Enable officials of affected small governments to provide meaningful and timely input, via the methods listed above; and

(3) Work to inform, educate, and advise small governments on compliance with the requirements.

- As discussed above in the Initial Regulatory Impact Assessment summary, DHS has identified and considered a reasonable number of regulatory alternatives and from those alternatives has attempted to select the least costly, most cost effective, or least burdensome alternative that achieves DHS's objectives.

*E. Small Business Regulatory Enforcement Fairness Act of 1996*

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, DHS wants to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact DHS via the address or phone number provided in the **FOR FURTHER INFORMATION CONTACT** section above. DHS will not retaliate against small entities that question or complain about this rule or about any policy or action by DHS related to this rule.

*F. Regulatory Flexibility Act*

DHS drafted this proposed rule so as to minimize its impact on small entities, in accordance with the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612, while meeting its intended objectives. The term ''small entities'' comprises small business, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. Based on presently available information, DHS is unable to state with certainty that the proposed rule, if promulgated as a final rule, would not have any effect on small entities of the type described in 5 U.S.C. 601(3). Accordingly, DHS has prepared an Initial Regulatory Flexibility Impact Analysis (IRFA) in accordance with 5 U.S.C. 603.

1. A Description of the Reasons Why the Action by the Agency Is Being Considered

In 2003 Congress passed PREA, 42 U.S.C. 15601. PREA directs the Attorney

General to promulgate national standards for enhancing the prevention, detection, reduction, and punishment of prison rape. On May 17, 2012, President Obama issued a Presidential Memorandum confirming the goals of PREA and directing Federal agencies with confinement facilities to issue regulations or procedures within 120 days of his Memorandum to satisfy the requirements of PREA. This regulation responds to and fulfills the President's direction by proposing comprehensive, national regulations for the detection, prevention, and reduction of prison rape at DHS confinement facilities.

2. A Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule

On May 17, 2012, DOJ released a final rule setting national standards to prevent, detect, and respond to prison rape for facilities operated by the Bureau of Prisons and the USMS. The final rule was published in the **Federal Register** on June 20, 2012. 77 FR 37106 (June 20, 2012). In its final rule, DOJ concluded that PREA ''encompass[es] any Federal confinement facility 'whether administered by [the] government or by a private organization on behalf of such government.''' Id. at 37113 (quoting 42 U.S.C. 15609(7)). DOJ recognized, however, that, in general, each Federal agency is accountable for, and has statutory authority to regulate the operations of its own facilities and is best positioned to determine how to implement Federal laws and rules that govern its own operations, staff, and persons in custody. *Id.* The same day that DOJ released its final rule, President Obama issued a Presidential Memorandum directing Federal agencies with confinement facilities to issue regulations or procedures within 120 days of his Memorandum to satisfy the requirements of PREA.

DHS uses a variety of legal authorities, which are listed below in the ''Authority'' provision preceding the proposed regulatory text, to detain individuals in confinement facilities. Most individuals detained by DHS are detained in the immigration removal process, and normally DHS derives its detention authority for these actions from section 236(a) of the INA, 8 U.S.C. 1226(a), which provides the authority to arrest and detain an alien pending a decision on whether the alien is to be removed from the United States, and section 241(a)(2) of the INA, 8 U.S.C. 1231(a)(2), which provides the authority to detain an alien during the period following the issuance of an order of removal. DHS components, however, use many other legal authorities to meet their statutory mandates and to detain individuals during the course of executing DHS missions.

The objective of the proposed rule is to propose minimum requirements for DHS immigration detention and holding facilities for the prevention, detection, and response to sexual abuse. The rule, if made final, would ensure prompt and coordinated response and intervention, proper treatment for victims, discipline and prosecution of perpetrators, and effective oversight and monitoring to prevent and deter sexual abuse.

3. A Description and, Where Feasible, an Estimate of the Number of Small Entities To Which the Proposed Rule Will Apply

The proposed rule would affect owners of DHS confinement facilities, including private owners, State and local governments, and the Federal government. DHS has two types of confinement facilities: (1) Immigration detention facilities, and (2) holding facilities. Holding facilities tend to be short-term in nature. ICE, in particular, is charged with administration of the immigration detention facilities while CBP and ICE each have many holding facilities under their detention authority. The analysis below addresses immigration detention facilities and holding facilities separately.

i. Immigration Detention Facilities

ICE divides its detention facilities into two groups: there are 158 for use over 72 hours, and 91 that typically hold detainees for more than 24 hours and less than 72 hours. These are treated separately, below. Further, there are several types of immigration detention facilities. Service processing center (SPC) facilities are ICE-owned facilities and staffed by a combination of Federal and contract staff. Contract detention facilities (CDFs) are owned by a private company and contracted directly with ICE. Detention services at Intergovernmental Service Agreement (IGSA) facilities are provided to ICE by State or local governments(s) through agreements with ICE and may be owned by the State or local government, or by a private entity. Finally, there are two types of IGSA facilities: dedicated and non-dedicated. Dedicated IGSA facilities hold only detained aliens whereas non-dedicated facilities hold a mixture of detained aliens and inmates. ICE does not include USMS facilities used by ICE under intergovernmental agreements in the scope of this rulemaking. Those facilities would be covered by the DOJ PREA standards. Any references to authorized immigration detention facilities is exclusive of these 119 USMS IGA facilities.

Of the current 158 ICE detention facilities that are for use over 72 hours, 6 are owned by the Federal government and are not subject to the Regulatory Flexibility Act (RFA). An additional 64 are covered not by this proposed rule but by the DOJ PREA rule, as USMS IGA facilities. Of the 88 facilities subject to the RFA, there are 79 distinct entities. DHS uses ICE information and public databases such as Manta.com and data from the U.S. Census Bureau [15] to search for entity type (public, private, parent, subsidiary, etc.), primary line of business, employee size, revenue, population, and any other necessary information. This information is used to determine if an entity is considered small by SBA size standards, within its primary line of business.

Of the 79 entities owning immigration detention facilities and subject to the RFA, the search returned 75 entities for which sufficient data are available to determine if they are small entities, as defined by the RFA. The table below shows the North American Industry Classification System (NAICS) codes corresponding with the number of facilities for which data are available. There are 27 small governmental jurisdictions, 1 small business, and 1 small not-for-profit. In order to ensure that the interests of small entities are adequately considered, DHS assumes that all entities without available ownership, NAICS, revenue, or employment data to determine size are small. Therefore, DHS estimates there are a total of 33 small entities to which this rule would apply. The table below shows the number of small entities by type for which data are available.

[15] U.S. Census Bureau, State and County QuickFacts, 2010 Population Data, available at *http://quickfacts.census.gov/qfd/index.html*

TABLE 5—SMALL ENTITIES BY TYPE—IMMIGRATION DETENTION FACILITIES

| Type | Entities found | SBA size standard |
|---|---|---|
| Small Governmental Jurisdiction | 27 | Population less than 50,000. |
| Small Business | 1 | $7 million (NAICS 488999)<br>$30 million (NAICS 488119). |
| Small Organization | 1 | Independently owned and operated not-for-profit not dominant in its field. |
| Subtotal | 29 | |
| Entities without Available Information | 4 | |
| Total Small Entities | 33 | |

ICE also has shorter-term immigration detention facilities, for several reasons: Some of ICE's immigration detention facilities are governed by IGSAs that limit the length of an immigration detainee's stay to under 72 hours for various reasons. Some of these facilities have limited bed space that prohibits longer stays by detainees. Others are used primarily under special circumstances such as housing a detainee temporarily to facilitate detainee transfers or to hold a detainee for court appearances in a different jurisdiction. In some circumstances the under 72-hour facilities are located in rural areas that only occasionally have immigration detainees.

At the time of writing, ICE has 91 immigration detention facilities for use under 72 hours. Of those, three are owned by the Federal or State government and are not subject to the RFA. An additional 55 are covered not by this proposed rule but by the DOJ PREA rule, as USMS IGA facilities. Of the 33 facilities subject to the RFA, all are owned by distinct entities. Again, DHS uses public databases such as Manta.com and U.S. Census Bureau to search for entity type, primary line of business, employee size, revenue, population, and any other necessary information needed to determine if an entity is considered small by SBA size standards.

Of the 33 entities owning immigration detention facilities and subject to the RFA, all have sufficient data available to determine if they are small entities as defined by the RFA. The table below shows the NAICS codes corresponding with the number of facilities for which data are available. DHS determines there are 10 small governmental jurisdictions, 0 small businesses, and 0 small organizations. The table below shows the number of small entities by type for which data are available.

TABLE 6—SMALL ENTITIES BY TYPE—OTHER DHS CONFINEMENT FACILITIES

| Type | Entities found | SBA size standard |
|---|---|---|
| Small Governmental Jurisdiction | 10 | Population less than 50,000. |
| Small Business | 0 | |
| Small Organization | 0 | |
| Total Small Entities | 10 | |

At the time of writing, ICE has 2 immigration detention facilities that are considered family residential facilities. Both are owned by counties. Again, DHS uses public databases such as Manta.com and U.S. Census Bureau to search for entity type, primary line of business, employee size, revenue, population, and any other necessary information needed to determine if an entity is considered small by SBA size standards. DHS was able to obtain sufficient data to determine if they are small entities. Based on the size of the counties, DHS determines neither would be considered small governmental jurisdictions as defined by the RFA.

ii. Holding Facilities

*U.S. Customs and Border Protection.* CBP operates 768 facilities with holding facilities. Of the 768, 364 are owned by private sector entities. CBP is responsible for funding any facility modifications once CBP has begun operations at the location. As such, any modifications at these facilities as a result of this rule will have no direct impact on the facilities.

*U.S. Immigration and Customs Enforcement.* Most ICE hold rooms are in ICE field offices and satellite offices. ICE estimates it has 149 holding facilities that would be covered under the proposed rule. None of these facilities would be considered small entities under the RFA.

4. A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirement and the Types of Professional Skills Necessary for Preparation of the Report or Record

With regard to non-DHS facilities, the requirements of the proposed rule are applicable only to new detention contracts with the Federal Government, and to contract renewals. To the extent this rule increases costs to any detainment facilities, which may be small entities, it may be reflected in the cost paid by the Federal Government for the contract. Costs associated with implementing the proposed rule paid by the Federal Government to small entities are transfer payments ultimately born by the Federal Government. However, DHS cannot say with certainty how much, if any, of these costs will be

paid in the form of increased bed rates for facilities. Therefore, for the purposes of this analysis, DHS assumes all costs associated with the proposed rule will be borne by the facility. The following discussion addresses the proposed provisions for which facilities currently operating under the NDS may incur implementation costs.

i. Contracting With Other Non-DHS Entities for the Confinement of Detainees, § 115.12

The proposed rule would require that any new contracts or contract renewals comply with the proposed rule and provide for agency contract monitoring to ensure that the contractor is complying with these standards. Therefore, DHS adds a 20-hour opportunity cost of time for the contractor to read and process the modification, determine if a request for a rate increase is necessary, and have discussions with the government if needed. DHS estimates this provision may cost a facility approximately $1,488 (20 hours × $74.41) in the first year.[16]

ii. Zero Tolerance of Sexual Abuse; Prevention of Sexual Abuse Coordinator, § 115.11

The proposed rule would require immigration detention facilities to have a written zero-tolerance policy for sexual abuse and establish a Prevention of Sexual Assault (PSA) Compliance Manager at each facility. ICE is not requiring facilities to hire any new staff for these responsibilities; rather ICE believes the necessary PSA Compliance Manager duties can be collateral duties for a current staff member.

For some of the standards proposed in this rulemaking, the actual effort required to comply with the standard will presumably be undertaken by the PSA Compliance Manager. The costs of compliance with those standards are thus essentially subsumed within the cost of this standard. For this reason, and to avoid double counting, many standards are assessed in their as having minimal to zero cost even though they will require some resources to ensure compliance; this is because the cost of those resources is assigned to this standard to the extent DHS assumes the primary responsibility for complying with the standard will lie with the PSA Compliance Manager. The table below presents the provisions and requirements DHS assumes would be the responsibility of the PSA Compliance Manger, and are included in the costs estimated for this provision.

TABLE 7—ASSUMED PSA COMPLIANCE MANAGER DUTIES—IMMIGRATION DETENTION FACILITIES

| Proposed standard | |
|---|---|
| 115.11 ..... | Zero tolerance of sexual abuse. |
| 115.21 ..... | Evidence protocols and forensic medical examinations. |
| 115.31 ..... | Staff training. |
| 115.32 ..... | Volunteer and contractor training. |
| 115.34 ..... | Specialized training: Investigations. |
| 115.63* .... | Reporting to other confinement facilities. |
| 115.65 ..... | Coordinated response. |
| 115.67 ..... | Agency protection against retaliation. |
| 115.86 ..... | Sexual abuse incident reviews. |
| 115.87 ..... | Data collection. |
| 115.93* .... | Audits. |

* Indicates new requirement for facilities under 2011 PBNDS or FRS

DHS spoke with some SPCs and CDFs who had SAAPICs required under the 2008 PBNDS. Based on these discussions, DHS estimates a PSA Compliance Manager will spend, on average, 114 hours in the first year and 78 hours thereafter, which includes writing/revising policies related to sexual abuse and working with auditors. DHS estimates this provision may cost a facility approximately $5,330 (114 hours × $46.75) in the first year.[17]

iii. Limits to Cross-Gender Viewing and Searches, § 115.15

The proposed requirement would prohibit cross-gender pat-down searches unless, after reasonable diligence, staff of the same gender is not available at the time the pat-down search is required (for male detainees), or in exigent circumstances (for female and male detainees alike). In addition, it would ban cross-gender strip or body cavity searches except in exigent circumstances; require documentation of all strip and body cavity searches and cross-gender pat-down searches; prohibit physical examinations for the sole purpose of determining gender; require training of law enforcement staff on proper procedures for conducting pat-down searches, including transgender and intersex detainees; and, implement policies on staff viewing of showering, performing bodily functions, and changing clothes.

The restrictions placed on cross-gender pat-down searches would be a new requirement for facilities operating under the NDS or 2008 PBNDS, and a modified requirement for facilities operating under the 2011 PBNDS.[18] ICE's detention population is 10 percent female, and 90 percent male. In comparison, 13 percent of correctional officers at Federal confinement facilities [19] and 28 percent at jails are female.[20] Though there may be disproportionate gender ratios of staff to detainees at some individual facilities, the overall national statistics do not indicate that there would be a significant problem with compliance. Facilities are allowed to conduct cross-gender pat down searches on male detainees when, after reasonable diligence by the facility, a member of the same gender is not available at the time. The pat-down restrictions for female detainees are more stringent. Female detainees only comprise 10 percent of the overall population, and one to five percent are held at ICE's dedicated female facility. The Family Residential Standards, under which the dedicated female facility operates, already prohibit cross-gender pat-downs.

DHS does not expect any facilities to hire new staff or lay off any staff specifically to meet the proposed requirement. Instead, DHS expects that facilities which may have an unbalanced gender ratio take this requirement into consideration during hiring decisions resulting from normal attrition and staff turnover. However, DHS requests comments from facilities on this conclusion. Please include information that would help determine

[16] Bureau of Labor Statistics, Occupational Employment Statistics (OES), May 2011, NAICS 999300, SOC 11–1021 General and Operations Manager Median Hourly Wage, retrieved on June 29, 2012 from *http://www.bls.gov/oes/2011/may/naics4_999300.htm.* Loaded for benefits. Bureau of Labor Statistics, Employer Cost for Employee Compensation, June 2011, Table 3: Employer Costs per hour worked for employee compensation and costs as a percent of total compensation: State and local government workers, by major occupational and industry group, Service Occupations, Salary and Compensation Percent of Total Compensation, retrieved on June 29, 2012 from *http://www.bls.gov/news.release/archives/ecec_09082011.pdf.* $74.41 = $44.42/0.597.

[17] Bureau of Labor Statistics, Occupational Employment Statistics (OES), May 2011, NAICS 999300, SOC 33–1011 First Line Supervisors of Correctional Officers Median Hourly Wage, retrieved on June 29, 2012 from *http://www.bls.gov/oes/2011/may/oes331011.htm.* Loaded for benefits. $46.75 = $29.67/0.597

[18] Specifically, the 2011 PBNDS permits cross-gender pat-down searches of women when staff of the same gender is not available at the time the pat-down search is required. Under the proposed standard, cross-gender searches of females would be allowed only in exigent circumstances.

[19] Bureau of Justice Statistics, Census of State and Federal Correctional Facilities, 2005, page 4, retrieved on August 13, 2012 from *http://www.bjs.gov/content/pub/pdf/csfcf05.pdf.*

[20] Department of Justice, Final Regulatory Impact Analysis, section 5.6.15.1 Analysis and Methodology for Adult Facilities of standards 115.15, retrieved May 24 from *www.ojp.usdoj.gov/programs/pdfs/prea_ria.pdf.*

and monetize the possible impact to facilities.

DHS includes a cost for facilities to examine their staff rosters, gender ratios, and staffing plans for all shifts for maximum compliance with cross gender pat downs. The length of time it takes for facilities to adjust staffing plans, strategies, and schedules for gender balance while ensuring there is adequate detainee supervision and monitoring pursuant to section 115.13 will vary with the size of the facility. DHS estimates this may take a supervisor 12 hours initially. DHS anticipates facilities will be able to incorporate these considerations into regular staffing decisions in the future. DHS estimates the restrictions on cross-gender pat-downs may cost a facility approximately $561 (12 hours × $46.75) in the first year.

The requirement for documentation of cross-gender pat-down searches would be new for all facilities, regardless of the version of the detention standards under which the facility operates. Presumably, cross-gender pat-down searches of female detainees would occur rarely, as the proposed rule would allow them in exigent circumstances only. However, cross-gender pat-down searches of male detainees may happen more frequently. DHS believes this requirement would be a notable burden on facilities both for the process of documenting the pat-down, but also keeping these records administratively. Therefore, as we discuss below, DHS includes an opportunity cost for this provision. ICE does not currently track the number of cross-gender pat-down searches, or any pat-down searches conducted. ICE requests comment from facilities on the number of cross-gender pat-down searches conducted. Please include details that would help with an aggregate estimate, such as the average daily population of detainees at your facility, the number of pat-downs that may occur daily, the percentage that are cross-gender, etc.

Because DHS believes this may be a noticeable burden on facilities, DHS includes a rough estimate using assumptions. DHS also welcomes comment on these assumptions. Detainees may receive a pat-down for a number of reasons. All detainees receive a pat-down upon intake to the facility, detainees may receive a pat-down after visitation, before visiting the attorney room, if visiting medical, if in segregation, etc. Therefore, DHS assumes that in any given day, approximately 50 percent of detainees may receive a pat-down. DHS uses the ratio of male guards to male detainees and female guards to female detainees as a proxy for the percentage of these pat-downs that would be cross-gender, realizing that this may not be representative of every facility, the circumstances at the time a pat-down is required, nor the results after the staff realignment previously discussed. As referenced previously, between 72 and 87 percent of guards are male and 90 percent of detainees are male. Therefore, to estimate a rough order of magnitude, DHS assumes between 3 and 18 percent of pat-downs of male detainees may be cross-gender, with a primary estimate of 10 percent.

DHS finds the total average daily population of male detainees at the 43 facilities classified as small entities and takes the average to determine an average daily population of 93 for a facility classified as a small entity (4,457 × 90% ÷ 43). Then DHS applies the methodology described above to estimate that approximately 2,000 cross gender pat-downs may be conducted at an average small entity annually (93 male ADP × 50% receive pat-down daily × 365 days × 10% cross-gender), which is rounded to the nearest thousand due to uncertainty. DHS estimates it will require an average of 5 minutes of staff for documentation. DHS estimates this provision may cost a facility approximately $5,435 (5 minutes × $32.61 per hour), annually.

The total estimate per small entity for proposed section 115.15 is $5,996 ($561 for staff realignment + $5,435 for cross-gender pat-down documentation).

iv. Evidence Protocols and Forensic Medical Examinations, § 115.21

The proposed rule would require ICE and any of its immigration detention facilities to establish a protocol for the investigation of allegations of sexual abuse or the referral of allegations to investigators. In addition, where appropriate, at no cost to the detainee, a forensic medical exam should be offered and an outside victim advocate shall be made available for support if requested.

DHS includes a cost for facilities to enter into a memorandum of understanding (MOU) with entities that provide victim advocate services, such as rape crisis centers. DHS estimates it will require approximately 20 hours of staff time to negotiate and settle on each MOU. DHS estimates this provision may cost a facility approximately $1,488 (20 hours × $74.41).

v. Staff Training, § 115.31, Volunteer and Contractor Training, § 115.32

Under section 115.31 the proposed rule would require that any facility staff and employee who may have contact with immigration detention facilities have training on specific items related to prevention, detection, and response to sexual abuse. In addition, under section 115.32 the proposed rule would require that any volunteers and contractors who may have contact with immigration detention facilities also receive training on specific items related to prevention, detection, and response to sexual abuse.[21] Both sections would also require facilities to maintain documentation that all staff, employees, contractors, and volunteers have completed the training requirements.

DHS uses the NCIC 2-hour training as an approximation for the length of the training course to fulfill the proposed requirements. DHS estimates this provision may cost a facility approximately $20,922 (2 hours × 290 staff and contractors × $32.61) + (2 hours × 30 volunteers × $33.47).[22] [23]

vi. Specialized Training: Investigations, §§ 115.34, 115.134

The proposed rule would require the agency or facility to provide specialized training on sexual abuse and effective cross-agency coordination to agency or facility investigators, respectively, who conduct investigations into alleged sexual abuse at immigration detention facilities.

DHS conducts investigations of all allegations of detainee sexual abuse in detention facilities. The 2012 ICE SAAPID mandates that ICE's OPR provide specialized training to OPR investigators and other ICE staff. However, facilities may also conduct their own investigations. However, because ICE conducts investigations into the allegations, training for facility investigators would likely be less specialized than required of ICE investigators. DHS includes a cost for the time required for training investigators. DHS estimates the training may take approximately 1 hour. DHS

[21] ICE does not keep record of the number of staff and contractors at contract facilities. The estimates represent the results from a small sample, stratified by facility type. The low and high estimates represent one standard deviation below and above the mean. ICE assumes one new under 72-hour non-dedicated IGSA facility annually and one new over 72-hour non-dedicated IGSA facility annually, and approximately 290 staff and contractors per new facility.

[22] Though there may be other types of facility staff or contractors that would require this training, such as medical practitioners or administrative staff, DHS assumes correctional officers and their supervisors comprise the majority of staff with detainee contact.

[23] Bureau of Labor Statistics, Occupational Employment Statistics (OES), May 2011, SOC 00–0000 All Occupations Median Hourly Wage, retrieved on August 16, 2012 from *http://www.bls.gov/oes/2011/may/naics4_999300.htm.* Loaded for benefits. $33.47 = $19.98/0.597.

estimates this provision may cost a facility approximately $468 (1 hour × 10 investigators × $46.75).[24 25]

vii. Specialized Training: Medical and Mental Health Care, § 115.35

The proposed rule would require specialized training to DHS medical and mental health care staff. In addition, it would require all facilities to have policies and procedures to ensure that the facility trains or certifies all full- or part-time facility medical and mental health care staff in procedures for treating victims of sexual abuse, in facilities where medical or mental health staff may be assigned these activities.[26]

DHS searched for continuing medical education courses that focused on the evaluation and treatment for victims of sexual assault. Based on the results, DHS estimates an average course will be one hour in length and cost between $10 and $15, and can be completed online. DHS estimates this provision may cost a facility approximately $1,957 (30 medical and mental health care practitioners × ($50.23 × 1 hr + $15)).[27]

viii. Detainee Access to Outside Confidential Support Services, § 115.53

The proposed rule would require facilities to maintain or attempt to enter into MOUs with organizations that provide legal advocacy and confidential emotional support services for victims of sexual abuse. It also requires notices of these services be made available to detainees, as appropriate.

DHS includes a cost for facilities to enter into a MOU with entities that provide legal advocacy and confidential support services, such as services provided by a rape crisis center. DHS estimates it will require approximately 20 hours of staff time to negotiate and settle on each MOU. DHS estimates this provision may cost a facility approximately $1,488 (20 hours × $74.41).

ix. Audits, § 115.93

Facilities may also incur costs for re-audits. Re-audits can be requested in the event that the facility does not achieve compliance with each standard or if the facility files an appeal with the agency regarding any specific finding that it believes to be incorrect. Costs for these audits would be borne by the facility, however the request for these re-audits is at the discretion of the facility.

x. Additional Implementation Costs

Facilities contracting with DHS agencies may incur organizational costs related to proper planning and overall execution of the rulemaking, in addition to the specific implementation costs facilities are estimated to incur for each of the proposed requirements. The burden resulting from the time required to read the rulemaking, research how it might impact facility operations, procedures, and budget, as well as consideration of how best to execute the rulemaking requirements or other costs of overall execution. This is exclusive of the time required under section 115.12 to determine and agree upon the new terms of the contract and the specific requirements expected to be performed by the facility PSA Compliance Manager under section 115.11.

To account for these costs, DHS adds an additional category of implementation costs for immigration detention facilities. Implementation costs will vary by the size of the facility, a facility's current practices, and other facility-specific factors. DHS assumes the costs any additional implementation costs might occur as a result of the provisions with start-up costs, such as entering into MOUs, rather than provisions with action or on-going costs, such as training. DHS estimates additional implementation costs as 10 percent of the total costs of provisions with a start-up cost. DHS requests comment on this assumption. The tables below present the estimates for additional implementation costs. DHS estimates this provision may cost a facility approximately $1,579 (10% × ($1,488 for section 115.12 + $5,330 for section 115.11 + $5,996 for section 115.15 + $1,488 for section 115.21 + $1,488 for section 115.53)).

xi. Total Cost per Facility

DHS estimates the total cost per immigration detention facility under the NDS for compliance with the standards is approximately $40,716 for the first year. In subsequent years, DHS estimates the costs drop to approximately $9,990. The following table summarizes the preceding discussion.

TABLE 8—ESTIMATED COST PER SMALL ENTITY UNDER NDS—IMMIGRATION DETENTION FACILITIES

| Proposed provision | Cost in year 1 | On-going cost |
|---|---|---|
| 115.12 Consulting with non-DHS entities for the confinement of detainees | $1,488 | $0 |
| 115.11 Zero tolerance of sexual abuse; PSA Coordinator* | 5,330 | 3,647 |
| 115.15 Limits to cross-gender viewing and searches | 5,996 | 5,435 |
| 115.21 Evidence protocols and forensic medical examinations | 1,488 | 0 |
| 115.31 & 115.32* Staff training & Volunteer and contractor training | 20,922 | 0 |
| 115.34 Specialized training: Investigations | 468 | 0 |
| 115.35 Specialized training: Medical and mental health care | 1,957 | 0 |
| 115.53 Detainee access to outside confidential support Services | 1,488 | 0 |
| Additional Implementation Costs* | 1,579 | 908 |

[24] ICE does not keep record of the number of investigators at contract facilities. The estimates represent the results from a small sample, stratified by facility type. The low and high estimates represent one standard deviation below and above the mean. ICE assumes one new under 72-hour non-dedicated IGSA facility annually and one new over 72-hour non-dedicated IGSA facility annually, and based on the data from the sample of facilities, 10 investigators per new facility.

[25] Bureau of Labor Statistics, Occupational Employment Statistics (OES), May 2011, NAICS 99300, Median Wage Rate for SOC 33–1011 First-Line Supervisors of Correctional Officers, retrieved on August 16, 2012 from *http://www.bls.gov/oes/2011/may/naics4_999300.htm.* Loaded for benefits. $46.75 = $27.91/0.597

[26] ICE does not keep record of the number of medical and mental health care providers at contract facilities. The estimates represent the results from a small sample, stratified by facility type. The low and high estimates represent one standard deviation below and above the mean. ICE assumes one new under 72-hour non-dedicated IGSA facility annually and one new over 72-hour non-dedicated IGSA facility annually, and based on the data from the sample of facilities, 30 medical and mental health care providers per new facility.

[27] Bureau of Labor Statistics, Occupational Employment Statistics (OES), May 2011, NAICS 99300, Weighted Average Median Wage Rate for SOC 29–1062 Family and General Practitioners; 29–1066 Psychiatrists; 29–1071 Physician Assistants; 29–1111 Registered Nurses; 29–2053 Psychiatric Technicians; and 29–2061 Licensed Practical and Licensed Vocational Nurses, retrieved on August 16, 2012 from *http://www.bls.gov/oes/2011/may/naics4_999300.htm.* Loaded for benefits. $50.23 = $29.99/0.597.

TABLE 8—ESTIMATED COST PER SMALL ENTITY UNDER NDS—IMMIGRATION DETENTION FACILITIES—Continued

| Proposed provision | Cost in year 1 | On-going cost |
|---|---|---|
| Total | 40,716 | 9,990 |

* Provisions for which DHS estimates there may be on-going costs.

DHS welcomes comments on this analysis. Members of the public should please submit a comment, as described in this proposed rule under ''Public Participation,'' if they think that their business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed rule would have a significant economic impact on it. It would be helpful if commenters provide DHS with as much of the following information as possible: Does the commenter's facility currently have a contract with ICE? What does the commenter expect to be the type and extent of the direct impact on the commenter's facility? What are any recommended alternative measures that would mitigate the impact on a small business, organization, or governmental jurisdiction?

5. An Identification, to the Extent Practicable, of All Relevant Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

On May 17, 2012, DOJ released a final rule setting national standards to prevent, detect, and respond to prison rape. 77 FR 37106 (June 20, 2012). The final rule is applicable to facilities operated by DOJ entities including the Bureau of Prisons and the USMS. While many of the immigration detention facilities with which DHS contracts may be facilities that would also be subject to the DOJ rule, the specific characteristics of immigration detention facilities differ in certain respects from other facilities with regard to the manner in which they are operated and the composition of their population. Therefore, DHS promulgated its own rulemaking to account for these differences.

In preparing this proposed rule, DHS has utilized its existing sexual abuse policies and procedures as a baseline for setting DHS standards. However, recognizing that one of the key purposes of PREA is to ''develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape,'' DHS has coordinated its proposed regulations with the final standards in the DOJ rulemaking to the extent practicable, given the differences in the types and operations of the facilities. DHS does not expect local jurisdictions with which DHS has contracts to have conflicts with any differences in the requirements between the two rulemakings. DHS, however, welcomes comment on this conclusion.

6. A Description of Any Significant Alternatives to the Proposed Rule Which Accomplish the Stated Objectives of Applicable Statutes and Which Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

DHS considered a longer phase-in period for small entities subject to the rulemaking. A longer period would reduce immediate burden on small entities with current contracts. The current requirements propose that facilities must comply with the standards upon renewal of a contract or exercising a contract option. Essentially, this would phase-in all authorized immigration detention facilities within a year of the effective date of the final rule. DHS is willing to work with small facilities upon contract renewal in implementing these standards.

DHS also considered requiring lesser standards, such as those under the National Detention Standards (NDS) or the 2008 PBNDS for small entities. However, DHS rejected this alternative because DHS believes in the importance of protecting detainees from, and providing treatment after, instances of sexual abuse, regardless of a facility's size.

*G. Paperwork Reduction Act*

DHS is proposing to set standards for the prevention, detection, and response to sexual abuse in its confinement facilities. For DHS facilities and as incorporated in DHS contracts, these standards will require covered facilities to retain and report to the agency certain specified information relating to sexual abuse prevention planning, responsive planning, education and training, and investigations, as well as to collect, retain, and report to the agency certain specified information relating to allegations of sexual abuse within the covered facility. DHS believes that most of the information collection requirements placed on facilities already are requirements derived from existing contracts with facilities for immigration detention. However, DHS is including these requirements as part of an information collection request, pursuant to the Paperwork Reduction Act (PRA), so as to ensure clarity of requirements associated with this rulemaking.

DHS will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the review procedures of the Paperwork Reduction Act of 1995. The proposed information collection requirements are outlined in this proposed rule to obtain comments from the public and affected entities. All comments and suggestions, or questions regarding additional information, should be directed to Alexander Y. Hartman, Office of Policy; U.S. Immigration and Customs Enforcement, Department of Homeland Security; Potomac Center North, 500 12th Street SW., Washington, DC 20536; Telephone: (202) 732–4292 (not a toll-free number). Written comments and suggestions from the public and affected agencies concerning the collection of information are encouraged. Your comments on the information collection-related aspects of this rule should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. In particular, DHS requests comments on the recordkeeping cost burden imposed by this rule and will use the information gained through such comments to assist in calculating the cost burden.

**Overview of This Information Collection**

(1) *Type of Information Collection:* New collection.

(2) *Title of the Form/Collection:* Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in DHS Confinement Facilities.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* No form.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

*Primary:* Federal governments, State governments, local governments, and businesses or other for profits.

*Other:* None.

*Abstract:* DHS is publishing a notice of proposed rulemaking (NPRM) to adopt standards for the detection, prevention, and response to sexual abuse in its confinement facilities. These standards will require covered facilities to retain, and report to the agency certain specified information relating to sexual abuse prevention planning, education and training, responsive planning, and investigations, as well as to collect and retain certain specified information relating to allegations of sexual abuse within the facility. Covered facilities include: 126 DHS immigration detention facilities and holding facilities.

(5) An estimate of the total number of responses/respondents and the total amount of time estimated for respondents in an average year to keep the required records is: 1,379,533 responses annually; 118,348 hours. The breakout of the estimated burden and responses are stated in the table immediately below. However, the number or responses from each immigration detention facility will vary depending on a variety of factors which may include: How many annual allegations, the number of staff at each facility, and the number of detainees held at a facility.

(6) An estimate of the total public burden (in hours) associated with the collection: 118,348 hours. There are no current information collection requirements based on a PRA instrument or approved collection on facilities to retain certain sexual abuse incident data. This information collection will be the first regulation-based national data collection for DHS facility-reported information on sexual abuse within correctional facilities, characteristics of the victims and perpetrators, circumstances surrounding the incidents, and how incidents are reported, tracked, and adjudicated. For the facilities that already maintain such records, there will be no additional burden of recordkeeping and reporting as their current recordkeeping and reporting will be sufficient for the need of DHS. The DHS rule would not impose a requirement on facilities to maintain duplicative records. However, for the purposes of this collection of information, DHS has estimated the burden as if the collection and reporting requirements are new for all 126 facilities.

The recordkeeping requirements set forth by this rule are new requirements that will require a new OMB Control Number. DHS is seeking comment on these new requirements as part of this NPRM. These new requirements will require covered facilities to retain certain specified information relating to sexual abuse prevention planning, responsive planning, education and training, investigations and to collect and retain certain specified information relating to allegations of sexual abuse within the confinement facility. The proposed recordkeeping requirements may be found in the following sections of the proposed rule:

Subpart A—Immigration Detention Facilities

Subpart B—Holding Facilities

| Function | NPRM cite | Avg. annual responses | Avg. annual hour burden |
|---|---|---|---|
| Documentation & Recordkeeping: | | | |
| Strip and visual body cavity searches | 115.15(e) | 500 | 83 |
| Cross-gender pat-downs | 115.15 (d) | 444,000 | 37,000 |
| Reports and referrals of allegations | 115.22 (b), 115.51(c), 115.61 (a) | 50 | 25 |
| Detainee education | 115.33 (c) | 882,520 | 73,543 |
| Administrative segregation | 115.43 (a) | 500 | 125 |
| Training records | 115.31(c), 115.32(c), 115.34(b), 115.35(c). | 37,550 | 3,129 |
| Incident reviews | 115.86(a), 115.87(b) | 50 | 100 |
| Maintaining case records of allegations | 115.87(a) | 50 | 100 |
| Reporting Requirements: | | | |
| Reporting to other confinement facilities | 115.63 (c) | 50 | 4 |
| Annual report for agency | 115.86(b) | 50 | 50 |
| ICE Review of Facility Policies and Procedures: | | | |
| Medical staff training policy | 115.35(c) | 45 | 223 |
| Staff disciplinary policy | 115.76(b) | 45 | 223 |
| Administrative investigation policy | 115.71(c), (d) | 45 | 223 |
| Provide Evidence of Background Investigation: | | | |
| Background Investigation Records | 115.17(c), (d) | 14,079 | 3,520 |
| Total | | 1,379,533 | 118,348 |

If additional information is required contact: Alexander Y. Hartman; Office of Policy; U.S. Immigration and Customs Enforcement, Department of Homeland Security; Potomac Center North, 500 12th Street SW., Washington, DC 20536; Telephone: (202) 732–4292 (not a toll-free number).

**List of Subjects in 6 CFR Part 115**

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

Accordingly, Part 115 of Title 6 of the Code of Federal Regulations is proposed to be added to read as follows:

## PART 115—SEXUAL ABUSE AND ASSAULT PREVENTION STANDARDS

Sec.

115.5 General definitions.

115.6 Definitions related to sexual abuse and assault.

**Subpart A—Standards for Immigration Detention Facilities Coverage**

115.10 Coverage of DHS immigration detention facilities.

**Prevention Planning**

115.11 Zero tolerance of sexual abuse; Prevention of Sexual Abuse Coordinator.
115.12 Contracting with non-DHS entities for the confinement of detainees.
115.13 Detainee supervision and monitoring.
115.14 Juvenile and family detainees.
115.15 Limits to cross-gender viewing and searches.
115.16 Accommodating detainees with disabilities and detainees who are limited English proficient.
115.17 Hiring and promotion decisions.
115.18 Upgrades to facilities and technologies.

**Responsive Planning**

115.21 Evidence protocols and forensic medical examinations.
115.22 Policies to ensure investigation of allegations and appropriate agency oversight.

**Training and Education**

115.31 Staff training.
115.32 Volunteer and contractor training.
115.33 Detainee education.
115.34 Specialized training: Investigations.
115.35 Specialized training: Medical and mental health care.

**Assessment for Risk of Sexual Victimization and Abusiveness**

115.41 Assessment for risk of victimization and abusiveness.
115.42 Use of assessment information.
115.43 Protective custody.

**Reporting**

115.51 Detainee reporting.
115.52 Grievances.
115.53 Detainee access to outside confidential support services.
115.54 Third-party reporting.

**Official Response Following a Detainee Report**

115.61 Staff reporting duties.
115.62 Protection duties.
115.63 Reporting to other confinement facilities.
115.64 Responder duties.
115.65 Coordinated response.
115.66 Protection of detainees from contact with alleged abusers.
115.67 Agency protection against retaliation.
115.68 Post-allegation protective custody.

**Investigations**

115.71 Criminal and administrative investigations.
115.72 Evidentiary standard for administrative investigations.
115.73 Reporting to detainees.

**Discipline**

115.76 Disciplinary sanctions for staff.
115.77 Corrective action for contractors and volunteers.
115.78 Disciplinary sanctions for detainees.

**Medical and Mental Care**

115.81 Medical and mental health assessments; history of sexual abuse.
115.82 Access to emergency medical and mental health services.
115.83 Ongoing medical and mental health care for sexual abuse victims and abusers.

**Data Collection and Review**

115.86 Sexual abuse incident reviews.
115.87 Data collection.
115.88 Data review for corrective action.
115.89 Data storage, publication, and destruction.

**Audits and Compliance**

115.93 Audits of standards.

**Additional Provisions in Agency Policies**

115.95 Additional provisions in agency policies.

**Subpart B—Standards for DHS Holding Facilities Coverage**

115.110 Coverage of DHS holding facilities.

**Prevention Planning**

115.111 Zero tolerance of sexual abuse; Prevention of Sexual Abuse Coordinator.
115.112 Contracting with non-DHS entities for the confinement of detainees.
115.113 Detainee supervision and monitoring.
115.114 Juvenile and family detainees.
115.115 Limits to cross-gender viewing and searches.
115.116 Accommodating detainees with disabilities and detainees who are limited English proficient.
115.117 Hiring and promotion decisions.
115.118 Upgrades to facilities and technologies.

**Responsive Planning**

115.121 Evidence protocols and forensic medical examinations.
115.122 Policies to ensure investigation of allegations and appropriate agency oversight.

**Training and Education**

115.131 Employee, contractor, and volunteer training.
115.132 Notification to detainees of the agency's zero-tolerance policy.
115.133 [Reserved]
115.134 Specialized training: Investigations.

**Assessment for Risk of Sexual Victimization and Abusiveness**

115.141 Assessment for risk of victimization and abusiveness.

**Reporting**

115.151 Detainee reporting.
115.152 [Reserved]
115.153 [Reserved]
115.154 Third-party reporting.

**Official Response Following a Detainee Report**

115.161 Staff reporting duties.
115.162 Agency protection duties.
115.163 Reporting to other confinement facilities.
115.164 Responder duties.
115.165 Coordinated response.
115.166 Protection of detainees from contact with alleged abusers.
115.167 Agency protection against retaliation.

**Investigations**

115.171 Criminal and administrative investigations.
115.172 Evidentiary standard for administrative investigations.

**Discipline**

115.176 Disciplinary sanctions for staff.
115.177 Corrective action for contractors and volunteers.

**Medical and Mental Care**

115.181 [Reserved]
115.182 Access to emergency medical services.

**Data Collection and Review**

115.186 Sexual abuse incident reviews.
115.187 Data collection.
115.188 Data review for corrective action.
115.189 Data storage, publication, and destruction.

**Audits and Compliance**

115.193 Audits of standards.

**Additional Provisions in Agency Policies**

115.195 Additional provisions in agency policies.

**Subpart C—External Auditing and Corrective Action**

115.201 Scope of audits.
115.202 Auditor qualifications.
115.203 Audit contents and findings.
115.204 Audit corrective action plan.
115.205 Audit appeals.

**Authority:** 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1103, 1182, 1223, 1224, 1225, 1226, 1227, 1228, 1231, 1251, 1253, 1255, 1330, 1362; 18 U.S.C. 4002, 4013(c)(4); Pub. L. 107–296, 116 Stat. 2135 (6 U.S.C. 101, et seq.); 8 CFR part 2.

### § 115.5 General definitions.

For purposes of this part, the term—

*Agency* means the unit or component of DHS responsible for operating or supervising any facility, or part of a facility, that confines detainees.

*Agency head* means the principal official of an agency.

*Contractor* means a person who or entity that provides services on a recurring basis pursuant to a contractual agreement with the agency or facility.

*Detainee* means any person detained in an immigration detention facility or holding facility.

*Employee* means a person who works directly for the agency.

*Exigent circumstances* means any set of temporary and unforeseen circumstances that require immediate action in order to combat a threat to the security or institutional order of a facility or a threat to the safety or security of any person.

*Facility* means a place, building (or part thereof), set of buildings, structure, or area (whether or not enclosing a building or set of buildings) that was built or retrofitted for the purpose of detaining individuals and is routinely used by the agency to detain individuals in its custody. References to requirements placed on facilities extend to the entity responsible for the direct operation of the facility.

*Facility head* means the principal official responsible for a facility.

*Family unit* means a group of detainees that includes one or more non-United States citizen juvenile(s) accompanied by his/her/their parent(s) or legal guardian(s), none of whom has a known history of criminal or delinquent activity, or of sexual abuse, violence or substance abuse.

*Gender nonconforming* means having an appearance or manner that does not conform to traditional societal gender expectations.

*Holding facility* means a facility that contains holding cells, cell blocks, or other secure enclosures that are:

(1) Under the control of the agency; and

(2) Primarily used for the short-term confinement of individuals who have recently been detained, or are being transferred to or from a court, jail, prison, other agency, or other unit of the facility or agency.

*Immigration detention facility* means a confinement facility operated by or pursuant to contract with U.S. Immigration and Customs Enforcement (ICE) that routinely holds persons for over 24 hours pending resolution or completion of immigration removal operations or processes, including facilities that are operated by ICE, facilities that provide detention services under a contract awarded by ICE, or facilities used by ICE pursuant to an Intergovernmental Service Agreement.

*Intersex* means having sexual or reproductive anatomy or chromosomal pattern that does not seem to fit typical definitions of male or female. Intersex medical conditions are sometimes referred to as disorders of sex development.

*Juvenile* means any person under the age of 18.

*Law enforcement staff* means officers or agents of the agency or facility that are responsible for the supervision and control of detainees in a holding facility.

*Medical practitioner* means a health professional who, by virtue of education, credentials, and experience, is permitted by law to evaluate and care for patients within the scope of his or her professional practice. A ''qualified medical practitioner'' refers to such a professional who has also successfully completed specialized training for treating sexual abuse victims.

*Mental health practitioner* means a mental health professional who, by virtue of education, credentials, and experience, is permitted by law to evaluate and care for patients within the scope of his or her professional practice. A ''qualified mental health practitioner'' refers to such a professional who has also successfully completed specialized training for treating sexual abuse victims.

*Pat-down search* means a sliding or patting of the hands over the clothed body of a detainee by staff to determine whether the individual possesses contraband.

*Security staff* means employees primarily responsible for the supervision and control of detainees in housing units, recreational areas, dining areas, and other program areas of an immigration detention facility.

*Staff* means employees or contractors of the agency or facility, including any entity that operates within the facility.

*Strip search* means a search that requires a person to remove or arrange some or all clothing so as to permit a visual inspection of the person's breasts, buttocks, or genitalia.

*Substantiated allegation* means an allegation that was investigated and determined to have occurred.

*Transgender* means a person whose gender identity (i.e., internal sense of feeling male or female) is different from the person's assigned sex at birth.

*Unfounded allegation* means an allegation that was investigated and determined not to have occurred.

*Unsubstantiated allegation* means an allegation that was investigated and the investigation produced insufficient evidence to make a final determination as to whether or not the event occurred.

*Volunteer* means an individual who donates time and effort on a recurring basis to enhance the activities and programs of the agency or facility.

**§ 115.6 Definitions related to sexual abuse and assault.**

For purposes of this part, the term—

*Sexual abuse* includes—

(1) Sexual abuse and assault of a detainee by another detainee; and

(2) Sexual abuse and assault of a detainee by a staff member, contractor, or volunteer.

*Sexual abuse of a detainee by another detainee* includes any of the following acts by one or more detainees, prisoners, inmates, or residents of the facility in which the detainee is housed who, by force, coercion, or intimidation, or if the victim did not consent or was unable to consent or refuse, engages in or attempts to engage in:

(1) Contact between the penis and the vulva or anus and, for purposes of this subparagraph, contact involving the penis upon penetration, however slight;

(2) Contact between the mouth and the penis, vulva or anus;

(3) Penetration, however slight, of the anal or genital opening of another person by a hand or finger or by any object;

(4) Touching of the genitalia, anus, groin, breast, inner thighs or buttocks, either directly or through the clothing, with an intent to abuse, humiliate, harass, degrade or arouse or gratify the sexual desire of any person; or

(5) Threats, intimidation, or other actions or communications by one or more detainees aimed at coercing or pressuring another detainee to engage in a sexual act.

*Sexual abuse of a detainee by a staff member, contractor, or volunteer* includes any of the following acts, if engaged in by one or more staff members, volunteers, or contract personnel who, with or without the consent of the detainee, engages in or attempts to engage in:

(1) Contact between the penis and the vulva or anus and, for purposes of this subparagraph, contact involving the penis upon penetration, however slight;

(2) Contact between the mouth and the penis, vulva, or anus;

(3) Penetration, however slight, of the anal or genital opening of another person by a hand or finger or by any object that is unrelated to official duties or where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire;

(4) Intentional touching of the genitalia, anus, groin, breast, inner thighs or buttocks, either directly or through the clothing, that is unrelated to official duties or where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire;

(5) Threats, intimidation, harassment, indecent, profane or abusive language, or other actions or communications, aimed at coercing or pressuring a detainee to engage in a sexual act;

(6) Repeated verbal statements or comments of a sexual nature to a detainee;

(7) Any display of his or her uncovered genitalia, buttocks, or breast in the presence of an inmate, detainee, or resident, or

(8) Unnecessary or inappropriate visual surveillance of a detainee.

## Subpart A—Standards for Immigration Detention Facilities Coverage

### § 115.10 Coverage of DHS immigration detention facilities.

This subpart covers ICE immigration detention facilities. Standards set forth in Subpart A are not applicable to Department of Homeland Security (DHS) holding facilities.

## Prevention Planning

### § 115.11 Zero tolerance of sexual abuse; Prevention of Sexual Abuse Coordinator.

(a) The agency shall have a written policy mandating zero tolerance toward all forms of sexual abuse and outlining the agency's approach to preventing, detecting, and responding to such conduct.

(b) The agency shall employ or designate an upper-level, agency-wide Prevention of Sexual Abuse Coordinator (PSA Coordinator) with sufficient time and authority to develop, implement, and oversee agency efforts to comply with these standards in all of its immigration detention facilities.

(c) Each facility shall have a written policy mandating zero tolerance toward all forms of sexual abuse and outlining the facility's approach to preventing, detecting, and responding to such conduct. The agency shall review and approve each facility's written policy.

(d) Each facility shall employ or designate a Prevention of Sexual Abuse Compliance Manager (PSA Compliance Manager) who shall serve as the facility point of contact for the agency PSA Coordinator and who has sufficient time and authority to oversee facility efforts to comply with facility sexual abuse prevention and intervention policies and procedures.

### § 115.12 Contracting with non-DHS entities for the confinement of detainees.

(a) When contracting for the confinement of detainees in immigration detention facilities operated by non-DHS private or public agencies or other entities, including other government agencies, the agency shall include in any new contracts or contract renewals the entity's obligation to adopt and comply with these standards.

(b) Any new contracts or contract renewals shall provide for agency contract monitoring to ensure that the contractor is complying with these standards.

### § 115.13 Detainee supervision and monitoring.

(a) Each facility shall ensure that it maintains sufficient supervision of detainees, including through appropriate staffing levels and, where applicable, video monitoring, to protect detainees against sexual abuse.

(b) Each facility shall develop and document comprehensive detainee supervision guidelines to determine and meet the facility's detainee supervision needs, and shall review those guidelines at least annually.

(c) In determining adequate levels of detainee supervision and determining the need for video monitoring, the facility shall take into consideration the physical layout of each facility, the composition of the detainee population, the prevalence of substantiated and unsubstantiated incidents of sexual abuse, the findings and recommendations of sexual abuse incident review reports, and any other relevant factors, including but not limited to the length of time detainees spend in agency custody.

(d) Each facility shall conduct frequent unannounced security inspections to identify and deter sexual abuse of detainees. Such inspections shall be implemented for night as well as day shifts. Each facility shall prohibit staff from alerting others that these supervisory rounds are occurring, unless such announcement is related to the legitimate operational functions of the facility.

### § 115.14 Juvenile and family detainees.

(a) In general, juveniles should be detained in the least restrictive setting appropriate to the juvenile's age and special needs, provided that such setting is consistent with the need to protect the juvenile's well-being and that of others, as well as with any other laws, regulations, or legal requirements.

(b) The facility shall hold juveniles apart from adult detainees, minimizing sight, sound, and physical contact, unless the juvenile is in the presence of an adult member of the family unit, and provided there are no safety or security concerns with the arrangement.

(c) In determining the existence of a family unit for detention purposes, the agency shall seek to obtain reliable evidence of a family relationship.

(d) The agency and facility shall provide priority attention to unaccompanied alien children as defined by 6 U.S.C. 279(g)(2), including transfer to a Department of Health and Human Services Office of Refugee Resettlement facility within 72 hours, except in exceptional circumstances, in accordance with 8 U.S.C. 1232(b)(3).

(e) If a juvenile has been convicted as an adult of crime related to sexual abuse, the agency shall provide the facility and the Department of Health and Human Services Office of Refugee Resettlement with the releasable information regarding the conviction(s) to ensure the appropriate placement of the alien in a Department of Health and Human Services Office of Refugee Resettlement facility.

### § 115.15 Limits to cross-gender viewing and searches.

(a) Searches may be necessary to ensure the safety of officers, civilians and detainees; to detect and secure evidence of criminal activity; and to promote security, safety, and related interests at immigration detention facilities.

(b) Cross-gender pat-down searches of male detainees shall not be conducted unless, after reasonable diligence, staff of the same gender is not available at the time the pat-down search is required or in exigent circumstances.

(c) Cross-gender pat-down searches of female detainees shall not be conducted unless in exigent circumstances.

(d) All cross-gender pat-down searches shall be documented.

(e) Cross-gender strip searches or cross-gender visual body cavity searches shall not be conducted except in exigent circumstances, including consideration of officer safety, or when performed by medical practitioners. Facility staff shall not conduct visual body cavity searches of juveniles and, instead, shall refer all such body cavity searches of juveniles to a medical practitioner.

(f) All strip searches and visual body cavity searches shall be documented.

(g) Each facility shall implement policies and procedures that enable detainees to shower, perform bodily functions, and change clothing without being viewed by staff of the opposite gender, except in exigent circumstances or when such viewing is incidental to routine cell checks or is otherwise appropriate in connection with a medical examination or monitored bowel movement. Such policies and procedures shall require staff of the opposite gender to announce their presence when entering an area where detainees are likely to be showering, performing bodily functions, or changing clothing.

(h) The facility shall permit detainees in Family Residential Facilities to shower, perform bodily functions, and change clothing without being viewed by staff, except in exigent circumstances or when such viewing is incidental to routine cell checks or is otherwise appropriate in connection with a medical examination or monitored bowel movement.

(i) The facility shall not search or physically examine a detainee for the sole purpose of determining the

detainee's gender. If the detainee's gender is unknown, it may be determined during conversations with the detainee, by reviewing medical records, or, if necessary, learning that information as part of a broader medical examination conducted in private, by a medical practitioner.

(j) The agency shall train security staff in proper procedures for conducting pat-down searches, including cross-gender pat-down searches and searches of transgender and intersex detainees. All pat-down searches shall be conducted in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs and existing agency policy, including consideration of officer safety.

**§ 115.16 Accommodating detainees with disabilities and detainees who are limited English proficient.**

(a) The agency and each facility shall take appropriate steps to ensure that detainees with disabilities (including, for example, detainees who are deaf or hard of hearing, those who are blind or have low vision, or those who have intellectual, psychiatric, or speech disabilities) have an equal opportunity to participate in or benefit from all aspects of the agency's and facility's efforts to prevent, detect, and respond to sexual abuse. Such steps shall include, when necessary to ensure effective communication with detainees who are deaf or hard of hearing, providing access to in-person, telephonic, or video interpretive services that enable effective, accurate, and impartial interpretation, both receptively and expressively, using any necessary specialized vocabulary. In addition, the agency and facility shall ensure that any written materials related to sexual abuse are provided in formats or through methods that ensure effective communication with detainees with disabilities, including detainees who have intellectual disabilities, limited reading skills, or who are blind or have low vision. An agency or facility is not required to take actions that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity, or in undue financial and administrative burdens, as those terms are used in regulations promulgated under title II of the Americans with Disabilities Act, 28 CFR 35.164.

(b) The agency and each facility shall take steps to ensure meaningful access to all aspects of the agency's and facility's efforts to prevent, detect, and respond to sexual abuse to detainees who are limited English proficient, including steps to provide in-person or telephonic interpretive services that enable effective, accurate, and impartial interpretation, both receptively and expressively, using any necessary specialized vocabulary.

(c) In matters relating to allegations of sexual abuse, the agency and each facility shall provide in-person or telephonic interpretation services that enable effective, accurate, and impartial interpretation, by someone other than another detainee, unless the detainee expresses a preference for a detainee interpreter, and the agency determines that such interpretation is appropriate. The provision of interpreter services by minors, alleged abusers, detainees who witnessed the alleged abuse, and detainees who have a significant relationship with the alleged abuser is not appropriate in matters relating to allegations of sexual abuse.

**§ 115.17 Hiring and promotion decisions.**

(a) An agency or facility shall not hire or promote anyone who may have contact with detainees, and shall not enlist the services of any contractor or volunteer who may have contact with detainees, who has engaged in sexual abuse in a prison, jail, holding facility, community confinement facility, juvenile facility, or other institution (as defined in 42 U.S.C. 1997); who has been convicted of engaging or attempting to engage in sexual activity facilitated by force, overt or implied threats of force, or coercion, or if the victim did not consent or was unable to consent or refuse; or who has been civilly or administratively adjudicated to have engaged in such activity.

(b) An agency or facility considering hiring or promoting staff shall ask all applicants who may have contact with detainees directly about previous misconduct described in paragraph (a) of this section, in written applications or interviews for hiring or promotions and in any interviews or written self-evaluations conducted as part of reviews of current employees. Agencies and facilities shall also impose upon employees a continuing affirmative duty to disclose any such misconduct. The agency, consistent with law, shall make its best efforts to contact all prior institutional employers of an applicant for employment, to obtain information on substantiated allegations of sexual abuse or any resignation during a pending investigation of alleged sexual abuse.

(c) Before hiring new staff who may have contact with detainees, the agency or facility shall conduct a background investigation to determine whether the candidate for hire is suitable for employment with the facility or agency, including a criminal background records check. Upon request by the agency, the facility shall submit for the agency's approval written documentation showing the detailed elements of the facility's background check for each staff member and the facility's conclusions. The agency shall conduct an updated background investigation every five years for agency employees who may have contact with detainees. The facility shall require an updated background investigation every five years for those facility staff who may have contact with detainees and who work in immigration-only detention facilities.

(d) The agency or facility shall also perform a background investigation before enlisting the services of any contractor who may have contact with detainees. Upon request by the agency, the facility shall submit for the agency's approval written documentation showing the detailed elements of the facility's background check for each contractor and the facility's conclusions.

(e) Material omissions regarding such misconduct, or the provision of materially false information, shall be grounds for termination or withdrawal of an offer of employment, as appropriate.

(f) Unless prohibited by law, the agency shall provide information on substantiated allegations of sexual abuse involving a former employee upon receiving a request from an institutional employer for whom such employee has applied to work.

(g) In the event the agency contracts with a facility for the confinement of detainees, the requirements of this section otherwise applicable to the agency also apply to the facility and its staff.

**§ 115.18 Upgrades to facilities and technologies.**

(a) When designing or acquiring any new facility and in planning any substantial expansion or modification of existing facilities, the facility or agency, as appropriate, shall consider the effect of the design, acquisition, expansion, or modification upon their ability to protect detainees from sexual abuse.

(b) When installing or updating a video monitoring system, electronic surveillance system, or other monitoring technology in an immigration detention facility, the facility or agency, as appropriate, shall consider how such technology may enhance their ability to protect detainees from sexual abuse.

## Responsive Planning

### § 115.21 Evidence protocols and forensic medical examinations.

(a) To the extent that the agency or facility is responsible for investigating allegations of sexual abuse involving detainees, it shall follow a uniform evidence protocol that maximizes the potential for obtaining usable physical evidence for administrative proceedings and criminal prosecutions. The protocol shall be developed in coordination with DHS and shall be developmentally appropriate for juveniles, where applicable.

(b) The agency and each facility developing an evidence protocol referred to in paragraph (a) of this section, shall consider how best to utilize available community resources and services to provide valuable expertise and support in the areas of crisis intervention and counseling to most appropriately address victims' needs. Each facility shall establish procedures to make available, to the full extent possible, outside victim services following incidents of sexual abuse; the facility shall attempt to make available to the victim a victim advocate from a rape crisis center. If a rape crisis center is not available to provide victim advocate services, the agency shall provide these services by making available a qualified staff member from a community-based organization, or a qualified agency staff member. A qualified agency staff member or a qualified community-based staff member means an individual who has received education concerning sexual assault and forensic examination issues in general. The outside or internal victim advocate shall provide emotional support, crisis intervention, information, and referrals.

(c) Where evidentiarily or medically appropriate, at no cost to the detainee, and only with the detainee's consent, the facility shall arrange for an alleged victim detainee to undergo a forensic medical examination by qualified health care personnel.

(d) As requested by a victim, the presence of his or her outside or internal victim advocate, including any available victim advocacy services offered by a hospital conducting a forensic exam, shall be allowed for support during a forensic exam and investigatory interviews.

(e) To the extent that the agency is not responsible for investigating allegations of sexual abuse, the agency or the facility shall request that the investigating agency follow the requirements of paragraphs (a) through (d) of this section.

### § 115.22 Policies to ensure investigation of allegations and appropriate agency oversight.

(a) The agency shall establish an agency protocol, and shall require each facility to establish a facility protocol, to ensure that each allegation of sexual abuse is investigated by the agency or facility, or referred to an appropriate investigative authority. The agency shall ensure that an administrative or criminal investigation is completed for all allegations of sexual abuse.

(b) The agency shall ensure that the agency and facility protocols required by paragraph (a) of this section, include a description of responsibilities of the agency, the facility, and any other investigating entities; and require the documentation and maintenance, for at least five years, of all reports and referrals of allegations of sexual abuse.

(c) The agency shall post its protocols on its Web site; each facility shall also post its protocols on its Web site, if it has one, or otherwise make the protocol available to the public.

(d) Each facility protocol shall ensure that all allegations are promptly reported to the agency as described in paragraphs (e) and (f) of this section, and, unless the allegation does not involve potentially criminal behavior, are promptly referred for investigation to an appropriate law enforcement agency with the legal authority to conduct criminal investigations. A facility may separately, and in addition to the above reports and referrals, conduct its own investigation.

(e) When a detainee, prisoner, inmate, or resident of the facility in which an alleged detainee victim is housed is alleged to be the perpetrator of detainee sexual abuse, the facility shall ensure that the incident is promptly reported to the Joint Intake Center, the ICE Office of Professional Responsibility or the DHS Office of Inspector General, as well as the appropriate ICE Field Office Director, and, if it is potentially criminal, referred to an appropriate law enforcement agency having jurisdiction for investigation.

(f) When a staff member, contractor, or volunteer is alleged to be the perpetrator of detainee sexual abuse, the facility shall ensure that the incident is promptly reported to the Joint Intake Center, the ICE Office of Professional Responsibility or the DHS Office of Inspector General, as well as to the appropriate ICE Field Office Director, and to the local government entity or contractor that owns or operates the facility. If the incident is potentially criminal, the facility shall ensure that it is promptly referred to an appropriate law enforcement agency having jurisdiction for investigation.

(g) The agency shall ensure that all allegations of detainee sexual abuse are promptly reported to the PSA Coordinator, and to the appropriate offices within the agency and within DHS to ensure appropriate oversight of the investigation.

(h) The agency shall ensure that any alleged detainee victim of sexual abuse that is criminal in nature is provided access to U nonimmigrant visa information.

## Training and Education

### § 115.31 Staff training.

(a) The agency shall train, or require the training of, all employees who may have contact with immigration detainees, and all facility staff, to be able to fulfill their responsibilities under this part, including training on:

(1) The agency's and the facility's zero-tolerance policies for all forms of sexual abuse;

(2) The right of detainees and staff to be free from sexual abuse, and from retaliation for reporting sexual abuse;

(3) Definitions and examples of prohibited and illegal sexual behavior;

(4) Recognition of situations where sexual abuse may occur;

(5) Recognition of physical, behavioral, and emotional signs of sexual abuse, and methods of preventing and responding to such occurrences;

(6) How to avoid inappropriate relationships with detainees;

(7) How to communicate effectively and professionally with detainees, including lesbian, gay, bisexual, transgender, intersex, or gender nonconforming detainees;

(8) Procedures for reporting knowledge or suspicion of sexual abuse; and

(9) The requirement to limit reporting of sexual abuse to personnel with a need-to-know in order to make decisions concerning the victim's welfare and for law enforcement or investigative purposes.

(b) All current facility staff, and all agency employees who may have contact with immigration detention facility detainees, shall be trained within one year of [EFFECTIVE DATE OF FINAL RULE], and the agency or facility shall provide refresher information every two years.

(c) The agency and each facility shall document that staff that may have contact with immigration facility detainees have completed the training.

**§ 115.32 Volunteer and contractor training.**

(a) The facility shall ensure that all volunteers and contractors who have contact with detainees have been trained on their responsibilities under the agency's and the facility's sexual abuse prevention, detection, intervention and response policies and procedures.

(b) The level and type of training provided to volunteers and contractors shall be based on the services they provide and level of contact they have with detainees, but all volunteers and contractors who have contact with detainees shall be notified of the agency's and the facility's zero-tolerance policies regarding sexual abuse and informed how to report such incidents.

(c) Each facility shall receive and maintain written confirmation that contractors and volunteers who may have contact with immigration facility detainees have completed the training.

**§ 115.33 Detainee education.**

(a) During the intake process, each facility shall ensure that the detainee orientation program notifies and informs detainees about the agency's and the facility's zero-tolerance policies for all forms of sexual abuse and includes (at a minimum) instruction on:

(1) Prevention and intervention strategies;

(2) Definitions and examples of detainee-on-detainee sexual abuse, staff-on-detainee sexual abuse and coercive sexual activity;

(3) Explanation of methods for reporting sexual abuse, including to any staff member, including a staff member other than an immediate point-of-contact line officer (e.g., the compliance manager or a mental health specialist), the DHS Office of Inspector General, and the Joint Intake Center;

(4) Information about self-protection and indicators of sexual abuse;

(5) Prohibition against retaliation, including an explanation that reporting sexual abuse shall not negatively impact the detainee's immigration proceedings; and

(6) The right of a detainee who has been subjected to sexual abuse to receive treatment and counseling.

(b) Each facility shall provide the detainee notification, orientation, and instruction in formats accessible to all detainees, including those who are limited English proficient, deaf, visually impaired or otherwise disabled, as well as to detainees who have limited reading skills.

(c) The facility shall maintain documentation of detainee participation in the intake process orientation.

(d) Each facility shall post on all housing unit bulletin boards the following notices:

(1) The DHS-prescribed sexual assault awareness notice;

(2) The name of the Prevention of Sexual Abuse Compliance Manager; and

(3) The name of local organizations that can assist detainees who have been victims of sexual abuse.

(e) The facility shall make available and distribute the DHS-prescribed ''Sexual Assault Awareness Information'' pamphlet.

(f) Information about reporting sexual abuse shall be included in the agency Detainee Handbook made available to all immigration detention facility detainees.

**§ 115.34 Specialized training: Investigations.**

(a) In addition to the general training provided to all facility staff and employees pursuant to § 115.31, the agency or facility shall provide specialized training on sexual abuse and effective cross-agency coordination to agency or facility investigators, respectively, who conduct investigations into allegations of sexual abuse at immigration detention facilities. All investigations into alleged sexual abuse must be conducted by qualified investigators.

(b) The agency and facility must maintain written documentation verifying specialized training provided to investigators pursuant to this paragraph.

**§ 115.35 Specialized training: Medical and mental health care.**

(a) The agency shall provide specialized training to DHS or agency employees who serve as full- and part-time medical practitioners or full- and part-time mental health practitioners in immigration detention facilities where medical and mental health care is provided.

(b) The training required by this section shall cover, at a minimum, the following topics:

(1) How to detect and assess signs of sexual abuse;

(2) How to respond effectively and professionally to victims of sexual abuse,

(3) How and to whom to report allegations or suspicions of sexual abuse, and

(4) How to preserve physical evidence of sexual abuse. If medical staff employed by the agency conduct forensic examinations, such medical staff shall receive the appropriate training to conduct such examinations.

(c) The agency shall review and approve the facility's policy and procedures to ensure that facility medical staff is trained in procedures for examining and treating victims of sexual abuse, in facilities where medical staff may be assigned these activities.

**Assessment for Risk of Sexual Victimization and Abusiveness**

**§ 115.41 Assessment for risk of victimization and abusiveness.**

(a) The facility shall assess all detainees on intake to identify those likely to be sexual aggressors or sexual victims and shall house detainees to prevent sexual abuse, taking necessary steps to mitigate any such danger. Each new arrival shall be kept separate from the general population until he/she is classified and may be housed accordingly.

(b) The initial classification process and initial housing assignment should be completed within twelve hours of admission to the facility.

(c) The facility shall also consider, to the extent that the information is available, the following criteria to assess detainees for risk of sexual victimization:

(1) Whether the detainee has a mental, physical, or developmental disability;

(2) The age of the detainee;

(3) The physical build and appearance of the detainee;

(4) Whether the detainee has previously been incarcerated;

(5) The nature of the detainee's criminal history;

(6) Whether the detainee has any convictions for sex offenses against an adult or child;

(7) Whether the detainee has self-identified as gay, lesbian, bisexual, transgender, intersex, or gender nonconforming;

(8) Whether the detainee has self-identified as having previously experienced sexual victimization; and

(9) The detainee's own concerns about his or her physical safety.

(d) The initial screening shall consider prior acts of sexual abuse, prior convictions for violent offenses, and history of prior institutional violence or sexual abuse, as known to the facility, in assessing detainees for risk of being sexually abusive.

(e) The facility shall reassess each detainee's risk of victimization or abusiveness between 60 and 90 days from the date of initial assessment, and at any other time when warranted based upon the receipt of additional, relevant information or following an incident of abuse or victimization.

(f) Detainees shall not be disciplined for refusing to answer, or for not disclosing complete information in

response to, questions asked pursuant to paragraphs (c)(1), (c)(7), (c)(8), or (c)(9) of this section.

(g) The facility shall implement appropriate controls on the dissemination within the facility of responses to questions asked pursuant to this standard in order to ensure that sensitive information is not exploited to the detainee's detriment by staff or other detainees or inmates.

**§ 115.42 Use of assessment information.**

(a) The facility shall use the information from the risk assessment under § 115.41 of this part to inform assignment of detainees to housing, recreation and other activities, and voluntary work. The agency shall make individualized determinations about how to ensure the safety of each detainee.

(b) When making assessment and housing decisions for a transgender or intersex detainee, the facility shall consider the detainee's gender self-identification and an assessment of the effects of placement on the detainee's health and safety. The facility shall consult a medical or mental health professional as soon as practicable on this assessment. The facility should not base placement decisions of transgender or intersex detainees solely on the identity documents or physical anatomy of the detainee; a detainee's self-identification of his/her gender and self-assessment of safety needs shall always be taken into consideration as well. The facility's placement of a transgender or intersex detainee shall be consistent with the safety and security considerations of the facility, and placement and programming assignments for each transgender or intersex detainee shall be reassessed at least twice each year to review any threats to safety experienced by the detainee.

(c) When operationally feasible, transgender and intersex detainees shall be given the opportunity to shower separately from other detainees.

**§ 115.43 Protective custody.**

(a) The facility shall develop and follow written procedures consistent with the standards in this Subpart A for each facility governing the management of its administrative segregation unit. These procedures, which should be developed in consultation with the ICE Enforcement and Removal Operations Field Operations Director having jurisdiction for the facility, must document detailed reasons for placement of an individual in administrative segregation.

(b) Use of administrative segregation by facilities to protect vulnerable detainees shall be restricted to those instances where reasonable efforts have been made to provide appropriate housing and shall be made for the least amount of time practicable, and when no other viable housing options exist, as a last resort. The facility should assign such detainees to administrative segregation for protective custody only until an alternative means of separation from likely abusers can be arranged, and such an assignment shall not ordinarily exceed a period of 30 days.

(c) Facilities that place detainees in administrative segregation for protective custody shall provide those detainees access to programs, visitation, counsel and other services available to the general population to the maximum extent practicable.

(d) Facilities shall implement written procedures for the regular review of all detainees held in administrative segregation, as follows:

(1) A supervisory staff member shall conduct a review within 72 hours of the detainee's placement in administrative segregation to determine whether segregation is still warranted; and

(2) A supervisory staff member shall conduct, at a minimum, an identical review after the detainee has spent seven days in administrative segregation, and every week thereafter for the first 30 days, and every 10 days thereafter.

## Reporting

**§ 115.51 Detainee reporting.**

(a) The agency and each facility shall develop policies and procedures to ensure that detainees have multiple ways to privately report sexual abuse, retaliation for reporting sexual abuse, or staff neglect or violations of responsibilities that may have contributed to such incidents. The agency and each facility shall also provide instructions on how detainees may contact their consular official, the DHS Office of the Inspector General or, as appropriate, another designated office, to confidentially and, if desired, anonymously, report these incidents.

(b) The agency shall also provide, and the facility shall inform the detainees of, at least one way for detainees to report sexual abuse to a public or private entity or office that is not part of the agency, and that is able to receive and immediately forward detainee reports of sexual abuse to agency officials, allowing the detainee to remain anonymous upon request.

(c) Facility policies and procedures shall include provisions for staff to accept reports made verbally, in writing, anonymously, and from third parties and to promptly document any verbal reports.

**§ 115.52 Grievances.**

(a) The facility shall permit a detainee to file a formal grievance related to sexual abuse at any time during, after, or in lieu of lodging an informal grievance or complaint.

(b) The facility shall not impose a time limit on when a detainee may submit a grievance regarding an allegation of sexual abuse.

(c) The facility shall implement written procedures for identifying and handling time-sensitive grievances that involve an immediate threat to detainee health, safety, or welfare related to sexual abuse.

(d) Facility staff shall bring medical emergencies to the immediate attention of proper medical personnel for further assessment.

(e) The facility shall issue a decision on the grievance within five days of receipt.

(f) To prepare a grievance, a detainee may obtain assistance from another detainee, the housing officer or other facility staff, family members, or legal representatives. Staff shall take reasonable steps to expedite requests for assistance from these other parties.

**§ 115.53 Detainee access to outside confidential support services.**

(a) Each facility shall utilize available community resources and services to provide valuable expertise and support in the areas of crisis intervention, counseling, investigation and the prosecution of sexual abuse perpetrators to most appropriately address victims' needs. The facility shall maintain or attempt to enter into memoranda of understanding or other agreements with community service providers or, if local providers are not available, with national organizations that provide legal advocacy and confidential emotional support services for immigrant victims of crime.

(b) Each facility's written policies shall establish procedures to include outside agencies in the facility's sexual abuse prevention and intervention protocols, if such resources are available.

(c) Each facility shall make available to detainees information about local organizations that can assist detainees who have been victims of sexual abuse, including mailing addresses and telephone numbers (including toll-free hotline numbers where available). If no such local organizations exist, the facility shall make available the same

information about national organizations. The facility shall enable reasonable communication between detainees and these organizations and agencies, in as confidential a manner as possible.

**§ 115.54 Third-party reporting.**

Each facility shall establish a method to receive third-party reports of sexual abuse in its immigration detention facilities and shall make available to the public information on how to report sexual abuse on behalf of a detainee.

**Official Response Following a Detainee Report**

**§ 115.61 Staff reporting duties.**

(a) The agency and each facility shall require all staff to report immediately and according to agency policy any knowledge, suspicion, or information regarding an incident of sexual abuse that occurred in a facility; retaliation against detainees or staff who reported such an incident; and any staff neglect or violation of responsibilities that may have contributed to an incident or retaliation. The agency shall review and approve facility policies and procedures and shall ensure that the facility specifies appropriate reporting procedures, including a method by which staff can report outside of the chain of command.

(b) Staff members who become aware of alleged sexual abuse shall immediately follow the reporting requirements set forth in the agency's and facility's written policies and procedures.

(c) Apart from such reporting, staff shall not reveal any information related to a sexual abuse report to anyone other than to the extent necessary to help protect the safety of the victim or prevent further victimization of other detainees or staff in the facility, make medical treatment, investigation, law enforcement, or other security and management decisions.

(d) If the alleged victim is under the age of 18 or considered a vulnerable adult under a State or local vulnerable persons statute, the agency shall report the allegation to the designated State or local services agency under applicable mandatory reporting laws.

**§ 115.62 Protection duties.**

If an agency employee or facility staff member has a reasonable belief that a detainee is subject to a substantial risk of imminent sexual abuse, he or she shall take immediate action to protect the detainee.

**§ 115.63 Reporting to other confinement facilities.**

(a) Upon receiving an allegation that a detainee was sexually abused while confined at another facility, the agency or facility whose staff received the allegation shall notify the appropriate office of the facility where the alleged abuse occurred.

(b) The notification provided in paragraph (a) of this section shall be provided as soon as possible, but no later than 72 hours after receiving the allegation.

(c) The agency or facility shall document that it has provided such notification.

(d) The agency or facility office that receives such notification, to the extent the facility is covered by this subpart, shall ensure that the allegation is referred for investigation in accordance with these standards and reported to the appropriate ICE Field Office Director.

**§ 115.64 Responder duties.**

(a) Upon learning of an allegation that a detainee was sexually abused, the first security staff member to respond to the report, or his or her supervisor, shall be required to:

(1) Separate the alleged victim and abuser;

(2) Preserve and protect, to the greatest extent possible, any crime scene until appropriate steps can be taken to collect any evidence;

(3) If the abuse occurred within a time period that still allows for the collection of physical evidence, request the alleged victim not to take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating; and

(4) If the sexual abuse occurred within a time period that still allows for the collection of physical evidence, ensure that the alleged abuser does not take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating.

(b) If the first staff responder is not a security staff member, the responder shall be required to request that the alleged victim not take any actions that could destroy physical evidence and then notify security staff.

**§ 115.65 Coordinated response.**

(a) Each facility shall develop a written institutional plan to coordinate actions taken by staff first responders, medical and mental health practitioners, investigators, and facility leadership in response to an incident of sexual abuse.

(b) Each facility shall use a coordinated, multidisciplinary team approach to responding to sexual abuse.

(c) If a victim of sexual abuse is transferred between DHS immigration detention facilities, the sending facility shall, as permitted by law, inform the receiving facility of the incident and the victim's potential need for medical or social services.

(d) If a victim is transferred from a DHS immigration detention facility to a non-DHS facility, the sending facility shall, as permitted by law, inform the receiving facility of the incident and the victim's potential need for medical or social services, unless the victim requests otherwise.

**§ 115.66 Protection of detainees from contact with alleged abusers.**

Staff, contractors, and volunteers suspected of perpetrating sexual abuse shall be removed from all duties requiring detainee contact pending the outcome of an investigation.

**§ 115.67 Agency protection against retaliation.**

Staff, contractors, and volunteers, and immigration detention facility detainees, shall not retaliate against any person, including a detainee, who reports, complains about, or participates in an investigation into an allegation of sexual abuse, or for participating in sexual activity as a result of force, coercion, threats, or fear of force. For at least 90 days following a report of sexual abuse, the agency and facility shall monitor to see if there are facts that may suggest possible retaliation by detainees or staff, and shall act promptly to remedy any such retaliation. Items the agency should monitor include any detainee disciplinary reports, housing, or program changes, or negative performance reviews or reassignments of staff. DHS shall continue such monitoring beyond 90 days if the initial monitoring indicates a continuing need.

**§ 115.68 Post-allegation protective custody.**

(a) The facility shall take care to place detainee victims of sexual abuse in a supportive environment that represents the least restrictive housing option possible (e.g., protective custody), subject to the requirements of § 115.43.

(b) Detainee victims shall not be held for longer than five days in any type of administrative segregation, except in unusual circumstances or at the request of the detainee.

(c) A detainee victim who is in protective custody after having been subjected to sexual abuse shall not be returned to the general population until

completion of a proper re-assessment, taking into consideration any increased vulnerability of the detainee as a result of the sexual abuse.

## Investigations

### § 115.71 Criminal and administrative investigations.

(a) If the facility has responsibility for investigating allegations of sexual abuse, all investigations into alleged sexual abuse must be prompt, thorough, objective, and conducted by specially trained, qualified investigators.

(b) Upon conclusion of a criminal investigation where the allegation was substantiated, an administrative investigation shall be conducted. Upon conclusion of a criminal investigation where the allegation was unsubstantiated, the facility shall review any available completed criminal investigation reports to determine whether an administrative investigation is necessary or appropriate. Administrative investigations shall be conducted after consultation with the appropriate investigative office within DHS, and the assigned criminal investigative entity.

(c)(1) The facility shall develop written procedures for administrative investigations, including provisions requiring:

(i) Preservation of direct and circumstantial evidence, including any available physical and DNA evidence and any available electronic monitoring data;

(ii) Interviewing alleged victims, suspected perpetrators, and witnesses;

(iii) Reviewing prior complaints and reports of sexual abuse involving the suspected perpetrator;

(iv) Assessment of the credibility of an alleged victim, suspect, or witness, without regard to the individual's status as detainee, staff, or employee, and without requiring any detainee who alleges sexual abuse to submit to a polygraph;

(v) An effort to determine whether actions or failures to act at the facility contributed to the abuse; and

(vi) Documentation of each investigation by written report, which shall include a description of the physical and testimonial evidence, the reasoning behind credibility assessments, and investigative facts and findings; and

(vii) Retention of such reports for as long as the alleged abuser is detained or employed by the agency or facility, plus five years.

(2) Such procedures shall govern the coordination and sequencing of the two types of investigations, in accordance with paragraph (b) of this section, to ensure that the criminal investigation is not compromised by an internal administrative investigation.

(d) The agency shall review and approve the facility policy and procedures for coordination and conduct of internal administrative investigations with the assigned criminal investigative entity to ensure non-interference with criminal investigations.

(e) The departure of the alleged abuser or victim from the employment or control of the facility or agency shall not provide a basis for terminating an investigation.

(f) When outside agencies investigate sexual abuse, the facility shall cooperate with outside investigators and shall endeavor to remain informed about the progress of the investigation.

### § 115.72 Evidentiary standard for administrative investigations.

When an administrative investigation is undertaken, the agency shall impose no standard higher than a preponderance of the evidence in determining whether allegations of sexual abuse are substantiated.

### § 115.73 Reporting to detainees.

The agency shall, when the detainee is still in immigration detention, or where otherwise feasible, following an investigation into a detainee's allegation of sexual abuse, notify the detainee as to the result of the investigation and any responsive action taken.

## Discipline

### § 115.76 Disciplinary sanctions for staff.

(a) Staff shall be subject to disciplinary or adverse action up to and including removal from their position and the Federal service for substantiated allegations of sexual abuse or for violating agency or facility sexual abuse policies.

(b) The agency shall review and approve facility policies and procedures regarding disciplinary or adverse actions for staff and shall ensure that the facility policy and procedures specify disciplinary or adverse actions for staff, up to and including removal from their position and from the Federal service, when there is a substantiated allegation of sexual abuse, or when there has been a violation of agency sexual abuse rules, policies, or standards. Removal from their position and from the Federal service is the presumptive disciplinary sanction for staff who have engaged in or attempted or threatened to engage in sexual abuse, as defined under paragraphs (1) through (4), (7), and (8) of the definition of *sexual abuse of a detained by a staff member, contractor, or volunteer* in § 115.6 of this part.

(c) Each facility shall report all removals or resignations in lieu of removal for violations of agency or facility sexual abuse policies to appropriate law enforcement agencies, unless the activity was clearly not criminal.

(d) Each facility shall make reasonable efforts to report removals or resignations in lieu of removal for violations of agency or facility sexual abuse policies to any relevant licensing bodies, to the extent known.

### § 115.77 Corrective action for contractors and volunteers.

(a) Any contractor or volunteer who has engaged in sexual abuse shall be prohibited from contact with detainees. Each facility shall make reasonable efforts to report to any relevant licensing body, to the extent known, incidents of substantiated sexual abuse by a contractor or volunteer. Such incidents shall also be reported to law enforcement agencies, unless the activity was clearly not criminal.

(b) Contractors and volunteers suspected of perpetrating sexual abuse shall be removed from all duties requiring detainee contact pending the outcome of an investigation.

(c) The facility shall take appropriate remedial measures, and shall consider whether to prohibit further contact with detainees by contractors or volunteers who have not engaged in sexual abuse, but have violated other provisions within these standards.

### § 115.78 Disciplinary sanctions for detainees.

(a) Each facility shall subject a detainee to disciplinary sanctions pursuant to a formal disciplinary process following an administrative or criminal finding that the detainee engaged in sexual abuse.

(b) At all steps in the disciplinary process provided in paragraph (a), any sanctions imposed shall be commensurate with the severity of the committed prohibited act and intended to encourage the detainee to conform with rules and regulations in the future.

(c) Each facility holding detainees in custody shall have a detainee disciplinary system with progressive levels of reviews, appeals, procedures, and documentation procedure.

(d) The disciplinary process shall consider whether a detainee's mental disabilities or mental illness contributed to his or her behavior when determining what type of sanction, if any, should be imposed.

(e) The facility shall not discipline a detainee for sexual contact with staff

unless there is a finding that the staff member did not consent to such contact.

(f) For the purpose of disciplinary action, a report of sexual abuse made in good faith based upon a reasonable belief that the alleged conduct occurred shall not constitute falsely reporting an incident or lying, even if an investigation does not establish evidence sufficient to substantiate the allegation.

## Medical and Mental Care

### § 115.81 Medical and mental health assessments; history of sexual abuse.

(a) If the assessment pursuant to § 115.41 of this part indicates that a detainee has experienced prior sexual victimization or perpetrated sexual abuse, staff shall ensure, subject to the circumstances surrounding the indication, that the detainee is immediately referred to a qualified medical or mental health practitioner for medical and/or mental health follow-up as appropriate.

(b) When a referral for medical follow-up is initiated, the detainee shall receive a health evaluation no later than two working days from the date of assessment.

(c) When a referral for mental health follow-up is initiated, the detainee shall receive a mental health evaluation no later than 72 hours after the referral.

### § 115.82 Access to emergency medical and mental health services.

(a) Detainee victims of sexual abuse in immigration detention facilities shall have timely, unimpeded access to emergency medical treatment and crisis intervention services, including emergency contraception and sexually transmitted infections prophylaxis, in accordance with professionally accepted standards of care, where appropriate under medical or mental health professional standards.

(b) Emergency medical treatment services provided to the victim shall be without financial cost and regardless of whether the victim names the abuser or cooperates with any investigation arising out of the incident.

### § 115.83 Ongoing medical and mental health care for sexual abuse victims and abusers.

(a) Each facility shall offer medical and mental health evaluation and, as appropriate, treatment to all detainees who have been victimized by sexual abuse while in immigration detention.

(b) The evaluation and treatment of such victims shall include, as appropriate, follow-up services, treatment plans, and, when necessary, referrals for continued care following their transfer to, or placement in, other facilities, or their release from custody.

(c) The facility shall provide such victims with medical and mental health services consistent with the community level of care.

(d) Detainee victims of sexually abusive vaginal penetration by a male abuser while incarcerated shall be offered pregnancy tests. If pregnancy results from an instance of sexual abuse, the victim shall receive timely and comprehensive information about lawful pregnancy-related medical services and timely access to all lawful pregnancy-related medical services.

(e) Detainee victims of sexual abuse while detained shall be offered tests for sexually transmitted infections as medically appropriate.

(f) Treatment services shall be provided to the victim without financial cost and regardless of whether the victim names the abuser or cooperates with any investigation arising out of the incident.

(g) The facility shall attempt to conduct a mental health evaluation of all known detainee-on-detainee abusers within 60 days of learning of such abuse history and offer treatment when deemed appropriate by mental health practitioners.

## Data Collection and Review

### § 115.86 Sexual abuse incident reviews.

(a) Each facility shall conduct a sexual abuse incident review at the conclusion of every investigation of sexual abuse and, where the allegation was not determined to be unfounded, prepare a written report recommending whether the allegation or investigation indicates that a change in policy or practice could better prevent, detect, or respond to sexual abuse. The facility shall implement the recommendations for improvement, or shall document its reasons for not doing so in a written response. Both the report and response shall be forwarded to the agency PSA Coordinator.

(b) Each facility shall conduct an annual review of all sexual abuse investigations and resulting incident reviews to assess and improve sexual abuse intervention, prevention and response efforts. The results and findings of the annual review shall be provided to the agency PSA Coordinator.

### § 115.87 Data collection.

(a) Each facility shall maintain all case records associated with claims of sexual abuse, including incident reports, investigative reports, offender information, case disposition, medical and counseling evaluation findings, and recommendations for post-release treatment, if necessary, and/or counseling in accordance with these standards and applicable agency policies, and in accordance with established schedules. The DHS Office of Inspector General shall maintain the official investigative file related to claims of sexual abuse investigated by the DHS Office of Inspector General.

(b) On an ongoing basis, the PSA Coordinator shall work with relevant facility PSA Compliance Managers and DHS entities to share data regarding effective agency response methods to sexual abuse.

(c) On a regular basis, the PSA Coordinator shall prepare a report for ICE leadership compiling information received about all incidents or allegations of sexual abuse of detainees in immigration detention during the period covered by the report, as well as ongoing investigations and other pending cases.

(d) On an annual basis, the PSA Coordinator shall aggregate, in a manner that will facilitate the agency's ability to detect possible patterns and help prevent future incidents, the incident-based sexual abuse data, including the number of reported sexual abuse allegations determined to be substantiated, unsubstantiated, or unfounded, or for which investigation is ongoing, and for each incident found to be substantiated, information concerning:

(1) The date, time, location, and nature of the incident;

(2) The demographic background of the victim and perpetrator (including citizenship, age, and gender);

(3) The reporting timeline for the incident (including the name of individual who reported the incident, and the date and time the report was received);

(4) Any injuries sustained by the victim;

(5) Post-report follow up responses and action taken by the facility (e.g., housing placement/custody classification, medical examination, mental health counseling, etc.); and

(6) Any sanctions imposed on the perpetrator.

(e) Upon request, the agency shall provide all data described in this section from the previous calendar year to the Office for Civil Rights and Civil Liberties no later than June 30.

### § 115.88 Data review for corrective action.

(a) The agency shall review data collected and aggregated pursuant to § 115.87 of this part in order to assess and improve the effectiveness of its sexual abuse prevention, detection, and

response policies, practices, and training, including by:

(1) Identifying problem areas;

(2) Taking corrective action on an ongoing basis; and

(3) Preparing an annual report of its findings and corrective actions for each immigration detention facility, as well as the agency as a whole.

(b) Such report shall include a comparison of the current year's data and corrective actions with those from prior years and shall provide an assessment of the agency's progress in preventing, detecting, and responding to sexual abuse.

(c) The agency's report shall be approved by the agency head and made readily available to the public through its Web site.

(d) The agency may redact specific material from the reports, when appropriate for safety or security, but must indicate the nature of the material redacted.

**§ 115.89 Data storage, publication, and destruction.**

(a) The agency shall ensure that data collected pursuant to § 115.87 of this part are securely retained in accordance with agency record retention policies and the agency protocol regarding investigation of allegations.

(b) The agency shall make all aggregated sexual abuse data from immigration detention facilities under its direct control and from any private agencies with which it contracts available to the public at least annually on its Web site consistent with existing agency information disclosure policies and processes.

(c) Before making aggregated sexual abuse data publicly available, the agency shall remove all personal identifiers.

### Audits and Compliance

**§ 115.93 Audits of standards.**

(a) During the three-year period starting on [DATE ONE YEAR PLUS 60 DAYS AFTER EFFECTIVE DATE OF FINAL RULE], and during each three-year period thereafter, the agency shall ensure that each of its immigration detention facilities is audited at least once.

(b) The agency may request an expedited audit if the agency has reason to believe that a particular facility may be experiencing problems relating to sexual abuse. The recommendation may also include referrals to resources that may assist the agency with PREA-related issues.

(c) Audits under this section shall be conducted pursuant to §§ 115.201 through 115.205 of Subpart C.

(d) Audits under this section shall be coordinated by the agency with the DHS Office for Civil Rights and Civil Liberties.

### Additional Provisions in Agency Policies

**§ 115.95 Additional provisions in agency policies.**

The regulations in Subpart A establish minimum requirements for agencies and facilities. Agency and facility policies may include additional requirements.

## Subpart B—Standards for DHS Holding Facilities

### Coverage

**§ 115.110 Coverage of DHS holding facilities.**

Subpart B covers all DHS holding facilities. Standards found in Subpart A of this Part are not applicable to DHS facilities except ICE immigration detention facilities.

### Prevention Planning

**§ 115.111 Zero tolerance of sexual abuse; Prevention of Sexual Abuse Coordinator.**

(a) The agency shall have a written policy mandating zero tolerance toward all forms of sexual abuse and outlining the agency's approach to preventing, detecting, and responding to such conduct.

(b) The agency shall employ or designate an upper-level, agency-wide PSA Coordinator with sufficient time and authority to develop, implement, and oversee agency efforts to comply with these standards in all of its holding facilities.

**§ 115.112 Contracting with non-DHS entities for the confinement of detainees.**

(a) An agency that contracts for the confinement of detainees in holding facilities operated by non-DHS private or public agencies or other entities, including other government agencies, shall include in any new contracts or contract renewals the entity's obligation to adopt and comply with these standards.

(b) Any new contracts or contract renewals shall provide for agency contract monitoring to ensure that the contractor is complying with these standards.

(c) To the extent an agency contracts for confinement of holding facility detainees, all rules in this subpart that apply to the agency shall apply to the contractor, and all rules that apply to staff or employees shall apply to contractor staff.

**§ 115.113 Detainee supervision and monitoring.**

(a) The agency shall ensure that each facility maintains sufficient supervision of detainees, including through appropriate staffing levels and, where applicable, video monitoring, to protect detainees against sexual abuse.

(b) The agency shall develop and document comprehensive detainee supervision guidelines to determine and meet each facility's detainee supervision needs, and shall review those supervision guidelines and their application at each facility at least annually.

(c) In determining adequate levels of detainee supervision and determining the need for video monitoring, agencies shall take into consideration the physical layout of each holding facility, the composition of the detainee population, the prevalence of substantiated and unsubstantiated incidents of sexual abuse, the findings and recommendations of sexual abuse incident review reports, and any other relevant factors, including but not limited to the length of time detainees spend in agency custody.

**§ 115.114 Juvenile and family detainees.**

(a) In general, juveniles shall be detained in the least restrictive setting appropriate to the juvenile's age and special needs, provided that such setting is consistent with the need to protect the juvenile's well-being and that of others, as well as with any other laws, regulations, or legal requirements.

(b) Unaccompanied juveniles shall be held separately from adult detainees.

**§ 115.115 Limits to cross-gender viewing and searches.**

(a) Searches may be necessary to ensure the safety of officers, civilians and detainees; to detect and secure evidence of criminal activity; and to promote security, safety, and related interests at DHS holding facilities.

(b) Cross-gender strip searches or cross-gender visual body cavity searches shall not be conducted except in exigent circumstances, including consideration of officer safety, or when performed by medical practitioners. An agency shall not conduct visual body cavity searches of juveniles and, instead, shall refer all such body cavity searches of juveniles to a medical practitioner.

(c) All strip searches and visual body cavity searches shall be documented.

(d) The agency shall implement policies and procedures that enable detainees to shower (where showers are available), perform bodily functions, and change clothing without being viewed by staff of the opposite gender,

except in exigent circumstances or when such viewing is incidental to routine cell checks or is otherwise appropriate in connection with a medical examination or monitored bowel movement under medical supervision. Such policies and procedures shall require staff of the opposite gender to announce their presence when entering an area where detainees are likely to be showering, performing bodily functions, or changing clothing.

(e) The agency and facility shall not search or physically examine a detainee for the sole purpose of determining the detainee's gender. If the detainee's gender is unknown, it may be determined during conversations with the detainee, by reviewing medical records (if available), or, if necessary, learning that information as part of a broader medical examination conducted in private, by a medical practitioner.

(f) The agency shall train law enforcement staff in proper procedures for conducting pat-down searches, including cross-gender pat-down searches and searches of transgender and intersex detainees. All pat-down searches shall be conducted in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs and existing agency policy, including consideration of officer safety.

**§ 115.116 Accommodating detainees with disabilities and detainees who are limited English proficient.**

(a) The agency shall take appropriate steps to ensure that detainees with disabilities (including, for example, detainees who are deaf or hard of hearing, those who are blind or have low vision, or those who have intellectual, psychiatric, or speech disabilities), have an equal opportunity to participate in or benefit from all aspects of the agency's efforts to prevent, detect, and respond to sexual abuse. Such steps shall include, when necessary to ensure effective communication with detainees who are deaf or hard of hearing, providing access to in-person, telephonic, or video interpretive services that enable effective, accurate, and impartial interpretation, both receptively and expressively, using any necessary specialized vocabulary. In addition, the agency shall ensure that any written materials related to sexual abuse are provided in formats or through methods that ensure effective communication with detainees with disabilities, including detainees who have intellectual disabilities, limited reading skills, or who are blind or have low vision. An agency is not required to take actions that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity, or in undue financial and administrative burdens, as those terms are used in regulations promulgated under title II of the Americans with Disabilities Act, 28 CFR 35.164.

(b) The agency shall take reasonable steps to ensure meaningful access to all aspects of the agency's efforts to prevent, detect, and respond to sexual abuse to detainees who are limited English proficient, including steps to provide in-person or telephonic interpretive services that enable effective, accurate, and impartial interpretation, both receptively and expressively, using any necessary specialized vocabulary.

(c) In matters relating to allegations of sexual abuse, the agency shall provide in-person or telephonic interpretation services that enable effective, accurate, and impartial interpretation, by someone other than another detainee, unless the detainee expresses a preference for a detainee interpreter, and the agency determines that such interpretation is appropriate. The provision of interpreter services by minors, alleged abusers, detainees who witnessed the alleged abuse, and detainees who have a significant relationship with the alleged abuser is not appropriate in matters relating to allegations of sexual abuse is not appropriate in matters relating to allegations of sexual abuse.

**§ 115.117 Hiring and promotion decisions.**

(a) The agency shall not hire or promote anyone who may have contact with detainees, and shall not enlist the services of any contractor or volunteer who may have contact with detainees, who has engaged in sexual abuse in a prison, jail, holding facility, community confinement facility, juvenile facility, or other institution (as defined in 42 U.S.C. 1997); who has been convicted of engaging or attempting to engage in sexual activity facilitated by force, overt or implied threats of force, or coercion, or if the victim did not consent or was unable to consent or refuse; or who has been civilly or administratively adjudicated to have engaged in such activity.

(b) When the agency is considering hiring or promoting staff, it shall ask all applicants who may have contact with detainees directly about previous misconduct described in paragraph (a) of this section, in written applications or interviews for hiring or promotions and in any interviews or written self-evaluations conducted as part of reviews of current employees. The agency shall also impose upon employees a continuing affirmative duty to disclose any such misconduct.

(c) Before hiring new employees who may have contact with detainees, the agency shall require a background investigation to determine whether the candidate for hire is suitable for employment with the agency. The agency shall conduct an updated background investigation for agency employees every five years.

(d) The agency shall also perform a background investigation before enlisting the services of any contractor who may have contact with detainees.

(e) Material omissions regarding such misconduct, or the provision of materially false information, shall be grounds for termination or withdrawal of an offer of employment, as appropriate.

(f) Unless prohibited by law, the agency shall provide information on substantiated allegations of sexual abuse involving a former employee upon receiving a request from an institutional employer for whom such employee has applied to work.

(g) In the event the agency contracts with a facility for the confinement of detainees, the requirements of this section otherwise applicable to the agency also apply to the facility.

**§ 115.118 Upgrades to facilities and technologies.**

(a) When designing or acquiring any new holding facility and in planning any substantial expansion or modification of existing holding facilities, the agency shall consider the effect of the design, acquisition, expansion, or modification upon the agency's ability to protect detainees from sexual abuse.

(b) When installing or updating a video monitoring system, electronic surveillance system, or other monitoring technology in a holding facility, the agency shall consider how such technology may enhance the agency's ability to protect detainees from sexual abuse.

## Responsive Planning

**§ 115.121 Evidence protocols and forensic medical examinations.**

(a) To the extent that the agency is responsible for investigating allegations of sexual abuse in its holding facilities, the agency shall follow a uniform evidence protocol that maximizes the potential for obtaining usable physical evidence for administrative proceedings and criminal prosecutions. The protocol shall be developed in coordination with DHS and shall be developmentally

appropriate for juveniles, where applicable.

(b) In developing the protocol referred to in paragraph (a) of this section, the agency shall consider how best to utilize available community resources and services to provide valuable expertise and support in the areas of crisis intervention and counseling to most appropriately address victims' needs.

(c) Where evidentiarily or medically appropriate, at no cost to the detainee, and only with the detainee's consent, the agency shall arrange for or refer the alleged victim detainee to a medical facility to undergo a forensic medical examination.

(d) If, in connection with an allegation of sexual abuse, the detainee is transported for a forensic examination to an outside hospital that offers victim advocacy services, the detainee shall be permitted to use such services to the extent available, consistent with security needs. (e) To the extent that the agency is not responsible for investigating allegations of sexual abuse, the agency shall request that the investigating agency follow the requirements of paragraphs (a) through (d) of this section.

**§ 115.122 Policies to ensure investigation of allegations and appropriate agency oversight.**

(a) The agency shall establish a protocol to ensure that each allegation of sexual abuse is investigated by the agency, or referred to an appropriate investigative authority.

(b) The agency protocol shall be developed in coordination with DHS investigative entities; shall include a description of the responsibilities of both the agency and the investigative entities; and shall require the documentation and maintenance, for at least five years, of all reports and referrals of allegations of sexual abuse. The agency shall post its protocol on its Web site, redacted if appropriate.

(c) The agency protocol shall ensure that each allegation is promptly reported to the Joint Intake Center and, unless the allegation does not involve potentially criminal behavior, promptly referred for investigation to an appropriate law enforcement agency with the legal authority to conduct criminal investigations. The agency may separately, and in addition to the above reports and referrals, conduct its own investigation.

(d) The agency shall ensure that all allegations of detainee sexual abuse are promptly reported to the PSA Coordinator, and to the appropriate offices within the agency and within DHS to ensure appropriate oversight of the investigation.

(e) The agency shall ensure that any alleged detainee victim of sexual abuse that is criminal in nature is provided access to U nonimmigrant visa information.

## Training and Education

**§ 115.131 Employee, contractor, and volunteer training.**

(a) The agency shall train, or require the training of all employees, contractors, and volunteers who may have contact with holding facility detainees, to be able to fulfill their responsibilities under these standards, including training on:

(1) The agency's zero-tolerance policies for all forms of sexual abuse;

(2) The right of detainees and employees to be free from sexual abuse, and from retaliation for reporting sexual abuse;

(3) Definitions and examples of prohibited and illegal sexual behavior;

(4) Recognition of situations where sexual abuse may occur;

(5) Recognition of physical, behavioral, and emotional signs of sexual abuse, and methods of preventing such occurrences;

(6) Procedures for reporting knowledge or suspicion of sexual abuse;

(7) How to communicate effectively and professionally with detainees, including lesbian, gay, bisexual, transgender, intersex, or gender nonconforming detainees; and

(8) The requirement to limit reporting of sexual abuse to personnel with a need-to-know in order to make decisions concerning the victim's welfare and for law enforcement or investigative purposes.

(b) All current employees, contractors and volunteers who may have contact with holding facility detainees shall be trained within two years of the effective date of these standards, and the agency shall provide refresher information, as appropriate.

(c) The agency shall document those employees who may have contact with detainees have completed the training and receive and maintain for at least five years confirmation that contractors and volunteers have completed the training.

**§ 115.132 Notification to detainees of the agency's zero-tolerance policy.**

The agency shall make public its zero-tolerance policy regarding sexual abuse and ensure that key information regarding the agency's zero-tolerance policy is visible or continuously and readily available to detainees, for example, through posters, detainee handbooks, or other written formats.

**§ 115.133 [Reserved]**

**§ 115.134 Specialized training: Investigations.**

(a) In addition to the training provided to employees, DHS agencies with responsibility for holding facilities shall provide specialized training on sexual abuse and effective cross-agency coordination to agency investigators who conduct investigations into allegations of sexual abuse at holding facilities. All investigations into alleged sexual abuse must be conducted by qualified investigators.

(b) The agency must maintain written documentation verifying specialized training provided to agency investigators pursuant to this subsection.

## Assessment for Risk of Sexual Victimization and Abusiveness

**§ 115.141 Assessment for risk of victimization and abusiveness.**

(a) Before placing any detainees together in a holding facility, agency staff shall consider whether, based on the information before them, a detainee may be at a high risk of being sexually abused and, when appropriate, shall take necessary steps to mitigate any such danger to the detainee.

(b) All detainees who may be held overnight with other detainees shall be assessed to determine their risk of being sexually abused by other detainees or sexually abusive toward other detainees; staff shall ask each such detainee about his or her own concerns about his or her physical safety.

(c) The agency shall also consider, to the extent that the information is available, the following criteria to assess detainees for risk of sexual victimization:

(1) Whether the detainee has a mental, physical, or developmental disability;

(2) The age of the detainee;

(3) The physical build and appearance of the detainee;

(4) Whether the detainee has previously been incarcerated;

(5) The nature of the detainee's criminal history; and

(6) Whether the detainee has any convictions for sex offenses against an adult or child;

(7) Whether the detainee has self-identified as gay, lesbian, bisexual, transgender, intersex, or gender nonconforming;

(8) Whether the detainee has self-identified as having previously experienced sexual victimization; and

(9) The detainee's own concerns about his or her physical safety.

(d) If detainees are identified pursuant to the assessment under this section to be at high risk of victimization, staff shall provide such detainees with heightened protection, to include continuous direct sight and sound supervision, single-cell housing, or placement in a cell actively monitored on video by a staff member sufficiently proximate to intervene, unless no such option is determined to be feasible.

(e) The facility shall implement appropriate controls on the dissemination of sensitive information provided by detainees under this section.

## Reporting

### § 115.151 Detainee reporting.

(a) The agency shall develop policies and procedures to ensure that the detainees have multiple ways to privately report sexual abuse, retaliation for reporting sexual abuse, or staff neglect or violations of responsibilities that may have contributed to such incidents, and shall provide instructions on how detainees may contact the DHS Office of the Inspector General or, as appropriate, another designated office, to confidentially and, if desired, anonymously, report these incidents.

(b) The agency shall also provide, and shall inform the detainees of, at least one way for detainees to report sexual abuse to a public or private entity or office that is not part of the agency, and that is able to receive and immediately forward detainee reports of sexual abuse to agency officials, allowing the detainee to remain anonymous upon request.

(c) Agency policies and procedures shall include provisions for staff to accept reports made verbally, in writing, anonymously, and from third parties and to promptly document any verbal reports.

### § 115.152 [Reserved]

### § 115.153 [Reserved]

### § 115.154 Third-party reporting.

The agency shall establish a method to receive third-party reports of sexual abuse in its holding facilities. The agency shall make available to the public information on how to report sexual abuse on behalf of a detainee.

## Official Response Following a Detainee Report

### § 115.161 Staff reporting duties.

(a) The agency shall require all staff to report immediately and according to agency policy any knowledge, suspicion, or information regarding an incident of sexual abuse that occurred to any detainee; retaliation against detainees or staff who reported such an incident; and any staff neglect or violation of responsibilities that may have contributed to an incident or retaliation. Agency policy shall include methods by which staff can report misconduct outside of their chain of command.

(b) Staff members who become aware of alleged sexual abuse shall immediately follow the reporting requirements set forth in the agency's written policies and procedures.

(c) Apart from such reporting, the agency and staff shall not reveal any information related to a sexual abuse report to anyone other than to the extent necessary to make medical treatment, investigation, law enforcement, or other security and management decisions.

(d) If the alleged victim is under the age of 18 or considered a vulnerable adult under a State or local vulnerable persons statute, the agency shall report the allegation to the designated State or local services agency under applicable mandatory reporting laws.

### § 115.162 Agency protection duties.

When an agency employee has a reasonable belief that a detainee is subject to a substantial risk of imminent sexual abuse, he or she shall take immediate action to protect the detainee.

### § 115.163 Reporting to other confinement facilities.

(a) Upon receiving an allegation that a detainee was sexually abused while confined at another facility, the agency that received the allegation shall notify the appropriate office or the agency where the alleged abuse occurred.

(b) The notification provided in paragraph (a) shall be provided as soon as possible, but no later than 72 hours after receiving the allegation.

(c) The agency shall document that it has provided such notification.

(d) The agency office that receives such notification, to the extent the facility is covered by this subpart, shall ensure that the allegation is referred for investigation in accordance with these standards.

### § 115.164 Responder duties.

(a) Upon learning of an allegation that a detainee was sexually abused, the first law enforcement staff member to respond to the report, or his or her supervisor, shall be required to:

(1) Separate the alleged victim and abuser;

(2) Preserve and protect, to the greatest extent possible, any crime scene until appropriate steps can be taken to collect any evidence;

(3) If the sexual abuse occurred within a time period that still allows for the collection of physical evidence, request the alleged victim not to take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating; and

(4) If the abuse occurred within a time period that still allows for the collection of physical evidence, ensure that the alleged abuser does not take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating.

(b) If the first staff responder is not a law enforcement staff member, the responder shall be required to request that the alleged victim not take any actions that could destroy physical evidence and then notify law enforcement staff.

### § 115.165 Coordinated response.

(a) The agency shall develop a written institutional plan and use a coordinated, multidisciplinary team approach to responding to sexual abuse.

(b) If a victim of sexual abuse is transferred between DHS holding facilities, the agency shall, as permitted by law, inform the receiving facility of the incident and the victim's potential need for medical or social services.

(c) If a victim is transferred from a DHS holding facility to a non-DHS facility, the agency shall, as permitted by law, inform the receiving facility of the incident and the victim's potential need for medical or social services, unless the victim requests otherwise.

### § 115.166 Protection of detainees from contact with alleged abusers.

Agency management shall consider whether any staff, contractor, or volunteer alleged to have perpetrated sexual abuse should be removed from duties requiring detainee contact pending the outcome of an investigation, and shall do so if the seriousness and plausibility of the allegation make removal appropriate.

### § 115.167 Agency protection against retaliation.

Agency employees shall not retaliate against any person, including a detainee, who reports, complains about, or participates in an investigation into an allegation of sexual abuse, or for participating in sexual activity as a result of force, coercion, threats, or fear of force.

## Investigations

### § 115.171 Criminal and administrative investigations.

(a) If the agency has responsibility for investigating allegations of sexual abuse, all investigations into alleged sexual abuse must be prompt, thorough, objective, and conducted by specially trained, qualified investigators.

(b) Upon conclusion of a criminal investigation where the allegation was substantiated, an administrative investigation shall be conducted. Upon conclusion of a criminal investigation where the allegation was unsubstantiated, the facility shall review any available completed criminal investigation reports to determine whether an administrative investigation is necessary or appropriate. Administrative investigations shall be conducted after consultation with the appropriate investigative office within DHS and the assigned criminal investigative entity.

(c) The facility shall develop written procedures for administrative investigations, including provisions requiring:

(1) Preservation of direct and circumstantial evidence, including any available physical and DNA evidence and any available electronic monitoring data;

(2) Interviewing alleged victims, suspected perpetrators, and witnesses;

(3) Reviewing prior complaints and reports of sexual abuse involving the suspected perpetrator;

(4) Assessment of the credibility of an alleged victim, suspect, or witness, without regard to the individual's status as detainee, staff, or employee, and without requiring any detainee who alleges sexual abuse to submit to a polygraph;

(5) Documentation of each investigation by written report, which shall include a description of the physical and testimonial evidence, the reasoning behind credibility assessments, and investigative facts and findings; and

(6) Retention of such reports for as long as the alleged abuser is detained or employed by the agency or facility, plus five years. Such procedures shall establish the coordination and sequencing of the two types of investigations, in accordance with paragraph (b) of this section, to ensure that the criminal investigation is not compromised by an internal administrative investigation.

(d) The departure of the alleged abuser or victim from the employment or control of the agency shall not provide a basis for terminating an investigation.

(e) When outside agencies investigate sexual abuse, the agency shall cooperate with outside investigators and shall endeavor to remain informed about the progress of the investigation.

### § 115.172 Evidentiary standard for administrative investigations.

When an administrative investigation is undertaken, the agency shall impose no standard higher than a preponderance of the evidence in determining whether allegations of sexual abuse are substantiated.

## Discipline

### § 115.176 Disciplinary sanctions for staff.

(a) Staff shall be subject to disciplinary or adverse action up to and including removal from their position and the Federal service for substantiated allegations of sexual abuse or violating agency sexual abuse policies.

(b) The agency shall review and approve policy and procedures regarding disciplinary or adverse action for staff and shall ensure that the policy and procedures specify disciplinary or adverse actions for staff, up to and including removal from their position and from the Federal service, when there is a substantiated allegation of sexual abuse, or when there has been a violation of agency sexual abuse rules, policies, or standards. Removal from their position and from the Federal service is the presumptive disciplinary sanction for staff who have engaged in or attempted or threatened to engage in sexual abuse, as defined under paragraphs (1) through (4), (7), and (8) of the definition of *sexual abuse of a detained by a staff member, contractor, or volunteer* in § 115.6 of this part.

(c) Each facility shall report all removals or resignations in lieu of removal for violations of agency or facility sexual abuse policies to appropriate law enforcement agencies, unless the activity was clearly not criminal.

(d) Each agency shall make reasonable efforts to report removals or resignations in lieu of removal for violations of agency or facility sexual abuse policies to any relevant licensing bodies, to the extent known.

### § 115.177 Corrective action for contractors and volunteers.

(a) Any contractor or volunteer suspected of perpetrating sexual abuse shall be prohibited from contact with detainees. The agency shall also consider whether to prohibit further contact with detainees by contractors or volunteers who have not engaged in sexual abuse, but have violated other provisions within these standards. The agency shall be responsible for promptly reporting sexual abuse allegations and incidents involving alleged contractor or volunteer perpetrators to an appropriate law enforcement agency as well as to the Joint Intake Center or another appropriate DHS investigative office in accordance with DHS policies and procedures. The agency shall make reasonable efforts to report to any relevant licensing body, to the extent known, incidents of substantiated sexual abuse by a contractor or volunteer.

(b) Contractors and volunteers suspected of perpetrating sexual abuse may be removed from all duties requiring detainee contact pending the outcome of an investigation, as appropriate.

## Medical and Mental Care

### § 115.181 [Reserved]

### § 115.182 Access to emergency medical services.

(a) Detainee victims of sexual abuse in holding facilities shall have timely, unimpeded access to emergency medical treatment.

(b) Emergency medical treatment services provided to the victim shall be without financial cost and regardless of whether the victim names the abuser or cooperates with any investigation arising out of the incident.

## Data Collection and Review

### § 115.186 Sexual abuse incident reviews.

(a) The agency shall conduct a sexual abuse incident review at the conclusion of every investigation of sexual abuse and, where the allegation was not determined to be unfounded, prepare a written report recommending whether the allegation or investigation indicates that a change in policy or practice could better prevent, detect, or respond to sexual abuse. The agency shall implement the recommendations for improvement, or shall document its reasons for not doing so in a written response. Both the report and response shall be forwarded to the agency PSA Coordinator.

(b) The agency shall conduct an annual review of all sexual abuse investigations and resulting incident reviews to assess and improve sexual abuse intervention, prevention and response efforts.

### § 115.187 Data collection.

(a) The agency shall maintain all agency case records associated with claims of sexual abuse, in accordance with these standards and applicable

agency policies, and in accordance with established schedules. The DHS Office of Inspector General shall maintain the official investigative file related to claims of sexual abuse investigated by the DHS Office of Inspector General.

(b) On an annual basis, the PSA Coordinator shall aggregate, in a manner that will facilitate the agency's ability to detect possible patterns and help prevent future incidents, the incident-based sexual abuse data available, including the number of reported sexual abuse allegations determined to be substantiated, unsubstantiated, or unfounded, or for which investigation is ongoing, and for each incident found to be substantiated, such information as is available to the PSA Coordinator concerning:

(1) The date, time, location, and nature of the incident;

(2) The demographic background of the victim and perpetrator (including citizenship, age, and gender);

(3) The reporting timeline for the incident (including the name of individual who reported the incident, and the date and time the report was received);

(4) Any injuries sustained by the victim;

(5) Post-report follow up responses and action taken by the agency (e.g., supervision, referral for medical or mental health services, etc.); and

(6) Any sanctions imposed on the perpetrator.

(c) The agency shall maintain, review, and collect data as needed from all available agency records.

(d) Upon request, the agency shall provide all such data from the previous calendar year to the PSA Coordinator and to the Office for Civil Rights and Civil Liberties no later than June 30.

#### § 115.188 Data review for corrective action.

(a) The agency shall review data collected and aggregated pursuant to § 115.187 of this part in order to assess and improve the effectiveness of its sexual abuse prevention, detection, and response policies, practices, and training, including by:

(1) Identifying problem areas;

(2) Taking corrective action on an ongoing basis; and

(3) Preparing an annual report of its findings and corrective actions for the agency as a whole.

(b) Such report shall include a comparison of the current year's data and corrective actions with those from prior years and shall provide an assessment of the agency's progress in preventing, detecting, and responding to sexual abuse.

(c) The agency's report shall be approved by the agency head and made readily available to the public through its Web site.

(d) The agency may redact specific material from the reports, when appropriate for safety or security, but must indicate the nature of the material redacted.

#### § 115.189 Data storage, publication, and destruction.

(a) The agency shall ensure that data collected pursuant to § 115.187 of this part are securely retained in accordance with agency record retention policies and the agency protocol regarding investigation of allegations.

(b) The agency shall make all aggregated sexual abuse data from holding facilities under its direct control and from any private agencies with which it contracts available to the public at least annually on its Web site consistent with agency information disclosure policies and processes.

(c) Before making aggregated sexual abuse data publicly available, the agency shall remove all personal identifiers.

### Audits and Compliance

#### § 115.193 Audits of standards.

(a) Within three years of [DATE ONE YEAR PLUS 60 DAYS AFTER EFFECTIVE DATE OF FINAL RULE], the agency shall ensure that each of its immigration holding facilities that houses detainees overnight is audited. For any such holding facility established after [DATE ONE YEAR PLUS 60 DAYS AFTER EFFECTIVE DATE OF FINAL RULE], the agency shall ensure that the facility is audited within three years . Audits of new holding facilities as well as holding facilities that have previously failed to meet the standards shall occur as soon as practicable within the three-year cycle; however, where it is necessary to prioritize, priority shall be given to facilities that have previously failed to meet the standards.

(1) Audits required under this paragraph (a) shall:

(i) Include a determination whether the holding facility is low-risk based on its physical characteristics and whether it passes the audit conducted pursuant to paragraph (a)(1)(ii) of this section,

(ii) Be conducted pursuant to §§ 115.201 through 115.205 of Subpart C, and

(iii) Be coordinated by the agency with the DHS Office for Civil Rights and Civil Liberties.

(b) Following an audit, the agency shall ensure that any immigration holding facility that houses detainees overnight and is determined to be low-risk, based on its physical characteristics and passing its most recent audit, is audited at least once every five years.

(1) Audits required under this paragraph (b) shall:

(i) Include a determination whether the holding facility is low-risk based on its physical characteristics and whether it passes the audit conducted pursuant to paragraph (b)(1)(ii) of this section,

(ii) Be conducted pursuant to §§ 115.201 through 115.205 of Subpart C, and

(iii) Be coordinated by the agency with the DHS Office for Civil Rights and Civil Liberties.

(c) Following an audit, the agency shall ensure that any immigration holding facility that houses detainees overnight and is determined to not be low-risk, based on its physical characteristics or not passing its most recent audit, is audited at least once every three years.

(1) Audits required under this paragraph (c) shall:

(i) Include a determination whether the holding facility is low-risk based on its physical characteristics and whether it passes the audit conducted by paragraph (c)(1)(ii) of this section,

(ii) Be conducted pursuant to §§ 115.201 through 115.205 of Subpart C, and

(iii) Be coordinated by the agency with the DHS Office for Civil Rights and Civil Liberties.

### Additional Provisions in Agency Policies

#### § 115.195 Additional provisions in agency policies.

The regulations in Subpart B establish minimum requirements for agencies. Agency policies may include additional requirements.

## Subpart C—External Auditing and Corrective Action

#### § 115.201 Scope of audits.

(a) The agency shall develop and issue an instrument that is coordinated with the DHS Office for Civil Rights and Civil Liberties, which will provide guidance on the conduct of and contents of the audit;

(b) The auditor shall review all relevant agency-wide policies, procedures, reports, internal and external audits, and accreditations for each facility type.

(c) The audits shall review, at a minimum, a sampling of relevant documents and other records and information for the most recent one-year period.

(d) The auditor shall have access to, and shall observe, all areas of the audited facilities.

(e) The agency shall provide the auditor with relevant documentation to complete a thorough audit of the facility.

(f) The auditor shall retain and preserve all documentation (including, *e.g.,* videotapes and interview notes) relied upon in making audit determinations. Such documentation shall be provided to the agency upon request.

(g) The auditor shall interview a representative sample of detainees and of staff, and the facility shall make space available suitable for such interviews.

(h) The auditor shall review a sampling of any available videotapes and other electronically available data that may be relevant to the provisions being audited.

(i) The auditor shall be permitted to conduct private interviews with detainees.

(j) Detainees shall be permitted to send confidential information or correspondence to the auditor.

(k) Auditors shall attempt to solicit input from community-based or victim advocates who may have insight into relevant conditions in the facility.

(l) All sensitive but unclassified information provided to auditors will include appropriate designations and limitations on further dissemination. Auditors will be required to follow all appropriate procedures for handling and safeguarding such information.

**§ 115.202 Auditor qualifications.**

(a) An audit shall be conducted by entities or individuals outside of the agency that have relevant audit experience.

(b) All auditors shall be certified by the agency and the agency shall develop and issue procedures regarding the certification process, which shall include training requirements.

(c) No audit may be conducted by an auditor who has received financial compensation from the agency being audited (except for compensation received for conducting other audits, or other consulting related to detention reform) within the three years prior to the agency's retention of the auditor.

(d) The agency shall not employ, contract with, or otherwise financially compensate the auditor for three years subsequent to the agency's retention of the auditor, with the exception of contracting for subsequent audits or other consulting related to detention reform.

**§ 115.203 Audit contents and findings.**

(a) Each audit shall include a certification by the auditor that no conflict of interest exists with respect to his or her ability to conduct an audit of the facility under review.

(b) Audit reports shall state whether facility policies and procedures comply with relevant standards.

(c) For each of these standards, the auditor shall determine whether the audited facility reaches one of the following findings: Exceeds Standard (substantially exceeds requirement of standard); Meets Standard (substantial compliance; complies in all material ways with the standard for the relevant review period); Does Not Meet Standard (requires corrective action). The audit summary shall indicate, among other things, the number of provisions the facility has achieved at each grade level.

(d) Audit reports shall describe the methodology, sampling sizes, and basis for the auditor's conclusions with regard to each standard provision for each audited facility, and shall include recommendations for any required corrective action.

(e) Auditors shall redact any personally identifiable detainee or staff information from their reports, but shall provide such information to the agency upon request.

(f) The agency shall ensure that the auditor's final report is published on the agency's Web site if it has one, or is otherwise made readily available to the public. The agency shall redact any sensitive but unclassified information (including law enforcement sensitive information) prior to providing such reports publicly.

**§ 115.204 Audit corrective action plan.**

(a) A finding of ''Does Not Meet Standard'' with one or more standards shall trigger a 180-day corrective action period.

(b) The auditor and the agency, with the facility if practicable, shall jointly develop a corrective action plan to achieve compliance.

(c) The auditor shall take necessary and appropriate steps to verify implementation of the corrective action plan, such as reviewing updated policies and procedures or re-inspecting portions of a facility.

(d) After the 180-day corrective action period ends, the auditor shall issue a final determination as to whether the facility has achieved compliance with those standards requiring corrective action.

(e) If the facility does not achieve compliance with each standard, it may (at its discretion and cost) request a subsequent audit once it believes that is has achieved compliance.

**§ 115.205 Audit appeals.**

(a) A facility may lodge an appeal with the agency regarding any specific audit finding that it believes to be incorrect. Such appeal must be lodged within 90 days of the auditor's final determination.

(b) If the agency determines that the facility has stated good cause for a re-evaluation, the facility may commission a re-audit by an auditor mutually agreed upon by the agency and the facility. The facility shall bear the costs of this re-audit.

(c) The findings of the re-audit shall be considered final.

**Janet Napolitano,**

*Secretary of Homeland Security.*

[FR Doc. 2012–29916 Filed 12–18–12; 8:45 am]

BILLING CODE 9110–9B–P

# FEDERAL REGISTER

Vol. 77 Wednesday,

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Part IV

## Environmental Protection Agency

Seventy-First Report of the TSCA Interagency Testing Committee to the Administrator of the Environmental Protection Agency; Receipt of Report and Request for Comments; Notice

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPPT–2012–0820; FRL–9370–9]**

## Seventy-First Report of the TSCA Interagency Testing Committee to the Administrator of the Environmental Protection Agency; Receipt of Report and Request for Comments

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** The Toxic Substances Control Act (TSCA) Interagency Testing Committee (ITC) transmitted its 71st ITC Report to the EPA Administrator on November 14, 2012. In the 71st ITC Report, which is included with this notice, the ITC is revising the TSCA section 4(e) *Priority Testing List* by removing 16 High Production Volume (HPV) Challenge Program orphan chemicals. The ITC is removing these 16 chemicals because actions have been taken to assess their hazardous potential.

**DATES:** Comments must be received on or before January 18, 2013.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2012–0820, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* OPPT Document Control Office (DCO), EPA East Bldg., Rm. 6428, 1201 Constitution Ave. NW., Washington, DC. ATTN: Docket ID Number EPA–HQ–OPPT–2012–0820. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564–8930. Such deliveries are only accepted during the DCO's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to docket ID number EPA–HQ–OPPT–2012–0820. EPA's policy is that all comments received will be included in the docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or email. The regulations.gov Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through regulations.gov, your email address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket:* All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available electronically at *http://www.regulations.gov,* or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave. NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

**FOR FURTHER INFORMATION CONTACT:**

*For technical information contact:* John D. Walker, TSCA Interagency Testing Committee (7401M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (202) 564–7527; fax number: (202) 564–7528; email address: *walker.johnd@epa.gov.*

*For general information contact:* The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this action apply to me?*

This notice is directed to the public in general. It may, however, be of particular interest to you if you manufacture (defined by statute to include import) and/or process TSCA-covered chemicals and you may be identified by the North American Industrial Classification System (NAICS) codes 325 and 32411. Because this notice is directed to the general public and other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be interested in this action.

*B. What should I consider as I prepare my comments for EPA?*

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–DOM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

## II. Background

The Toxic Substances Control Act (TSCA) (15 U.S.C. 260l *et seq.*) authorizes the EPA Administrator to promulgate regulations under TSCA section 4(a) requiring testing of chemicals and chemical groups in order to develop data relevant to determining the risks that such chemicals and chemical groups may present to health or the environment. Section 4(e) of TSCA established the ITC to recommend chemicals and chemical groups to the EPA Administrator for priority testing consideration. Section 4(e) of TSCA directs the ITC to revise the TSCA section 4(e) *Priority Testing List* at least every 6 months.

You may access additional information about the ITC at *http://www.epa.gov/oppt/itc.*

*A. The 71st ITC Report*

The ITC is revising the TSCA section 4(e) *Priority Testing List* by removing 16 HPV Challenge Program orphan chemicals.

*B. Status of the Priority Testing List*

The *Priority Testing List* includes 16 chemicals with insufficient dermal absorption rate data, 2 alkylphenols, 148 HPV Challenge Program orphan chemicals, cadmium, a category of cadmium compounds including any unique chemical substance that contains cadmium as part of that chemical's structure, 6 non-phthalate plasticizers, 25 phosphate ester flame retardants, 2 other flame retardants, 9 chemicals to which children living near hazardous waste sites may be exposed, and a category of 69 diisocyanates and related compounds.

### List of Subjects

Environmental protection, Chemicals, Hazardous substances.

Dated: December 11, 2012.

**Wendy C. Hamnett,**

*Director, Office of Pollution Prevention and Toxics.*

## Seventy-First Report of the TSCA Interagency Testing Committee to the Administrator of the Environmental Protection Agency

### Table of Contents

Summary
I. Background
II. ITC's Activities During This Reporting Period (June to October 2012)
III. HPV Challenge Program Orphan Chemicals Removed From the TSCA Section 4(e) *Priority Testing List*
IV. References
V. The TSCA Interagency Testing Committee

### Summary

The ITC is revising the Toxic Substances Control Act (TSCA) section 4(e) *Priority Testing List* by removing 16 High Production Volume (HPV) Challenge Program orphan chemicals.

The TSCA section 4(e) *Priority Testing List* is Table 1 of this unit.

TABLE 1—TSCA SECTION 4(e) PRIORITY TESTING LIST

[October 2012]

| ITC report | Date | Chemical name/group | Action |
|---|---|---|---|
| 31 | January 1993 | 2 Chemicals with insufficient dermal absorption rate data, methylcyclohexane and cyclopentane. | Designated. |
| 32 | May 1993 | 10 Chemicals with insufficient dermal absorption rate data | Designated. |
| 35 | November 1994 | 4 Chemicals with insufficient dermal absorption rate data, cyclopentadiene, formamide, 1,2,3-trichloropropane, and *m*-nitrotoluene. | Designated. |
| 37 | November 1995 | Branched 4-nonylphenol (mixed isomers) | Recommended. |
| 41 | November 1997 | Phenol, 4-(1,1,3,3-tetramethylbutyl)- | Recommended. |
| 55 | December 2004 | 147 High Production Volume (HPV) Challenge Program orphan chemicals. | Recommended. |
| 56 | August 2005 | 1 HPV Challenge Program orphan chemical, naphtha (petroleum), clay-treated light straight-run. | Recommended. |
| 68 | May 2011 | Cadmium | Recommended. |
| 69 | November 2011 | Cadmium compounds | Recommended. |
| 69 | November 2011 | 6 Non-phthalate plasticizers | Recommended. |
| 69 | November 2011 | 25 Phosphate ester flame retardants | Recommended. |
| 69 | November 2011 | 2 Other flame retardants | Recommended. |
| 69 | November 2011 | 9 Chemicals to which children living near hazardous waste sites may be exposed. | Recommended. |
| 69 | November 2011 | 69 Diisocyanates and related compounds | Recommended. |

## I. Background

The ITC was established by TSCA section 4(e) ''to make recommendations to the Administrator respecting the chemical substances and mixtures to which the Administrator should give priority consideration for the promulgation of rules for testing under section 4(a) * * *. At least every six months * * *, the Committee shall make such revisions to the *Priority Testing List* as it determines to be necessary and transmit them to the Administrator together with the Committee's reasons for the revisions'' (Public Law 94–469, 90 Stat. 2003 *et seq.,* 15 U.S.C. 2601 *et seq.*). ITC reports are available from the ITC's Web site (*http://www.epa.gov/oppt/itc*) and from regulations.gov (*http://www.regulations.gov*) after publication in the **Federal Register**. The ITC produces its revisions to the *Priority Testing List* with administrative and technical support from the ITC staff and ITC members. ITC members and staff are listed at the end of this report.

## II. ITC's Activities During This Reporting Period (June to October 2012)

During this reporting period, the ITC discussed the 164 High Production Volume (HPV) Challenge Program orphan chemicals remaining on the TSCA section 4(e) *Priority Testing List.* As a result of these discussions, the ITC removed 16 HPV Challenge Program orphan chemicals from the TSCA section 4(e) *Priority Testing List.* Orphan chemicals are those HPV chemicals for which no sponsors have volunteered to develop and submit robust summaries of basic hazard and fate testing data to the EPA. The hazard and fate testing data requested by the ITC for HPV Challenge Program orphan chemicals are necessary to establish a screening level understanding of their potential human health and environmental impacts.

## III. HPV Challenge Program Orphan Chemicals Removed From the TSCA Section 4(e) Priority Testing List

The Chemical Abstract Service (CAS) Registry numbers and names of the 16 HPV Challenge Program orphan chemicals being removed from the *Priority Testing List* are listed in Table 2 of this unit. Also listed in Table 2 of this unit are the ITC reports in which the HPV Challenge Program orphan chemicals were added to the *Priority Testing List* and the rationale for their removal. The Universal Resource Locators (URLs or Web site addresses) provide additional information about the disposition of these chemicals and are included as footnotes to Table 2 of this unit.

TABLE 2—HPV ORPHAN CHEMICALS BEING REMOVED FROM THE PRIORITY TESTING LIST IN THIS 71ST ITC REPORT

| CAS No. | Chemical name | ITC report | Removal rationale |
|---|---|---|---|
| 62–56–6 | Thiourea | 55 | EPA NPRM.[a] |
| 81–16–3 | 1-Naphthalenesulfonic acid, 2-amino- | 55 | OECD SIDS.[b] |
| 84–69–5 | 1,2-Benzenedicarboxylic acid, 1,2-bis(2-methylpropyl) ester | 55 | EPA NPRM.[a] |
| 91–68–9 | Phenol, 3-(diethylamino)- | 55 | Sponsored chemical.[c] |
| 110–18–9 | 1,2-Ethanediamine, N1,N1,N2,N2-tetramethyl- | 55 | Sponsored chemical.[d] |
| 119–33–5 | Phenol, 4-methyl-2-nitro- | 55 | OECD SIDS program.[e] |
| 121–69–7 | Benzenamine, *N,N*-dimethyl- | 55 | Sponsored chemical.[c] |
| 131–57–7 | Methanone, (2-hydroxy-4-methoxyphenyl)phenyl- | 55 | EPA NPRM.[a] |
| 870–72–4 | Methanesulfonic acid, 1-hydroxy-, sodium salt (1:1) | 55 | EPA NPRM.[a] |
| 6473–13–8 | 2-Naphthalenesulfonicacid, 6-[2-(2,4-diaminophenyl)diazenyl]-3-[2-[4-[[4-[2-[7-[2-(2,4-diaminophenyl)diazenyl]-1-hydroxy-3-sulfo-2-naphthalenyl]diazenyl]phenyl]amino]-3-sulfophenyl]diazenyl]-4-hydroxy-, sodium salt (1:3). | 55 | EPA NPRM.[a] |
| 28188–24–1 | Octadecanoic acid, 1,1'-2-(hydroxymethyl)-2-[[(1-oxooctadecyl)oxy]methyl]-1,3-propanediyl ester. | 55 | EPA NPRM[a] |
| 61788–44–1 | Phenol, styrenated | 56 | Sponsored chemical.[f] |
| 68334–01–0 | Disulfides, alkylaryl dialkyl diaryl, petroleum refinery spent caustic oxidn. products | 55 | Sponsored chemical.[g] |
| 68457–74–9 | Phenol, isobutylenated methylstyrenated | 56 | Sponsored chemical.[f] |
| 68915–39–9 | Cyclohexane, oxidized, aq. ext., sodium salt | 55 | Analog to CAS No. 68915–38–8.[h] |
| 90640–80–5 | Anthracene oil | 55 | OECD SIDS program.[i] |

**Footnotes:**
[a] EPA Notice of Proposed Rulemaking (NPRM). **Federal Register** (65 FR 81658, December 26, 2000) (FRL–6758–4).
[b] *http://webnet.oecd.org/hpv/UI/Result.aspx?Q=2e64bf75-689c-4499-95c8-bb0a5616c03d.*
[c] *http://www.epa.gov/chemrtk/pubs/summaries/aroamin/c13310tc.htm.*
[d] *http://www.epa.gov/HPV/pubs/summaries/nnnntetr/c14715rs.pdf.*
[e] *http://webnet.oecd.org/hpv/UI/Result.aspx?Q=df187798-b971-44f0-8323-b841fff85856.*
[f] *http://www.epa.gov/HPV/pubs/summaries/hndrdphn/c13382tp.pdf.*
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[h] *http://www.epa.gov/chemrtk/pubs/summaries/cyclhxox/c15012tc.htm.*
[i] *http://webnet.oecd.org/hpv/UI/SIDS_Details.aspx?id=289cb585-0b2f-4d84-bece-59184368cc20.*
NOTE: OECD SIDS program = Organization for Economic Cooperation and Development Screening Information Data Set program.

Fourteen of the HPV Challenge Program orphan chemicals that were removed from the *Priority Testing List* in this 71st ITC Report were added to the *Priority Testing List* in the 55th ITC Report (Ref. 1). Two of the HPV Challenge Program orphan chemicals that were removed from the *Priority Testing List* in this 71st ITC Report were added to the *Priority Testing List* in the 56th ITC Report (Ref. 2). Six of the HPV Challenge Program orphan chemicals were removed because they were added to a Notice of Proposed Rulemaking (NPRM) that proposed to require manufacturers and processors of these chemicals to conduct testing for acute toxicity, repeated dose toxicity, developmental and reproductive toxicity, genetic toxicity, ecotoxicity, and environmental fate (Ref. 3). Three of the HPV Challenge Program orphan chemicals were removed because they were in the Organization for Economic Cooperation and Development (OECD) Screening Information Data Set (SIDS) program (*http://www.epa.gov/opptintr/chemtest/pubs/oecdsids.html*). The URLs for the three OECD SIDS chemicals are provided as footnotes b, e, and i to Table 2 of this unit. Six of the HPV Challenge Program orphan chemicals were removed because their testing was sponsored by the chemical's producers. The URLs for the six sponsored chemicals are provided as footnotes c, d, f, and g to Table 2 of this unit. One chemical was removed because it was an analog to a chemical with robust summaries and test plans. The URL for that chemical is provided as footnote h to Table 2 of this unit.

## IV. References

1. ITC. Fifty-Fifth Report of the ITC; Notice. **Federal Register** (70 FR 7364, February 11, 2005) (FRL–7692–1). Available online at: *http://www.regulations.gov.* Docket ID Number: EPA–HQ–OPPT–2012–0820.
2. ITC. Fifty-Sixth Report of the ITC; Notice. **Federal Register** (70 FR 61520, October 24, 2005) (FRL–7739–9). Available online at: *http://www.regulations.gov.* Docket ID Number: EPA–HQ–OPPT–

2012–0820.

3. EPA. Testing of Certain High Production Volume Chemicals; Proposed Rule. **Federal Register** (65 FR 81658, December 26, 2000) (FRL–6758–4). Available online at: *http://www.regulations.gov.* Docket ID number: EPA–HQ–OPPT–2012–0820.

## V. The TSCA Interagency Testing Committee

*Statutory Organizations With Representatives*

Department of Commerce

National Institute of Standards and Technology
Dianne L. Poster, Alternate

Environmental Protection Agency

Robert W. Jones, Member
John E. Schaeffer, Alternate

National Institute of Environmental Health Sciences

Nigel Walker, Member
Scott Masten, Alternate

National Institute for Occupational Safety and Health

Gayle DeBord, Member
Dennis W. Lynch, Alternate

Occupational Safety and Health Administration

Janet Carter, Member
Thomas Nerad, Alternate

*Liaison Organizations With Representatives*

Agency for Toxic Substances and Disease Registry

Glenn D. Todd, Member

Consumer Product Safety Commission

Dominique Johnson, Member

Department of Agriculture

Clifford P. Rice, Member
Cathleen J. Hapeman, Alternate

Department of Defense

Laurie E. Roszell, Member

Department of the Interior

Barnett A. Rattner, Member

Food and Drug Administration

Kirk Arvidson, Member
Ronald F. Chanderbhan, Alternate

*ITC Staff*

John D. Walker, Director
Carol Savage, Administrative Assistant (NOWCC Employee)

TSCA Interagency Testing Committee (7401M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; email address: *savage.carol@epa.gov*; url: *http://www.epa.gov/oppt/itc.*

[FR Doc. 2012–30615 Filed 12–18–12; 8:45 am]

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# FEDERAL REGISTER

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Part V

## The President


Proclamation 8916—Bill of Rights Day, 2012

Proclamation 8917—Honoring the Victims of the Tragedy in Newtown, Connecticut

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# Presidential Documents

**Title 3—**

## The President

**Proclamation 8916 of December 14, 2012**

## Bill of Rights Day, 2012

**By the President of the United States of America**

**A Proclamation**

When President Franklin D. Roosevelt recognized the 150th anniversary of our Nation's Bill of Rights, he called it the ''great American charter of personal liberty and human dignity.'' He understood that the freedoms it protects—among them speech, worship, assembly, and due process—are freedoms that reinforce one another. They form the bedrock of the American promise, and we cannot fully realize one without realizing them all. Today, as we work to reinforce human rights at home and around the globe, we reaffirm our belief that government of the people, by the people, and for the people inspires the stability and individual opportunity that serve as a basis for peace in our world.

In adopting the 10 Constitutional Amendments that make up the Bill of Rights, the Framers sought to balance the power and security of a new Federal Government with a guarantee of our most basic civil liberties. They acted on a conviction that rings as true today as it did two centuries ago: Unlocking a nation's potential depends on empowering all its people. The Framers also called upon posterity to carry on their work—to keep our country moving forward and bring us ever closer to a more perfect Union.

Generations of patriots have taken up that challenge. They have been defenders who stood watch at freedom's frontier, marchers who broke down barriers to full equality, dreamers who pushed America from what it was toward what it ought to be. Now it falls to us to build on their work. On Bill of Rights Day, we celebrate the liberties secured by our forebears, pay tribute to all who have fought to protect and expand our civil rights, and rededicate ourselves to driving a new century of American progress.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim December 15, 2012, as Bill of Rights Day. I call upon the people of the United States to mark these observances with appropriate ceremonies and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this fourteenth day of December, in the year of our Lord two thousand twelve, and of the Independence of the United States of America the two hundred and thirty-seventh.

[FR Doc. 2012–30740
Filed 12–18–12; 11:15 am]
Billing code 3295–F3

# Presidential Documents

**Proclamation 8917 of December 14, 2012**

## Honoring the Victims of the Tragedy in Newtown, Connecticut

**By the President of the United States of America**

**A Proclamation**

As a mark of respect for the victims of the senseless acts of violence perpetrated on December 14, 2012, in Newtown, Connecticut, by the authority vested in me as President of the United States by the Constitution and the laws of the United States of America, I hereby order that the flag of the United States shall be flown at half-staff at the White House and upon all public buildings and grounds, at all military posts and naval stations, and on all naval vessels of the Federal Government in the District of Columbia and throughout the United States and its Territories and possessions until sunset, December 18, 2012. I also direct that the flag shall be flown at half-staff for the same length of time at all United States embassies, legations, consular offices, and other facilities abroad, including all military facilities and naval vessels and stations.

IN WITNESS WHEREOF, I have hereunto set my hand this fourteenth day of December, in the year of our Lord two thousand twelve, and of the Independence of the United States of America the two hundred and thirty-seventh.

[FR Doc. 2012–30744
Filed 12–18–12; 11:15 am]
Billing code 3295–F3

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